THE

INDIAN HIGH COURT REPORTS

Being a re-print of all the cases of the Privy Council on appeals from India and of all the High Courts in India from the year 1901.

ALLAHABAD VOL. I

(1901—1902)

I. L. R. 23, 24 AND 25 ALLAHABAD

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JUDGES OF THE HIGH COURT OF ALLAHABAD
DURING 1901—1903.

Chief Justice:

The Hon'ble Sir Arthur Strachey, KT. (*On leave from April 17th* 1901 : *Died May 14th* 1901).

The Hon'ble Sir John Stanley KT. (*Took his seat August 17th* 1901).

Puisne Judges:

The Hon'ble G. E. Knox. (*Acted as Chief Justice from May 17th to August 16th* 1901).

" H. F. Blair.

" P. C. Banerji.

" W. R. Burkitt. (*On furlough in India from 26th May to 24th July* 1902, *and on Privilege leave for one month from 17th July* 1903).

" R. S. Aikman. (*On leave from July* 19th, 1901 *to August 18th*, 1901).

" E. M. Des. C. Chamier. (*Acted as Judge from May* 31*st*, 1901 *to August 16th*, 1901).

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I. L. R. XXIII ALLAHABAD

23 A 1 (=20 A W N 176)

APPELLATE CIVIL

Before Mr Justice Burkitt and Mr Justice Henderson

1900 JULY 31

APPELLATE CIVIL

23 A 1= 20 A W N 176

BALDEO SINGH AND OTHERS (*Defendants*) *v* JAGGU RAM AND ANOTHER (*Plaintiffs*)* [31st July, 1900]

Act No IV of 1882 (*Transfer of Property Act*), *sections* 67, 75, 85 101—*Mortgage—Foreclosure—Parties—Suit for foreclosure by prior mortgagee without making holder of subsequent registered mortgage a party*

A prior mortgagee (by conditional sale) brought a suit for foreclosure and obtained a decree without making party to the suit a second mortgagee (by usufructuary mortgage) whose mortgage was registered The second mortgagee having unsuccessfully objected when the prior mortgagee proceeded to [illegible]

[illegible] mortgage might be deprived of his right to redeem, and that in that case possession should be given to the plaintiff *Held* that the contention of the second mortgagee that all that the prior mortgagee was entitled to was to obtain possession on redeeming the second mortgage could not be sustained and that [illegible] mortgagee was entitled to the decree prayed for *Venkata* [illegible] *ayan Kutti Haji* (2) *Radhabai* v *Shamrav* [illegible] *thabai* v *Mundas Kuberdas* (4) and *Mohan* [illegible]

[Ref 15 C P L R 188 28 Bom 153 21 M L J 213 (F B)=9 M L T 431]

* Second Appeal No 306 of 1898 from a decree of Maulvi Syed Zain ul Abdin, Subordinate Judge of Ghazipur, dated the 25th January 1898 confirming a decree of Maulvi Muhammad Abdur Rahim, Munsif of Ghazipur, dated the 8th November 1897

(1) (1882) I L R 5 Mad 184
(2) (1892) I L R 17 Mad 17
(3) (1881) I L R 8 Bom 168
(4) (1895) I L R 20 Bom 390
(5) (1885) I L R 10 Bom 224

1900 JULY 31.

APPELLATE CIVIL.

23 A. 1= 20 A. W. N. 176.

THE facts of this case sufficiently appear from the judgment of Henderson, J.

Mr. *W. K. Porter* for the appellants.

Mr. *Abdul Majid* for the respondent.

HENDERSON, J.—The defendants-appellants are second mortgagees, and under this mortgage, which was a registered usufructuary mortgage, they are in possession of the mortgaged property.

[2] The plaintiffs-respondents held a prior mortgage by conditional sale, and it appears that they brought a previous suit upon their mortgage for foreclosure without making the defendants-appellants parties to their suit. The second mortgage was a registered mortgage, and according to the decisions of this Court, and amongst them the decision of a Full Bench, which is binding upon us, the plaintiffs, when they brought the suit, must be taken to have had notice within the meaning of section 85 of the Transfer of Property Act of the second mortgage, and were therefore bound under that section to have made the second mortgagees parties. The plaintiffs obtained a decree for foreclosure and possession, but when they proceeded to take possession through the Court the defendants-appellants objected that they were not bound by the decree, and that their possession as usufructuary mortgagees could not be disturbed. Their objections having been disallowed, they sued for and obtained a declaration that they were not bound by the foreclosure decree. The plaintiffs thereupon brought the present suit against the defendants-appellants, praying that the latter, if they failed to redeem their (the plaintiffs') mortgage, might be debarred of their right to redeem, and that in that case possession should be given to the plaintiffs. The plaintiffs, it should be mentioned, claim the benefit of section 101 of the Transfer of Property Act; in other words, they claim for the purposes of this suit to have their mortgage treated as still continuing to subsist notwithstanding the decree for foreclosure which they obtained against the mortgagor.

It has been contended before us on behalf of the appellants that the plaintiffs, not having in the previous suit given the defendants an opportunity of redeeming their mortgage, are not entitled now to insist upon the defendants redeeming or being foreclosed, and that all they are entitled to is to obtain possession on redeeming the defendants' mortgage. This contention was raised for the first time in second appeal, but we allowed the matter to be argued, and gave the respondent an opportunity of meeting the contention.

As pointed out in *Venkata* v. *Kannam* (1), to render a decree for foreclosure effectual, the mortgagees must make subsequent [3] incumbrancers parties to the suit, if he has notice of them. The decree for foreclosure therefore was not binding upon the defendants, who were not parties to the suit in which it was made; that is to say, it did not deprive the defendants of their right to redeem the prior mortgage; but between the plaintiffs and the mortgagor it was a binding decree, and absolutely debarred the mortgagor of his right to redeem the property—*vide Krishnan* v. *Chadayan Kutti Haji* (2), *Radhabai* v. *Shamrav Vinayak* (3)—and had the defendants been made parties to the

(1) (1882) I. L. R. 5 Mad. 184, p. 187.
(2) (1892) I. L. R. 17 Mad. 17, p. 20.
(3) (1881) I. L. R. 8 Bom. 168.

suit, they also would have been similarly debarred if they did not take advantage of the opportunity given to them to redeem The fact that the plaintiffs did not in their first suit make the defendants parties can not, in my opinion, bar the present suit Neither section 43 of the Code of Civil Procedure nor section 85 of the Transfer of Property Act, to which reference has been made, has any application, and I know of no general principle of law which stands in the way of the plaintiffs bring ing this suit with the object of getting the full benefit of the security which they held The cases of *Desai Lallubhai Jethabai* v *Mundas Kuberdas* (1), *Krishnan* v *Chadayan Kutti Haji* (2) and *Mohan Manor* v *Togu Uka* (3), support the view that the present suit will lie, and that the defendant is only entitled to retain possession upon his redeeming the plaintiffs' mortgage The decree in each of these cases upon the first mortgage was for sale and not for foreclosure as in the present case, but to my mind that circumstance makes no difference in principle The case of *Radhabai* v *Shamrav Vinayak* (4), which is referred to in *Desai Lallubhai Jethabai* v *Mundas Kuberdas* (1), does not conflict with the view taken in the cases quoted, for although in that case the purchaser under a decree upon a prior mortgage, to which decree the subsequent mortgagee in possession was not a party, was not allowed to foreclose and get possession, but only to redeem, the purchaser bought the mort gaged property with notice, at the time of the sale, of the subsequent mortgage When mortgaged property is brought to sale under a decree upon a first mortgage, the purchaser takes it free from all subsequent incumbrances, but a subsequent mortgagee, if he was not a party [4] to the suit in which the decree was obtained, is still, as he was before, entitled to redeem the property, if he so wishes—*Mohan Manor* v *Togu Uka* (3) The fact that a first mortgagee claims to foreclose and obtains a foreclosure decree ought not in principle to put a subsequent mortgagee, who was not a party to the suit or the purchaser under a sale under a decree upon the subsequent mortgage, in a worse position than he would have been had the first mortgagee obtained a decree for sale instead of for foreclosure

1900 JULY 31

APPELLATE CIVIL

23 A 1= 20 A W N 176

Then it has been contended that section 75 of the Transfer of Property Act, which provides that "every second or other subsequent mortgagee has, as regards redemption and foreclosure, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees and the same rights against subsequent mortgagees, if any, as he has against his mortgagor," does not apply to the case of a first mortgagee, and therefore such a mortgagee has not as regards foreclosure the same rights against subsequent mort gagees as he has against his mortgagor

In my opinion this contention is not sound The first mortgagee has full power under section 67 of the Transfer of Property Act to bring a suit against his mortgagor to foreclose the mortgage If there are subsequent mortgagees of whom he has notice, he is bound to make them parties to his suit, and if, having been made parties, they do not exercise their right to redeem the first mortgage, he can get a decree for fore closure, which will for ever debar the subsequent mortgagees also of their right to redeem

(1) (1895) I L R 20 Bom 390
(2) (1892) I L R 17 Mad. 17, p 20
(3) (1885) I L R 10 Bom 224
(4) (1884) I L R 8 Bom 168

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1900 JULY 31 — APPELLATE CIVIL — 23 A 1= 20 A W N 176

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(1) (1895) I L R 20 Bom 390
(2) (1892) I L R 17 Mad 17, p 20
(3) (1885) I L R 10 Bom 224
(4) (1881) I L R 8 Bom 168

1900 JLY 16. — ELLATE CIVIL. — 3 A. 5= A. W. N. 173.

that some of the reasons which apply in the case of arrears due to the Government itself are not equally applicable when the arrears are due to an assignee from the Government, but had it been the intention of the Legislature that the interdiction as to the payment of interest should be limited only to the case of the Government itself, one would have expected that the Rent Act would have contained a provision for the payment of interest on arrears of revenue recoverable under that Act by an assignee from Government similar to that contained in section 34 (*a*) in the case of rent. For the above reasons I hold that the plaintiff is not entitled to the amount claimed by him as interest.

The next question to be considered is whether we are precluded from granting to the defendant the relief to which he is, according to the above view, entitled by reason of any previous judgment which has the effect of *res judicata.* I am most reluctant to come to a conclusion which will work manifest injustice unless driven to do so by any specific provision of law which unmistakeably applies to the case before me. I may observe, in the first [8] place, that neither of the Courts below has based its judgment on the ground of *res judicata.* The learned Judge says :—"The question of interest payable on arrears of assigned land revenue I have gone into in a judgment between the same parties which is on the record. I hold that interest is payable." He has evidently referred to his previous judgment as containing the reasons for his conclusion that interest was payable. In the next place, it is noticeable that in the able argument which Mr. *Conlan* addressed to us on behalf of the respondent, he referred but faintly to the question of *res judicata.* It was not distinctly indicated on behalf of the respondent which judgment barred the present suit. All that was said was that in a previous litigation between these parties interest had been decreed to the plaintiff. If Mr. Well's judgment of the 1st June, 1897, a copy of which is on the record of this case, is deemed to bar the defendant's plea as to interest in the present case, I am unable to hold that it has that effect. The 13th section of the Code of Civil Procedure bars a second trial under the conditions mentioned in the section, not only of a suit but also of an issue. It is beyond question that the subject-matter of the two suits is not identical. The present suit relates to the arrears for the three years 1302, 1303 and 1304 F. ; the former suit had reference to arrears for three previous years. Was the issue as to interest the same in both suits? I am unable to hold that it was so. In the present suit arrears are claimed in respect of the defendant's share in *khata* No. 29. In the suit in which the judgment referred to above was passed, the *khata* in question was No. 47. This is clear from the judgment itself. Assuming that the question of the plaintiff's title to recover interest was finally determined in the former suit, that determination had reference to the revenue payable for *khata* No. 47. The question of the defendant's liability to pay interest on arrears of revenue for *khata* No. 29 was not decided in that suit, nor in any other suit, as far as the record shows, and therefore that question has not become *res judicata* by reason of any previous judgment. The reasoning upon which the former judgment was based may be equally applicable to the present case, but that cannot have the effect of *res judicata* in the present suit in regard to the issue which arises in it. Suppose two bonds are executed by the same [9] debtor in

favour of the same creditor on exactly similar terms, and in a suit brought on the basis of one of the bonds the question arises whether under the terms of that bond interest is payable. A decision of that question cannot surely bar the trial of a similar question if such question be raised in a subsequent suit brought upon the other bond. The reason for the decision of the issue in the one case would equally apply to the other, but it cannot be said that the issue in the one case is the same as that in the other. The issue in the first case would be whether interest was payable on the amount of the first bond. The issue in the subsequent suit would be whether interest was payable in respect of the amount of the other bond. These are not identical issues. Similarly, in the case before us, the issue in the first suit was whether interest was payable on the arrears due on account of *khata* No. 47. That is not the same issue as the issue which arises in the present suit, namely, whether the defendant is liable to pay interest on the arrears for *khata* No. 29. Therefore the determination of the issue in the one case cannot bar a decision of the issue in the other. In this view it is unnecessary to express any opinion on the question whether, even if the former suit had related to *khata* No. 29, the *khata* with which we are concerned in this suit, the defendant would have been precluded by reason of the judgment in the former suit from contesting the present claim to recover interest. The ruling in *Balkishan* v. *Kishan Lal* (1), which was not cited at the hearing, but which I understand is supposed to apply to this case, has in my opinion, no bearing on the question before us. There it was held that if a previous judgment negatives the title of the plaintiff to obtain *malikana*, the plaintiff cannot re-agitate the same question of title by claiming *malikana* for a subsequent year. There was no decision in the previous litigation between the parties to this suit upon the question of the plaintiff's title as assignee of the Government revenue. However, I need not enter into a consideration of this matter, as, for the reasons stated above, I hold that there has been no previous adjudication of the defendant's liability to pay interest on arrears due for the *khata* No. 29, and there is no bar of conclusiveness to the agitation of that question in the present suit. In this view the plaintiff is not [10] legally entitled to obtain the interest decreed to him. I would allow the appeal, and vary the decrees below by dismissing the claim for recovery of interest. I would direct that the parties do pay and receive costs in all Courts in proportion to their failure and success. *Quod ultra*, I would affirm the decree of the lower Court.

1900 JULY 16 — APPELLATE CIVIL — 23 A. 5 = 20 A. W. N. 173

AIKMAN, J.—The plaintiff respondent is assignee from Government of land revenue of the village Fatehpura in the Agra District. The defendant appellant is a co-sharer in that village. The plaintiff sued him for arrears of land revenue for the years 1302, 1303 and the kharif of 1304 F., with interest thereon. The Court of first instance decreed the plaintiff's claim in full, and the decree was affirmed by the District Judge on appeal. The defendant comes here in second appeal. Of the pleas raised in the memorandum of appeal, the first only has been pressed. It is to the effect that the Courts below have erred in awarding interest on the arrears of land revenue. That plea is based on the second paragraph of section 148 of the N. W. P. Land Revenue Act of 1873, which is as follows:—

(1) (1889) I. L. R. 11 All. 148.

1900 JULY 16.

APPELLATE CIVIL.

23 A. 5= 20 A. W. N. 173.

"No interest shall be demanded on any arrear of land revenue." It is clear that the language of the Act supports the appellant's contention.

For the respondent, it is argued that the section relied on occurs in a chapter which treats of the collection of land revenue by Government, and therefore does not apply to the case of a private person suing for arrears of land revenue. It is further pointed out that Government is by law invested with wide and summary powers for recovering such arrears, which powers a private person does not possess. The latter must have recourse to a suit, and delay must therefore frequently occur before he can realize the money due to him. It would, therefore, it is contended, be unfair to refuse him interest on the arrears. It is possible that the reason why the law prohibits Government from demanding interest on land revenue, when it is in arrears, may be that the same law gives the Government summary powers for recovering the revenue immediately it is overdue, and that reason does not exist in the case of a private person like the plaintiff. But the fact remains that Government has no power to demand interest, [11] and in my opinion when Government assigns to a private person the right to receive land revenue, the latter is under the same disability as his assignor in the matter of demanding interest. For the respondent, however, a plea is raised to the effect that, as between the parties to this suit, the question of the defendant's liability to pay interest is *res judicata.* This plea was overruled by the lower Court, but I feel bound, though somewhat reluctantly, to sustain it.

On the last occasion when the plaintiff sued the defendant for arrears of revenue, he claimed interest on those arrears. He was met by the same plea, based on section 148 of Act No. XIX of 1873, as is raised in the present case. The Assistant Collector, in an excellent judgment, sustained that plea and held that interest could not be claimed. But on appeal the District Judge, on the 1st of June, 1897 took a different view, and held as between the parties to this suit that an assignee of land revenue is entitled to claim interest. Unfortunately for himself the defendant allowed that judgment to become final. It is no doubt true that the former suit was to recover a different sum of money with interest thereon from that claimed in the present suit, and therefore the cause of action was not the same as in this case. Had the law as to *res judicata* been the same as it was in the old Code of Civil Procedure, it would have been difficult to sustain the respondent's contention. Section 2 of Act No. VIII of 1859 ran as follows:—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." But the law as to *res judicata* has been expanded and modified by section 13 of the existing Code. As the law now stands, a Court is forbidden to try, not only a suit, but an issue, in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a Court of jurisdiction competent to try the subsequent suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation IV shows what is a final decision within the meaning of the section. Now, as section 146 of the

[12] Code of Civil Procedure shows, an issue arises when a material proposition of fact *or law* is affirmed by the one party and denied by the other It appears from this that a matter in issue may be one of law as well as of fact The issue of law raised in the present case was raised in a former suit between the same parties, was heard, and was finally decided adversely to the present appellant within the meaning of Explanation IV by a Court competent to decide the present suit In the case *Pahlwan Singh* v *Risal Singh* (1) it was observed —" The subject matter, in the sense of the thing sued for, is of course different in each suit, but it is the 'matter in issue' not the 'subject matter of the suit that forms the essential test of *res judicata* in the section in question (section 13) * * * * In the two suits of the parties now before us one *common* matter in issue was the question of the liability of the obligors of the bond in regard to the amount of the interest secured thereby ' Applying the principle enunciated in that case, I would hold that one matter in issue common to the two suits was the liability of arrears of land revenue to pay interest

Again in the case *Balkishan* v *Kishan Lal* (2) there is in the judgment of Mahmood J , in which Edge, C J and Straight, J , concurred the following passage at p 157 —" Now there can be no doubt that for purposes of *res judicata* it is *not* essential that the subject matter of the litigation should be identical with the subject matter of the previous suit of which the adjudication is made the foundation of the plea, which plea, as I have already said is extensive enough to bar a suit as well as the retrial of an *issue* The distinction between the two aspects of the plea must not be lost sight of, for it is of special significance in cases of recurring liabilities such as the present The general rule of law may be briefly stated to be that where a recurring liability is the subject of a claim, a previous judgment, dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata* but if such previous judgment does negative the title itself the plaintiff cannot re agitate the same question of title by suing to obtain relief for a subsequent item of the obligation ' Now [13] in the present case if the appellant is liable to pay interest on arrears of land revenue this is a liability recurring as often as he is in arrears The previous suit decided that he was liable on grounds which dealt not merely with the claim to interest then before the Court, but which went to the very root of plaintiff's title to recover interest at all

I would also refer to the authorities cited on p 47 *et seq* of Mr Hukm Chand s Treatise on the Law of *res judicata* For the reasons set forth above, I feel myself compelled to sustain the respondent s plea based on section 13 of the Code of Civil Procedure

I would dismiss the appeal with costs

BY THE COURT

Under the second paragraph of section 575 of the Code of Civil Procedure the decree of the Court below is affirmed and the appeal is dismissed with costs

Appeal dismissed

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(1) (1881) I L R 4 All 55 (2) (1888) I L R 11 All 148

1900 JULY 16 — APPELLATE CIVIL — 23 A 13= 20 A W N 178

or without the Judge's knowledge, got the Judge's initials attached to it, and hustled the record into the record room The decree holder had got an order for sale, and no process fees were required to carry out that order any further As for the objection that a copy of the decree was wanted, this was contrary to law Notification No 671 of the 30th of September, 1880, which has the force of law, provides that the Court shall send all the necessary papers Rule VI expressly says that "the aforesaid documents shall be prepared and transmitted to the Collector free of all costs to the parties, the copies, etc, being prepared by the Court establishment"

In support of his contention the learned vakil referred us first to the well known Full Bench Ruling *Paras Ram* v *Gardner* (1) That was a case in which the interruption to the execution of [18] the decree was caused by the illegal intervention of Debi Das, an outsider But the principle underlying the decision was this, that the decree holder's application which the Court was then considering was not a new or fresh act, but was in legal continuance of a previous application which was within time, *i e*, the application of June 1871 As Stuart, C J, pointed out, the decree holder's petition recited the whole previous procedure, and simply repeated the prayer for execution of the decree which had been made in June, 1871 The other Judge held similarly

The case next cited, *Raghubans Gir* v *Sheosaran Gir* (2), Mr Malaviya pointed out, was a case in which the interruption was due to an act of the Court This is quite true, but here again what the learned Judges who decided the appeal appear to have considered mainly was that the application was primarily and essentially one made in conformance with the direction of the Court given in its previous order, dated 27th May, 1878, with the object of moving the Court to proceed in the matter of the former application which had been postponed The case of *Booboo Pyaroo Tuhobildarinee* v *Syud Nazir Hossein* (3) was also a case in which the interruption caused had been due to the act of a third person Execution proceedings had been struck off upon a claim made by this third person, and it took the judgment creditor all but three years to get this claim set aside Still it was so set aside, and then the decree holder returned to his original application More than three years had intervened, but the Court was satisfied that his proceedings had been continuous, and that he was really acting upon his former application The Bombay High Court reviewed these and other similar precedents in the case of *Kalyanbhai Dipchand* v *Ganashamlal Jadunathji* (4) The distinction now contended for was not mentioned in that precedent All that was held was that an application made by a decree holder after the removal of an obstacle which has for a time rendered execution impossible was merely an application for the continuation of former proceedings Nothing is predicated as to the obstacle being only one raised by some person other than the decree holder or by the Court

[19] The case of *Basant Lal* v *Batul Bibi* (5) goes a good deal further, but we need not consider that now, nothing is laid down in it as to the doctrine now contended for

(1) (1877) I L R 1 All 355
(2) (1882) I L R 5 All 243
(3) (1875) 23 W R 183
(4) (1880) I L R 5 Bom 29
(5) (1883) I L R 6 All 23

1900 JULY 16. — APPELLATE CIVIL. — 23 A. 13= 5 A. W. N. 178.

In the case of *Baikanta Nath Mittra* v. *Aughore Nath Bose* (1), the Judges, following the precedent of *Chandra Prodhan* v. *Gopi Mohun Shaha* (2), which appeared to them to be in harmony with a long series of decisions both in the Calcutta and other High Courts, held that an application which the decree-holder expressly called a continuation of former proceedings might be held to be such an application, so far at least as regards the property which was mentioned in the former application. Here too the Judges do not seem to have considered the origin of the obstacle, but to have held generally that when execution proceedings are stayed by order of the Court a subsequent application to remove that order and proceed with the execution may be taken as a continuation of the former proceedings.

One of the most recent decisions on the point is that of *Raghunath Sahay Singh* v. *Lalji Singh* (3). In this most of the cases already mentioned were considered. But again there is nothing to show that the learned Judges who decided the case were influenced by the consideration as to whether the obstacle which had delayed execution proceedings was the act of some person other than the decree-holder.

This exhausts the cases to which we are referred. In the present case we have found above that there was no sleeping over his rights by the decree-holder. We are totally unable to agree with the learned Subordinate Judge that he was to blame. We are satisfied that the order striking off execution proceedings was one of which he never had notice. It was a proceeding purely for the convenience of the Court, if indeed it was not more than this, *i.e.*, a forgery on the part of the execution clerk. So that now what we are about to hold is not intended to apply to cases in which it can be shown that the decree-holder acted dilatorily and thereby delayed proceedings. The circumstances under which execution proceedings are struck off will usually be questions of fact and must be determined upon [20] the facts. Where a decree-holder has made an application within time and has obtained an order granting his request, and the completion of that order is suspended by some obstacle which the decree-holder has to remove before he can get satisfaction of his decree, and where, it may be after an interval of three years, having removed that obstacle, he returns to the Court and prays that, as in the present case, the order which he got years ago may now be carried to completion, his application is not a fresh application, but one praying the Court to revive the suspended order and permit it to be pushed through to completion.

We decree the appeal, set aside the order of the Court below and return the proceedings to that Court with a view to their being carried out according to law.

The appellant will get his costs in all Courts.

Appeal decreed.

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(1) (1893) I. L. R. 21 Cal. 387.
(2) (1887) I. L. R. 14 Cal. 385.
(3) (1895) I. L. R. 23 Cal. 397.

23 A 20 (=20 A W. N 181)

APPELLATE CIVIL

Before Mr Justice Knox, Acting Chief Justice, and Mr Justice Aikman

1900 JULY 23

APPELLATE CIVIL

23 A 20= 20 A W N 181

JAMMYA (*Plaintiff*) v DIWAN AND OTHERS (*Defendants*) *
[23rd July, 1900]

Act No XII of 1887 (*Bengal Civil Courts Act*) *section* 37—*Muhammadan Law—Evidence of custom at variance with Muhammadan Law*

Where the parties to a suit are Muhammadans, governed, in regard to the matters mentioned in section 37 of the Bengal Civil Courts Act, 1887, by the ordinary rules of Muhammadan law, evidence is inadmissible to prove a custom of succession at variance with that law *Surmust Khan* v *Kadir Dad Khan* (1) referred to

[Fol 1908 A W N 7=4 A L J 792 Ref 38 Mad 1052]

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Moti Lal* (for whom Pandit *Mohun Lal Nehru*), for the Appellant

Mr *Abdul Raoof* (for whom Mr *Abdul Jalil*), for the Respondents

KNOX, ACTING C J, and AIKMAN, J —The main point taken in this appeal is that the learned Subordinate Judge has erred in law in holding that a custom of exclusion of daughters, which overrides the Muhammadan law of inheritance, is a good [21] and valid custom when the parties are Muhammadans That this was the view taken by the learned Subordinate Judge is undoubtedly correct He appears to have entirely overlooked section 37 of Act No XII of 1887 That section lays down in very positive and emphatic terms that whenever it is necessary for a Civil Court to decide any question with regard to succession, inheritance, and other points therein specified, the Muhammadan law, in the case where parties are Muhammadans shall form the rule of decision, except where such law has by legislative enactment been altered or abolished We have not been referred to any legislative enactment touching the particular question before us, and we know of none In striking contrast to the language used in section 37 of the Bengal Civil Courts Act, is that used in section 5, Act No IV of 1872, the corresponding section which has force in the Punjab That provides that in questions regarding successions in cases where the parties are Muhammadans, the Muhammadan law is to be followed, except in so far as such law has been altered or abolished by legislative enactment, or has been modified by any custom applicable to the parties concerned, and not contrary to justice, equity or good conscience The law which governs these Provinces gives no opening where parties are Muhammadans to the consideration of custom, and we have not been referred to any case of this Court which at all points that way On the contrary, such decisions as there are, beginning with a Full Bench decision in the case of *Surmust Khan* v *Kadir Dad Khan* (1) and extending onwards, are all

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* Second Appeal No 496 of 1898 from a decree of Babu Prag Das, Subordinate Judge of Saharanpur dated the 20th April 1898, reversing a decree of Pandit Kunwar Bahadur Munsif of Muzaffarnagar, dated the 23rd August 1897

(1) (1866) Agra Full Bench Rulings, Vol I, p 38

1900 ULY 16. — ·· ATE CIVIL. — A. 13= A. W. N. 178.

In the case of *Baikanta Nath Mittra* v. *Aughore Nath Bose* (1), the Judges, following the precedent of *Chandra Prodhan* v. *Gopi Mohun Shaha* (2), which appeared to them to be in harmony with a long series of decisions both in the Calcutta and other High Courts, held that an application which the decree-holder expressly called a continuation of former proceedings might be held to be such an application, so far at least as regards the property which was mentioned in the former application. Here too the Judges do not seem to have considered the origin of the obstacle, but to have held generally that when execution proceedings are stayed by order of the Court a subsequent application to remov that order and proceed with the execution may be taken as a contin tion of the former proceedings.

One of the most recent decisions on the point is that of *Ragl Sahay Singh* v. *Lalji Singh* (3). In this most of the cases alrea tioned were considered. But again there is nothing to sł learned Judges who decided the case were influenced by the c as to whether the obstacle which had delayed execution pro the act of some person other than the decree-holder.

This exhausts the cases to which we are referred. case we have found above that there was no sleeping the decree-holder. We are totally unable to agre Subordinate Judge that he was to blame. W order striking off execution proceedings was on notice. It was a proceeding purely for the conv indeed it was not more than this, *i.e.*, a for execution clerk. So that now what we are ab to apply to cases in which it can be shown dilatorily and thereby delayed proceedi which execution proceedings are struck fact and must be determined upon [20] has made an application within time his request, and the completion of obstacle which the decree-holder faction of his decree, and where. years, having removed that ob that, as in the present case, t be carried to completion, h one praying the Court to r pushed through to comple

We decree the ap return the proceeding out according to law.

their judgment-debtors, and not the property of the objectors, and [23] as such was liable to be sold in execution of the decree The two other decree holders did not join in the suit, and they were made defendants, not because any relief was claimed against them, but merely for the purpose of having them before the Court as being persons interested in the decree These two persons filed no written statement and did not appear or take any part in the proceedings at any stage of the suit

1900 JULY 31 — APPELLATE CIVIL — 23 A 22= 20 A. W N 183

No objection could be made to the suit as filed that it was not properly constituted, or that any one who ought to have been, was not made a party The real and only question in the suit was whether the property was the property of the successful objectors, or of the judgment debtors, and that question in no way depended upon the fact that the original decree was one in which the plaintiffs were jointly interested with their co decree holders who did not join in the suit, though perhaps it may be conceded that "the party" in section 283 refers to all the persons against whom the order allowing or disallowing an objection is made

The suit was dismissed by the Court of first instance, and the decree of that Court was confirmed on appeal by the lower appellate Court The appellants, who alone appealed against the decree of the Court of first instance, again appealed to this Court, and, as in the Court below, they made their two co decree-holders respondents Pending the hearing of this appeal, the latter both died, and no application was made to place their legal representatives (if any) on the record in their place

A preliminary objection has been taken before us that the appeal must abate altogether, and in support of that objection we have been referred to the case of *Kamlapat* v *Baldeo* (1) I do not think that the objection is sound In the case quoted, which is by a single Judge, it was one of two decree holders who were appellants who died, and it was held that the suit abated, as the representatives of the deceased appellant were not brought upon the record In *Chandarsang* v *Khimabhai* (2), it was said by Farran, C J, and Tyabji, J, that the mere fact of the death of one of several appellants cannot affect the right of the other appellants to proceed with the appeal if they chose to do so There one of the appellants had died, and the legal representatives [24] not having been brought upon the record, the lower appellate Court had held that the suit abated The High Court pointed out that if the ground of appeal was common to all the defendants (who had been appellants), it was open to the Court to have proceeded under section 544 of the Code of Civil Procedure That case, it seems to me, is in conflict with the decision of this Court to which I have referred But as the circumstances of the latter are different from those of the present case, it is unnecessary for me to express any opinion upon the conflict

The present case is distinguishable from the previous case in this Court in this respect, that it was two of the respondents, and not one of the appellants, who died In principle there may not be any real distinction, as the interests of the deceased respondents were identical with those of the appellants, and the decree of the lower appellate Court proceeded upon a ground common to them all Had the two deceased res

(1) (1900) I L R 22 A 222 (2) (1870) I L R 22 Bom 718

1900 JULY 31.

APPELLATE CIVIL.

23 A. 22= 20 A. W. N. 183.

pondents been appellants, then according to the view taken by the Bombay High Court, the appeal might have proceeded under section 544 of the Code.

Now does the fact that they were respondents and not appellants, make any difference? On principle I should be inclined to think not. The case of one of several appellants dying is dealt with under section 363 read with section 582, and of one of several respondents by section 368 read with section 582 of the Code, and the provisions applicable to the two cases are different. As in the present case, we have to deal with the death of two out of several respondents, it is necessary then to see whether section 368 read with section 582 has any bearing. Can it be said (and unless it can be said these sections will not apply) that "the right to appeal did not survive against the surviving respondents?" The only right of suit and of appeal against anyone was against the objectors, namely, the surviving respondents. There was no right of suit or appeal against the two co-decree-holders, who were merely put upon the record because they did not join in bringing the suit. No question arises under section 368 read with section 582 of any right of suit surviving *to* or *in favour* of the appellants or other persons. I am of opinion therefore that section 368 read with section 582 does not apply, and that there is no abatement, and that, there being no abatement, the appeal may proceed.

[25] The respondents now before us cannot complain that because the representatives of the two deceased decree-holders are not parties to this appeal, they may be subjected by such legal representative to another suit, for the decree of the lower appellate Court would bar such a suit. Nor can they complain that they are entitled to have the representatives of the deceased upon the record in order to get an order for costs against them, as under no circumstances could they have got costs against them if they had been made respondents within the time limited.

I am not prepared to say whether section 544 would apply to this case. Possibly not, as it applies in terms to a case where the decree appealed against proceeds on a ground common to all the appellants or all the respondents, and here the decree, it may be said, proceeded upon a ground common to the appellants and two of the respondents in the Court below.

I would overrule the preliminary objection.

BURKITT, J.—I concur in overruling the preliminary objection.

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23 A. 25 (=20 A. W. N. 185).

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

KUDRAT-ULLAH (*Plaintiff*) *v.* KUBRA BEGAM (*Defendant.*)*
[31st July, 1900.]

Act No. IV of 1882 (*Transfer of Property Act*), *section* 85—*Mortgage—Prior and subsequent incumbrancers, rights of*—inter se—*Sales in execution of decrees separately obtained—Rights of auction-purchasers.*

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* Second Appeal No. 879 of 1897, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 23rd August 1897, reversing a decree of Babu Upendra Nath Sen, Officiating Munsif of Bijnor, dated the 30th April 1897.

1900 JULY 31.

APPELLATE CIVIL

23 A 25= 20 A W N 185

Umrao Singh in 1879 mortgaged 10 biswansis of a certain village to Kanhai Singh In 1885 the mortgagee sued upon the mortgage, obtained a decree, and brought the mortgaged property to sale, and it was purchased by Kubra Begam for Rs 425 2 0 of which Rs 296 13 6 was due to and paid to the mortgagee

At a subsequent date in 1879 Umrao Singh and his brother Munna Singh mortgaged to one Shambhu Nath a larger share in the same village including the share which had been mortgaged to Kanhai Singh Shambhu Nath was not made a party to the suit on the first mortgage

In 1886 Shambhu Nath without making the first mortgagee a party thereto, instituted a suit on his second mortgage, and, in 1887, obtained a decree, in execution of which the mortgaged property was put up to sale, and purchased by Kudrat ullah for Rs 3,000 Both the mortgages in question were registered

[26] In 1896 Kudrat ullah deposited in Court Rs 296 13 6, the amount which had been due, and paid, upon the first mortgage to the first mortgagee, [illegible] at sum, filed [illegible] d by her at [illegible]

Held that such a suit would lie, and that the plaintiff was entitled to redeem the first mortgage

Matadin Kasodhan v *Kazim Husain* (1), *Janki Prasad* v *Kishen Dat* (2), and *Mehrbano* v *Nadir Ali* (3), distinguished *Sheo Charan Lal* v *Sheo Sewak Singh* (4) *Rewa Mahton* v *Ram Kishen Singh* (5), *Mukhoda Dassi* v *Gopal Chunder Dutta* (6), *Mohan Manor* v *Togu Uka* (7), and *Desai Lallubhai Jethabai* v *Mundas Kuberdas* (8) referred to

THE facts of this case are fully stated in the judgment of Henderson, J

Mr *Amir ud din*, for the appellant

Mr *M Ishaq Khan*, for the respondent

HENDERSON, J —In this case one Umrao Singh, on the 23rd of January, 1879, mortgaged 10 biswansis of mauza Jagri Bangar to one Kanhai Singh On the 12th of January, 1885, the mortgagee sued upon the mortgage, and obtained a decree on the 30th of January 1885, under which the property mortgaged was subsequently, on the 30th of November, 1886, sold to Kubra Begam, the defendant respondent, for Rs 425 2 0, of which Rs 296 13 6 was due to and paid to the mortgagee

It appears that Umrao Singh and his brother Munna Singh, on the 5th of June, 1879, mortgaged 3 biswas 6½ biswansis of mauza Jagri Bangar (including the 10 biswansis already mortgaged), together with certain other property, to one Shambhu Nath Shambhu Nath was not made a party to the suit on the first mortgage

On the 13th of November, 1886, after the decree in the previous suit and before the sale under that decree, Shambhu Nath instituted a suit on his mortgage without making the first mortgagee a party, and he obtained a decree on the 26th March, 1887, for sale of the mortgaged properties, which were put up for sale, and purchased by the plaintiff-appellant for Rs 3,000

[27] Both mortgages were registered, and according to a decision of a Full Bench of this Court (which, however, has not been followed by the High Courts of Calcutta and Madras) the first mortgagee must be

(1) (1891) I L R 13 All 432
(2) (1894) I L R 16 All 478
(3) (1900) I L R 22 All 212
(4) (1896) I L R 18 All 460
(5) (1886) L R 13 I A 106
(6) (1899) I L R 26 Cal 731
(7) (1885) I L R 10 Bom 224
(8) (1895) I L R 20 Bom 390

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taken at the time of instituting his suit to have had constructive notice of the second mortgage—*Matadin Kasodhan* v. *Kasim Husain* (1). *Janki Prasad* v. *Kishen Dat* (2),—and he was therefore bound to have made the second mortgagee a party to his suit.

On the 15th of December, 1896, the plaintiff-appellant deposited Rs. 293-13-6, the amount which had been due and paid upon the first mortgage to the first mortgagee, in Court to the credit of the defendant-respondent, under section 83 of the Transfer of Property Act. She refused to accept this sum, and the plaintiff-appellant thereupon brought this suit seeking to redeem the 10 biswansis of Jagri Bangar purchased by her.

The Court of first instance dismissed the suit, but the lower appellate Court has given the plaintiff a decree for redemption, but, apparently overlooking the fact of the deposit, has made that decree conditional upon his paying to the defendant-respondent Rs. 296-13-6 with interest up to the 30th September 1897 (a day fixed by the Court), when on payment of that amount with interest, he should get possession.

The plaintiff has appealed against so much of the decree as deals with the interest, and it is admitted that if his suit will lie, his appeal must succeed.

Cross-objections, however, have been filed by the respondent who contends that the suit will not lie on the ground that nothing passed to her, the plaintiff, under her purchase. In support of this proposition the Full Bench case of *Matadin Kasodhan* v. *Kazim Husain* (1) has been cited as an authority to show that Shambhu Nath, the second mortgagee, could not bring to sale under the mortgage the property mortgaged to him, or at all events so much of it as had already been mortgaged, without first redeeming the prior mortgage, and we were referred to a passage in the judgment of Edge, C. J., at page 453. That passage is as follows :—" The decisions to which I have referred show, and I think rightly, that as well before as since Act No. IV of 1882 [28] came into force, a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgage, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale on his mortgage, the other mortgagees whether prior or subsequent, were necessary parties ; and further, that the property which might effectively be brought to sale under a decree for sale in a mortgage suit was the specific immoveable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property." Another case has also been cited—*Janki Prasad* v. *Kishen Dat* (2) before a Division Bench of this Court. There one Tika Ram, the second mortgagee, brought a suit upon his mortgage without making the prior mortgagee, Kishen Dat, a party, obtained a decree for sale, and put up the mortgaged property for sale, and it was purchased by Janki Prasad on the 22nd of June, 1891. Kishen Dat then brought a suit upon his mortgage, not making either Tika Ram or Janki Prasad a party to that suit. He obtained a decree on the 10th of September 1889, for sale, and proceeded to sell the property, when Janki Prasad objected that the property could not be sold under the decree. The Division Bench in its judgment said—" A first mortgagee cannot sell

(1) (1891) I. L. R. 13 All. 432. (2) (1894) I. L. R. 16 All. 478.

except under a decree which has given a right to redeem within a time fixed by the Court, which, in the event of the second mortgagee not redeeming the first mortgage, forecloses the second mortgagee's right to redeem The first mortgagee's right to sell under the decree arises only on the second mortgagee having failed to redeem and being foreclosed by the decree There is no such decree in the case before us, that is to say, there is no decree giving the second mortgagee a right to redeem * * * All we need say is that under the decree of the 10th of September, 1889, Kishen Dat is not entitled to bring the mortgaged property, the subject of this appeal, to sale As to this last mentioned case it is sufficient to say that it deals with the case of an attempt by a first mortgagee to bring to sale the mortgaged property under a decree in a suit to which a second mortgagee was not a party, and I am not disposed to extend the finding of the Court to the case of a second mortgagee who, under analogous circumstances, has [29] actually brought the mortgaged property to sale With regard to the Full Bench case, it is an authority for the proposition that "a mortgagee has no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgage, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, so that on a suit by a mortgagee for sale on his mortgage, the other mortgagees whether prior or subsequent, are necessary parties," and so far as it is an authority for these propositions, it is binding upon a Division Bench of this Court In my opinion, however, it is not an authority for the proposition that where a sale *has actually taken place* under a decree obtained by a mortgagee in a suit to which he has not made a prior mortgagee a party, nothing passes to the purchaser It may be that under the decisions of this Court a mortgagee under the circumstances mentioned by the Full Bench has no right to bring the mortgaged property to sale Here, however, the mortgaged property has been sold It was competent to the mortgagor after the first mortgage to deal with the interest remaining in him, whether we call that interest the equity of redemption, as in the case of an English mortgage, or not That interest the present mortgagor dealt with when he mortgaged the property to the second mortgagee, and the effect of the mortgage was that the second mortgagee acquired as against the first mortgagee the right of redemption The mortgaged property having been brought to sale under a decree in suit on the second mortgage against the mortgagor, although the entire property may not have passed to the purchaser, it is clear that whatever rights the mortgagor and second mortgagee had passed to the purchaser, and there can be no question that Shambhu Nath, the second mortgagee in the case before us, acquired by his mortgage an interest in the property mortgaged It is true that the Full Bench in the case of *Matadin Kasodhan* v *Kazim Husain* (1) has said that the term "property" in the Transfer of Property Act means the actual physical property, and does not include what is known as "the equity of redemption" Here under the decree on the second mortgage, although it was the mortgaged property that was sold, nothing more could pass to the purchaser than the mortgagor and mortgagee had between them to dispose of, yet that much did pass, and that certainly included the right to redeem The sale took [30] place at a sale duly held—see *Sheo Charan Lal* v *Sheo Sewak Singh* (2)—and a purchaser at an auction sale is not bound to look behind the decree to see whether the decree under which the sale is held,

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(1) (1891) I L. R 13 All 432 (2) (1896) I L. R. 18 All 469

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was rightly made. It is sufficient that the decree of a competent Court directs the property to be sold. In the case of a sale in execution of a decree, their Lordships of the Privy Council said:—"To hold that a purchaser at a sale in execution is bound to enquire into such matters, would throw a great impediment in the way of purchasers under executions. If the Court has jurisdiction, a purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." *Rewa Mahton* v. *Ram Kishen Singh* (1). As pointed out in *Mukhoda Dassi* v. *Gopal Chunder Dutta* (2), there is no real distinction between the case in which a sale takes place in execution of a money decree, and that in which a sale takes place in execution of a decree on a mortgage, by reason of the order for sale in the one case being distinct from the decree, and in the other case being part of the decree itself. The sale in the case before us has never been set aside, and in my opinion the plaintiff-appellant by that sale acquired an interest in the property mortgaged, entitling him under the Transfer of Property Act to redeem.

If the contention raised before us, that the plaintiff-appellant acquired nothing by purchase be correct, the result, apparently, would be that the defendant-respondent who purchased the 10 biswansis in mauza Jagri Bangar, which at the time was subject to a subsequent mortgage, would be in the same position as if there had been no such mortgage upon it. This is a result which I cannot conceive was ever contemplated by the Courts which decided the cases referred to. In my opinion these cases are not applicable to the circumstances of the present case.

When mortgaged property is brought to sale upon a first mortgage, the purchaser takes it as it stood at the time of the mortgage, that is, free from all subsequent incumbrances, but a subsequent mortgagee who was not a party to the suit in which the sale [31] took place, if he so wish, is still entitled to redeem the property. *Mohan Manor* v. *Togu Uka* (3), *Desai Lallubhai Jethabai* v. *Mundas Kuberdas* (4). Therefore in the case before us the second mortgagee, not having had an opportunity to redeem, would have been entitled to do so, and I see no reason why the defendant-respondent should be in a better position when redemption is sought by the purchaser at a sale under a decree on the second mortgage than he would have been if the second mortgagee himself had sought to redeem. The claim put forward by the defendant-respondent is not one which upon merely equitable grounds is entitled to consideration.

I consider that there is nothing to bar the plaintiff's suit, and that he is entitled to redeem, and I would allow the appeal, that is to say, I would set aside so much of the decree as directs the appellant to pay interest upon the deposit of Rs. 296-13-6.

It may be mentioned that in the objections filed by the defendant-respondent no objection was taken to the fact that, whereas he paid Rs. 425-2-0 for the property purchased by him, the decree directed that the property should be redeemed on payment of only Rs. 296-13-6, the amount which was due, and paid to the first mortgagee. I desire to express no opinion as to whether the plaintiff-appellant in making a

(1) (1886) L. R. 13 I. A. 106; I. L. R. 14 Cal. 18, p. 25.
(2) (1899) I. L. R. 26 Cal. 734, p. 737.
(3) (1885) I. L. R. 10 Bom. 224.
(4) (1895) I. L. R. 20 Bom. 390.

deposit under section 83 of the Transfer of Property Act, after the first mortgage decree had been satisfied, adopted the proper course

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Since writing the above, I have been referred to the case of *Mehr bano* v *Nadir Ali* (1) This case was not reported when the appeal was heard by us, and was not referred to in argument In my opinion this case also has no bearing on the circumstances of the present appeal It follows the case of *Janki Prasad* v *Kishen Dat* (2), which I have already distinguished

BURKITT, J —I concur in the order proposed by my learned brother, and would set aside the decree under appeal to the extent suggested by him

Decree modified

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23 A 32 (=20 A W N 188)

[32] APPELLATE CIVIL

Before Mr. Justice Burkitt and Mr Justice Henderson

CHATAR SINGH (*Defendant*) v KALYAN SINGH (*Plaintiff*) *
[2nd August, 1900]

Pre emption—Wajib-ul-arz—Interpretation of document—Meaning of the term "ek jaddi

Held that the term "*ek jaddi* used in the pre emption clause of a *wajib-ul-arz* signifies persons descended from a common ancestor through the male line *Guneshee Lal* v *Zaraut Ali* (3) *referred to*

[Fol 3 A L J 179=1906 A W N 72]

IN this case the plaintiff and the defendant were rival claimants for pre emption in respect of a sale made by Sewa Ram and Mewa Ram to Ganga Bakhsh, son of Chatar Singh The plaintiff relied on the provisions of the wajib ul arz, which gave a preferential right of pre emption to co sharers who were *ek jaddi* with the vendor The plaintiff and the vendors were both admittedly descended from the same common ancestor, but while the plaintiff s descent was in the direct male line, the vendors were the sons of the great granddaughter of that ancestor

The Court of first instance decreed the plaintiff s claim for half only of the property in suit The lower appellate Court decreed the claim in full, holding that the expression "*ek jaddi*' included descent from a common ancestor by either side From this decree the defendant Chatar Singh appealed to the High Court

Babu *Jogindro Nath Chaudhri* and Babu *Satish Chandra Banerji*, for the appellant

Mr *D N Banerji* and Pandit *Moti Lal*, for the respondent

BURKITT, J —There is only one short point to be decided in this case, and that is whether the plaintiff Kalyan Singh can be considered to be *ek jaddi* with the vendors Mewa Ram and Sewa Ram

As I understand the term *ek jaddi* when used in a wajib ul arz in these Provinces, it means persons descended from a common ancestor

*Second Appeal No 288 of 1898 from a decree of L G Evans, Esq, District Judge of Aligarh dated the 10th February 1898, modifying a decree of Maulvi Ahmad Ali Khan, Additional Subordinate Judge of Koil dated the 31st May 1897

(1) (1900) I L R 22 All 212
(2) (1894) I L R 16 All 478
(3) (1870) 2 N W P H C Rep. p 343

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through the male line. If that be the case, it is clear that Kalyan Singh and the vendors are not *ek jaddi*, for although they are all descended from one Lal Singh, Sewa Ram and Mewa Ram are the sons of a great-granddaughter of Lal [33] Singh, so that they cannot claim an unbroken male descent from Lal Singh. This question was before a Division Bench of this Court in the year 1893, in an unreported case—F. A. F. O. No. 80 of 1892. In that case, which is on all fours with the present one, it had been held by the Court of first instance that the plaintiff was *ek jaddi* with the vendor, and that the "*jadd*" of the plaintiff therein was to be sought in his own father's stock and not his mother's. That decision was reversed in appeal by the lower appellate Court. That Court held that the plaintiff's *jadd* was not necessarily confined to his father's stock, and therefore he was *ek jaddi* with the vendors. On second appeal to this Court, it was held that that view was erroneous. The decision of the lower appellate Court was reversed, and that of the Court of first instance was restored. That decision is binding on me, and I cannot say that I at all disagree with it. I have always understood that in all cases such as this "*ek jaddi*" implied descent through males.

I would therefore allow this appeal and modify the decree of the lower appellate Court, and restore that of the Court of first instance. I would direct that each of the pre-emptors take half of the property, each of them paying Rs. 2,500.

The appellant will have his costs.

HENDERSON, J.—In this case it is admitted that if the question had been a question of succession between Kalyan, Mewa Ram and Sewa Ram, Kalyan could not be said to be *ek jaddi* with the vendors. I am not prepared to dissent from the unreported decision which has been just referred to, though I have some doubt as to its correctness. It seems to me that the object of the provisions in the wajib-ul-arz giving preferential rights to co-sharers who are *ek jaddi* with the vendors, was to keep the property in the family, and therefore to give to co-sharers who were related by descent from a common ancestor a preferential right of pre-emption. There can be no doubt that Sewa Ram and Mewa Ram through their mother are related to Kalyan. In Shakespear's Dictionary the word "*ek jaddi*" is said to mean "descendants from the same ancestor," and in the case of *Guneshee Lal* v. *Zaraut Ali* (1) the words "*ek jaddi*" were interpreted to mean [34] "related by descent from a common ancestor." Having regard to these considerations, I have, as I have said, some doubt as to the correctness of the unreported decision, but I do not feel myself justified in dissenting from that case and from the judgment which has just been delivered, and I, therefore, though with some hestitation, agree with the order which has just been passed.

Decree modified.

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(1) (1870) 2 N.-W. P. H. C. Rep. p. 343.

23 All 34 (=20 A W N 190)

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23 A 34=
20 A W N.
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APPELLATE CIVIL

Before Mr Justice Aikman

DURGA (*Defendant*) v BHAGWAN DAS AND ANOTHER (*Plaintiffs*)' [3rd August, 1900]

Civil Procedure Code s ction 317—Execution of decree—Sale i i execution—Suit against certified purchaser for recovery of part of the property purchased

Kishan Lal and Tokha Mal were joint mortgagees After their death Durga the adopted son of Kishan Lal and Todar the son of Tokha Mal, brought a

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lecree into execution and caused the mortgaged property to be sold, and purchased it themselves Thereupon the representatives of Musammat Pano sued Durga to recover that portion of the property which they alleged ought to have come to Pano

Held that the suit would not lie as being in contravention of section 317 of the Code of Civil Procedure

[Fol (1916) 1 M W N 220=32 I C 434=3 L W 86]

THE facts of this case sufficiently appear from the judgment of the Court

Babu *Sital Prasad Ghosh*, for Appellant

Pandit *Tej Bahadur Sapru*, for Respondents

AIKMAN, J —It appears that two brothers Kishan Lal and Tokha Mal held a mortgage over a certain property After the death of the mortgagees, Durga, the adopted son of Kishan, who is appellant here, and Todar, the son of Tokha Mal, brought a suit upon the mortgage and got a decree on the 25th of April, 1884 Some dispute had arisen on Kishan Lal's death as to the title of Durga to his property, and a suit was brought by Kishan [35] Lal's daughters against Durga and the widow of Kishan Lal to get possession of Kishan Lal's property This suit ended in a decree of the 16th of February, 1885, which was based upon a compromise By this compromise decree Musammat Pano, the predecessor in title of the plaintiffs in the present suit, was held to be entitled to one quarter of Kishan Lal's property Durga and Todar, the decree holders under the mortgage decree, brought the mortgaged property to sale, and purchased it themselves on the 20th of March, 1888, a certificate of sale being issued in their name On the 18th of March 1899 the present plaintiffs brought this suit against Durga to recover their share of the property, which he had purchased at auction on the 20th of March, 1888 The allegation in the plaint is that the purchase made by Durga was made on behalf of himself and on behalf of Musammat Pano, the mother of the plaintiffs The defendant pleaded that with reference to the provisions of section 317 of the Code of Civil Procedure the suit was not maintainable Other pleas were raised, which were all overruled by the Courts below A decree was made by the Munsif in the plaintiffs' favour

* Second Appeal No 811 of 1899 from a decree of Munshi Shiva Sahai Additional Subordinate Judge of Meerut, dated the 25th August 1899, confirming a decree of Maulvi Muhammad Abbas Ali Additional Munsif of Meerut dated the 16th June 1899

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23 A. 34= 20 A. W. N. 190.

That decree was affirmed on appeal by the Subordinate Judge. The defendant Durga comes here in second appeal. The main contention in this appeal is that which was also put forward in the lower Courts, namely, that the suit is barred by section 317. There is no doubt that the suit is one against a certified purchaser, and is based on the allegation that the property claimed was purchased by the certified purchaser on behalf of Musammat Pano. It appears to me that it is impossible to hold that such a suit is not barred by the language of section 317. It is in my opinion immaterial that the claim is not for the whole of the property of which the defendant is the certified purchaser. He is the certified purchaser of the property claimed, and the suit is based on the allegation that the purchase was made on behalf of some other person. The provisions of section 82 of the Trusts Act, No. II of 1882, might have helped the plaintiffs had it not been for the proviso to that section which declares that nothing therein shall be deemed to affect section 317 of the Code of Civil Procedure. It was contended on behalf of the respondents that under the compromise decree they were entitled to one-half of any property [36] which might be brought under the compromise decree. I cannot put any such construction upon the language of that decree. It appears that on the 30th of October, 1890, the defendant before the revenue authorities admitted the plaintiffs' right to the share now claimed, provided they paid to him the proportionate amount due to him on account of the expenditure which he had incurred in the Civil Court, but the plaintiffs declining to pay this, their application to the revenue authorities to have the property entered in their names was dismissed. The learned vakil for the respondents professes his willingness on behalf of his clients now to pay the amount which Durga then claimed ; but the learned vakil for the appellant says that he has no authority to accept such an offer. The mere acknowledgment by Durga that a portion of the property which he had bought was purchased on behalf of the plaintiffs' predecessor in title would not of itself justify the plaintiffs in maintaining the present suit in the face of the language of section 317, unless that acknowledgment were accompanied by some act which would operate as a valid transfer of the property [see *Monappa* v. *Surappa*, (1)]. In the present case there was no such act on the part of the certified purchaser. For the reasons set forth above, I am of opinion that, even if on the compromise decree the plaintiffs are entitled to recover a share of the property purchased at the execution sale of the 20th of March 1888, which I think is very doubtful, their present suit is barred by section 317 of the Code of Civil Procedure. I allow the appeal, and, setting aside the decrees of the Courts below, dismiss the plaintiffs' suit with costs in all Courts.

Appeal decreed.

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(1) I. L. R. 11 Mad. 234.

23 All 37 (=2 Bom L R 831=5 C W N 33=27 I A 238=10 M L J. 267= 7 Sar 724)

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23 A 37= 2 Bom L R 831=5 C W N 33=27 I A 238=10 M L J 267=7 Sar 724

[37] PRIVY COUNCIL

PRESENT

Lord Davey, Lord Robertson, Sir Richard Couch, Sir Henry De Villiers and Sir Ford North

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GARURADHWAJA PRASAD *(Defendant Appellant)* v. SUPERUNDHWAJA PRASAD *(Plaintiff Respondent)* [8th, 10th May and 27th June, 1900]

On appeal from the High Court for the North Western Provinces

Act No I *of* 1872 *(Indian Evidence Act) section* 32, *sub section* (5), 49 *and* 60—*Evidence—Custom—Alleged custom of primogeniture in a Hindu family—Admissibility of statements of deceased persons*

The burden of proving that the custom in a particular family of primo geniture regulates the succession to their property is upon him who claims to inherit in that right

The elder of two brothers having obtained possession of all the family estate the younger suing for his half share under the general Hindu law was met by the defence that there was in this family a custom of primogeniture

Upon the evidence the decision was that the custom alleged had been prov ed to exist.

[illegible]

rise to much probability that it was the custom in this one also For nearly eighty years possession had been consistent with the alleged custom, and in the earlier part of that period inconsistent with any other basis

In that part of the oral evidence which related to the practice of gaddina [illegible] t fication understood to be meant by [illegible] tice with primogeniture in the same [illegible] in *Thakur Nitr Pal Singh* v *Thakur* [illegible]

In the evidence as to tradition regarding the family, learned by witnesses from deceased persons their statements came within sub section (5) of section 32 of the Evidence Act 1872 And by the aid of section 49 rendering rele vant the opinions of persons having special means of knowledge as to the family usages, oral statements of such opinions were admissible But sec tion 60 requires that oral evidence referring to an opinion or its grounds should be the evidence of a person holding that opinion on the grounds refer red to A witness may state as the ground of his opinion as to the existence of a family custom, information derived from deceased persons But this must be the statement of independent opinion and though derived from hearsay must not be the mere repetition of hearsay

The weight of such evidence depends upon the character of the witness and of the deceased

[Ref 27 All 203 15 C L J 281=14 I C 609 18 C L J 277=18 C W N 297= 21 I C 481 37 Mad 286 60 I C 147 47 Cal 979=25 C W N 857=60 I C 984 Rel 1 P L J 109 20 C W N 876]

[38] APPEAL from a decree (7th February 1893) of the High Court (2), reversing a decree (14th January 1889) of the Subordinate Judge of Aligarh who dismissed the respondent s suit

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(1) (1896) L R 23 Ind Ap 147 I L R 19 All 1
(2) (1893) I L R 15 All 147

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The principal issue was whether the alleged family custom existed or not The Subordinate Judge, Abinash Chandra Banerji, after considering the evidence at length in his judgment, dismissed the suit with the following statement in conclusion —"There are facts connected with "this family which warrant us in presuming that the usage now in dis-"pute existed in the family before the time of Nawal Singh who inherited "this estate from his father Bhuri Singh in 1775 The Mursan Raj was "founded at about that time, … on all hands that the "rule of succession by primogenit… that fam… In the "case of *Rawat Arjun Singh* v I… …istence "of a similar custom was pre… …r eight "generations And in the case of *Ramrao Trimbak* v *Yash-"want Rao Madhav Rao Deshpande* (2) it was presumed from its observ-"ance for about one hundred and fifty years So far as the principle "is concerned those cases are authorities on the strength of which we "may from the observance of the usage for the period proved presume "its existence as an ancient and valid custom"

[40] In reference to the title "Thakur," the Judge referred to the judgment in Babu *Ganesh Dut Singh* v *Maheshur Singh* (3)

On the plaintiff's appeal the High Court (TYRRELL and BLAIR, JJ) in the judgment reported in I L R, 15 All 147, expressed their opinions that notwithstanding the admission of the respondent when the entry at the collectorate was made in 1880, he having been then sixteen years old, the custom under which that entry had been claimed was not established by the evidence As points against the defence they noticed that the successive devolutions of the estate from father to one son were not necessarily attributable only to the existence of the alleged custom The practice of gaddinashini in the family had not afforded any substantial support to the belief in the existence of the custom of primogeniture, for with this that practice had no necessary connection The entries in several wajib ul arzes of villages belonging to the Beswan family, having been the work of the Thakur Gir Prasad himself proved no more than that he was desirous that the custom of premogeniture should be followed in his family, and they were no evidence to prove an ancient family custom The inquiry in 1809 directed by the Collector to be made, and forming part of the earliest collectorate proceeding, was as to the law and custom of Hindus in regard to primogeniture, and not as to the existence of the custom in this particular family The High Court had regard to these, and other matters, which appeared to them questionable enough to cause them to reverse the decree of the first Court, and to decree in the plaintiff's favour

Mr *J H A Branson*, for the appellant, argued that the grounds had not been sufficient on which the High Court had acted Upon more than one of the several parts of the case, presented in support of the alleged custom, the High Court had not given due effect to the evidence, and especially in regard to the repeated instances of succession by an elder son to the whole family estate, the Court had failed to consider that there was no evidence of any family agreement or arrangement that the property should be held by him to the exclusion of his brother or [41] brothers He referred to the ancestral connection of the Beswan

(1) (1851) 5 Moo I A 169
(2) (1885) I L R 10 Bom 327
(3) (1855) 6 Moo I A 164, at p 191

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illegitimate sons. By his order of the 22nd November 1809 Mr. Elliot, the Collector of Aligarh, directed that a parwana be issued to Daya Ram and Raja Bhagwant Singh (the then representative of the Mursan family) asking them to give information whether there is any son of Har Kishan other than Jai Kishore and whether according to the custom of Hindus the property of Har Kishan devolves upon Jai Kishore and whether the sanads of jagir and istimrar should be granted to Jai Kishore.

The reply of Daya Ram to this request was in the following terms:—

"After paying my compliments and expressing my wish to pay my respects to "you, I beg to state that I received your kind note enquiring whether Jai Kishore "was the rightful person owing to the death of Thakur Har Kishan, and granting the "sanad of jagir and istimrar to Barkhurdar* Jai Kishore on condition of its being "ascertained that he was entitled to it under the custom of the Hindus. It is "known to you that Thakur Har Kishan and others, and now Jai Kishore, are "among my farzandst (sons). Formerly Thakur Har Kishan, who was senior in age "to his other four brothers, was distinguished from, and surpassed them all, by his "qualities as a sirdar and head, and also during his lifetime his four other brothers "were of one mind with him and obedient to his orders and carried on the affairs "zealously. In the time of Thakur Har Kishan, Barkhurdar Jai Kishore, who is "also senior in age to his other four brothers and is distinguished from, and sur-"passess them all, used to be called the heir apparent and successor. At present "after the death of the said Thakur he has the control of all the affairs small and "great, of his father, and it is Jai Kishore who is entitled to the favours of the "British Company. In accordance with their usual practice the turban of sirdari "was tied round the head of Jai Kishore. It is hoped that the sanads of jagir and "istimrar will be kindly granted to the said Burkhurdar. Submitted for inform-"ation. Further respects.

"(Sd.) THAKUR DAYA RAM SINGH, of Hathras son of Shipuri (?)."

The reply of the Raja of Mursan was in almost the same words and they were evidently written in concert.

Upon these reports a further order, dated the 18th December 1809 was made by the Collector in the following terms:—

"On the 14th petition was made by Thakur Daya Ram stating "that after the death of Thakur Har Kishan his estate devolves "[45] upon Thakur Jai Kishore his eldest son and to-day a petition was "made by Raja Bhagwant Singh stating that Thakur Jai Kishore was "the eldest son of Thakur Har Kishan deceased and that the estate of "the deceased Thakur devolved upon him and consequently all the "brethren deeming Thakur Jai Kishore to be the rightful person and "eldest son tied the turban of the Sirdari." The petitions were then ordered to be forwarded to the Board.

The terms of this order clearly show the sense in which the Collector understood the reports of Daya Ram and the Raja of Mursan. Accordingly two Sanads, dated the 19th January 1810 were granted by the Government to Jai Kishore. By the first of these documents after noticing that, under the orders of the Governor-General, Taluka Beswan had been settled with and granted to Har Kishan for his lifetime, and his death before the issue of the perpetual sanad of the taluka, it was stated that His Excellency therefore thought it advisable and proper that instead of the said deceased the taluka should be maintained in the name

* Literally "May you eat the fruit of life. † Literally means children.

of his eldest son Thakur Jai Kishore for his lifetime at the jama therein mentioned The second sanad contained the grant of a village called Jhanga by way of jagir in similar terms

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From the two letters of Daya Ram and the Raja of Mursan it appears that Jai Kishore had then four brothers living The inference is that Jugal Kishore his uterine brother was then living It is true that in two documents dated the 16th March 1845 it is stated by Tikam then Raja of Mursan and by a tahsildar named Syed Hardar Ali that Har Kishan had four sons only Jai Kishore and three illegitimate sons It is more probable that (Jugal Kishore having died young and childless) his existence was forgotten or overlooked after a lapse of nearly forty years than that Daya Ram and the Raja Bhagwant were mistaken, and their Lordships agree with the Subordinate Judge that the balance of evidence is in favour of Jugal Kishore having survived his father The witness Dharag Singh whose evidence is vouched by Mr Justice Blair says indeed that Jugal Kishore died in his father s lifetime, but in an earlier part of his examination he had said that he "did not know whe ther Jugal Kishore died in his [46] father's lifetime or after his death ' This witness was born some years after Jugal Kishore's death, and was speaking from hearsay only, and there are many witnesses of the same kind, some of whom say that Jugal Kishore died in his father's lifetime and others of whom say he survived him The oral evidence (even if admissible) is quite inconclusive

Jiwa Ram might have claimed to share the taluka with his brother Har Kishan, and he as well as Jugal Kishore (if living) might have claimed to share it with Jai Kishore if the succession was regulated by the ordinary Hindu law From the record of a proceeding before the Deputy Collector and Settlement Officer of the District of Aligarh on the 30th April 1846 it appears that on the death of Jai Kishore, which took place in 1844 or 1845, Ram Prasad and others, sons of Jiwa Ram who was also then dead, claimed to be entitled to one half of the estate of Beswan and to have a settlement thereof made in their names This claim was dismissed by the Collector The document contains a history of the case gathered from a perusal of "the papers in the records of the " Collectorate and those received from the Commissioner's Office as well " as those filed in the Settlement Department together with the records " of the Kazi's office civil side relating to Jiwa Ram and Jai Kishore " deceased minor and fixing a monthly allowance for Jiwa Ram " Shortly " told the story is that Jiwa Ram was appointed manager of the estate during Jai Kishore's minority, but, in consequence of some irregular proceedings on his part which were thought to manifest an intention to dispossess his nephew, litigation ensued, with the result that Jiwa Ram was deprived of the management of the estate and subsequently an allowance of Rs 400 a month was made to him, which he con tinued to receive during his lifetime On his death Jai Kishore stopped the payment, but the Commissioner, by a rubkar of the 12th August 1836, directed that until an order should be made to the contrary or till the institution of a civil suit to establish right by the heirs of Jiwa Ram it should be continued as theretofore, and the heirs of Jiwa Ram received the monthly allowance during the life of Jai Kishore There is other evidence that Jiwa Ram enjoyed an allowance of Rs 400 per mensem for maintenance, and there is no evidence whatever that he brought any suit in the [47] Civil

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Court to dispute his brothers' or his nephew's possession of the family estate. Nor did the sons of Jiwa Ram ever bring any suit to contest the possession of Girdhar the eldest son and successor of Jai Kishore. The Collector by a subsequent proceeding held the allowance of Rs. 400 per mensem to be a pension only, and he reduced the allowance to Rs. 120 per mensem divisible between the sons of Jiwa Ram. They thereupon commenced a suit to establish their right to the Rs. 400 as a malikana allowance and applied for leave to sue *in forma pauperis* but the claim was rejected by the judgment of the District Judge of the 25th June 1856.

It thus appears that Har Kishan succeeded his father Nawal in exclusion of his younger brother Jiwa Ram and on his death in 1808 Jai Kishore succeeded in exclusion not only of his younger brother Jugal Kishore but also of his uncle Jiwa Ram and on Jai Kishore's death in 1844 or 1845 Girdhar his eldest son succeeded to his estate. Jiwa Ram and his sons, though challenged to assert their claim to share in the estate by a civil suit, abstained from doing so and contented themselves with an allowance for maintenance. Girdhar died about eighteen months after his father and was succeeded by his only brother Gir Prasad. But as the latter was a minor throughout his elder brother's tenure of the estate no strong inference can be drawn from his not claiming to share in the estate. Gir Prasad died early in 1880. It results that for a period of nearly 80 years from the time of the British occupation the enjoyment has been consistent with the alleged custom and for the earlier and greater part of that term has been inconsistent with any other legal basis.

The High Court minimise the inference to be drawn from these successive descents of the estate to an eldest son in three generations and the circumstances accompanying them. (1) They say that the inquiry made by order of the Collector of Daya Ram and Raja Bhagwant Singh in 1809 was directed to the custom of Hindus and not to the custom peculiar to this family and they suggest that the reports made in pursuance of that inquiry related only to management and control of the estate not to property. (2) It is suggested that Jiwa Ram was awarded his allowance of Rs. 400 a month as compensation for being [48] dispossessed of the zemindari, and being content with his position did not care to claim a share in the estate.

Their Lordships observe on the first point that the customs of Hindus would include any custom regulating the succession in a particular family and that the inquiry was whether the property "devolves on Thakur Jai Kishore" They have already observed that the Collector evidently understood the replies of Daya Ram and the Raja of Mursan as directed to the question who was entitled to the property. The sanads were grants of the property to Jai Kishore described as eldest son, and in short the transaction was not merely a settlement of the estate in his name for the purpose of revenue as suggested in the High Court. On the second point it is extremely unlikely that Jiwa Ram would have rested content with an allowance if he had a claim to one-half of the estate which he could prosecute with any prospect of success. Jiwa Ram (apparently) and his sons certainly asserted a claim to be sharers in the estate, though they never ventured to bring their claims to the test of a legal decision. The records of the Collectorate so far as concerns the

relations between Jiwa Ram and his sons on the one hand and Jai Kishore and afterwards Girdhar on the other do not disclose a picture of a perfectly united and contented family

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But the learned Judges in the High Court thought that the acquiescence of the descendants of Nawal Singh in the usurpation of Daya Ram was far more impressive than the acquiescence of Jiwa Ram and his descendants Their Lordships must therefore examine what is known of the relations between Nawal Singh and Daya Ram and their respective descendants Nawal Singh and Daya Ram were sons, and so far as appears, the only sons, of Bhuri Singh, who is said to have died in the years 1775 The Subordinate Judge says that Daya Ram forcibly wrested the bulk of his father s property, including taluka Hathras, from his elder brother on their father's death, and being a man of great energy he managed to dispossess the other descendants of Nand Ram from their estates and annex their estates to his extensive possessions His authorities for this statement are apparently the settlement reports of Aligarh made by Mr Thornton in 1834 and by Mr Smith in 1874 and Atkinson's Gazetteer published in 1875 These works [49] are not before their Lordships, and they cannot say whether they bear out the learned Judges' statement, which, however, seems to go further than the oral evidence of tradition warrants It may be that the reports and gazetteer in question are not strictly evidence of the truth of all the statements contained in them And it may be that if examined they would not bear out the conclusions drawn from them by the Subordinate Judge They were, however, used apparently without objection, and probably no objection would be taken to their being read for what they are worth in a similar case in this country But if you exclude evidence of tradition, what evidence is there that Hathras ever was part of the ancestral property of Bhuri Singh? In the last century when the Mogul Empire was breaking up, and when (to quote Mr Justice Blair) "law was in abeyance," it is not uncommon for an able and energetic man to carve out a large property for himself by the sword at the expense either of his own relatives or of strangers If you look to tradition as disclosed by the oral evidence the statements as to Hathras are conflicting Indeed Kehari Singh says that Daya Ram acquired the Hathras estate from the Porch Thakurs In the opinion of their Lordships it is impossible to presume a partition between the brothers or to say with any approach to certainty whether any or what portion of Daya Ram's possessions was or was not ancestral property, or from whom or by what means they were acquired All that can be said is that tradition points to his having acquired them by force and not by right Daya Ram was at first confirmed in possession of his estates by the British Government, but in 1817 was deprived of the bulk of them for rebellion It appears from documents in evidence that 20 of Daya Ram's villages under the appellation of taluka Shahzadpur were conferred on Jai Kishore and 31 were conferred on Jiwa Ram It is probable that these villages were only a comparatively small part of the estates confiscated by the Government The learned Judges in the High Court ask why the heirs of Nawal Singh did not then ask for reinstatement in the fiefs which had been seized by Daya Ram, as had been alleged, in violation of Nawal Singh's right of primogeniture And it is this acquiescence to which they attach so much importance Their Lordships cannot agree, for the [50] simple reason that they do not

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know enough of the facts or circumstances or of the motives or policy of the British Government to form any reliable opinion on the subject.

Their Lordships now turn to the oral evidence in the case. No less than fifty-six witnesses were called and examined on behalf of the appellants. Their evidence mainly divides itself into two branches. (1) Evidence of the existence of the custom of gaddinashini in the Beswan taluka and of the successive holders of the taluka within living memory having sat on the gaddi and received the customary offerings. (2) Evidence of tradition relating to the family learnt by the witnesses from their deceased relatives and others.

In commenting on the evidence of the custom of gaddinashini the High Court say.—" In order to constitute that a valid argument it ought " to have been shown not only that gaddinashini and the presentation " of nazars was the ordinary concomitant in the possession of an impar- " tible Raj but also that it was an exclusive attribute of families in " whom the custom of primogeniture prevails." The judgment of the High Court was delivered on the 7th February 1893. Subsequently to that date a case of *Thakur Nitr Pal Singh* v. *Thakur Jai Pal Singh* (1) (which in many of its circumstances is strikingly like the present one) was before this Board. The case related to the succession to the ancestral property of a Rajput family long settled in the Agra district. In delivering the judgment of their Lordships Lord Hobhouse observes :—

" The other remark is a suggestion that there is no necessary " connection between gaddinashini and primogeniture. That may be " so: but it is impossible to read the evidence without seeing that the " witnesses on both sides treat the two as indentical or the former as " proving the latter. Not a single question is put to any witness who " has affirmed or denied gaddinashini for the purpose of disconnecting it " from primogeniture. . . . . It is clear that the Subor- " dinate Judge had no suspicion that the evidence applying to gaddinashini " could be taken as not applying to primogeniture. The first suggestion " of such a distinction comes from the High Court. Their Lordships " think that when the witnesses affirm or deny gaddinashini they mean " to affirm or [51] deny primogeniture: and their constant identifica- " tion of the two things shows how closely they are connected in the " minds of the families of that part of the country. The custom of " gaddinashini has clearly an important bearing on that of primogeni- " ture though the connection between them may not be a necessary " one."

Their Lordships think that these observations are directly applicable to the case before them. The language in which the Raja of Mursan spoke of the custom of gaddinashini has already been referred to. The respondent himself in denying that the custom prevailed in his family says :—" By gaddinashini or masnadnashini I mean the practice of one " person of the eldest son succeeding to the whole estate and the other " sons only getting maintenance." Kharag (a son of Jiwa Ram) says :— " By gaddinashini I mean that he (gaddinashin) used to sit on a gaddi " and receive nazar and one son inherited the property while the other " sons received maintenance." Kashi Ram the jaga (bard or genealogist)

(1) (1896) L. R. 23 I. A. 147; I. L. R. 19 All. 1.

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of the Beswan family (whose father and grandfather were jagas before him) after deposing to the custom says —" I call that gaddinashini that " is that the eldest son sits on the gaddi and younger sons receive main "tenance " And expressions of this kind showing the identification in the minds of the witnesses of the right of sitting on the gaddi with succession to the estate constantly occur in the course of the evidence There are five witnesses who say they saw Jai Kishore sit on the gaddi and receive nazar There are seven witnesses who say they saw Girdhar do so and there are numerous witnesses who saw Gir Prasad

Their Lordships agree with the High Court that a good deal of the evidence of statements made by deceased persons is of doubtful admissibility By the 32nd Section (5) of the Evidence Act such statements are relevant when they relate to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised For this purpose and to this extent statements of deceased relatives and servants and dependents of the family are admissible By Section 49 when the Court has to form an opinion or [52] (*inter alia*) the usages of any family, the opinions of persons having special means of knowledge thereon are also relevant But by Section 60 if oral evidence refers to an opinion or the grounds on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds Their Lordships think it is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay In this way some of the evidence of such witnesses as Kharag, a son of Jiwa Ram, of Prasad a nephew of Lala Lachmi Narain who was dewan at Beswan for about 25 years, of Keheri Singh a descendant of Sakat who made out a genealogical tree of Nand Ram's family from the information of his grandfather, of Ganga Ballabh, and others of the same class, would perhaps be admissible evidence of the custom, and when corroborated by the proved facts as to the descent of the estate during the last eighty years is not without value But their Lordships would not be disposed to place much reliance upon it standing alone

Another class of evidence consists of the wajib-ul-arzes of various villages comprised in the taluka The plaintiff put in evidence ten of these documents compiled in the years 1862 and 1863 They do not support the appellant's case and they afford negative evidence against it because they contain a provision for the appointment of lambardar in [illegible]ll of the co sharers, and in one of them [illegible] said that if there be no son then one [illegible] with the consent of the other heirs On the other hand the appellant also put in evidence the wajib ul-arzes of ten villages compiled in the year 1873 They contain a declaration by Gir Prasad himself of the custom " After my death my eldest son, if he " is fit and well behaved, shall, according to the custom and usage of my " family, succeed me to the gaddi, and the other sons if they are fit shall " receive Rs 200 a month and if they are unfit Rs 50 a month " Their Lordships do [53] not place much reliance on these later documents, which are

1900 AUG 8 — APPELLATE CIVIL — 23 A 55=20 A W N 194

[57] BURKITT and HENDERSON, JJ —This is an appeal from an order of a Court of Small Causes, invested with the powers of a Subordinate Judge, declaring (1) Jamna Das, and (2) Bhika Mal to be insolvents under section 351 of the Code of Civil Procedure Jamna Das died since the order was made

The facts of the case are that on April 29th, 1898, Shiam Lal and others obtained a money decree for less than Rs 1,000 against Jamna Das and Bhika Mal in the Munsif's Court The property of the defendants was on the same day attached by order of the Munsif, but, as is now admitted, this attachment was made before judgment, and not in execution of the decree of that day Subsequently, on the 16th May, the judgment-debtors mentioned above made an application under section 344 to the District Judge paying that they might be declared insolvents That application was on the same day transferred for disposal to the Court of Small Causes exercising the powers of a Subordinate Judge By that Court, on the 29th June, 1899, the application was granted, the two applicants being declared insolvents From that order this appeal has been instituted One of the insolvents died before the hearing of the appeal At the hearing of the appeal a preliminary objection was raised on behalf of the insolvent respondent to the effect that no appeal lies to this Court, and that the appeal should have been instituted in the Court of the District Judge Pandit *Sundar Lal* for the respondent supports this objection by a reference to the terms of the proviso to section 589 of the Code of Civil Procedure and section 2 of the same Code, where the words "District" and "District Court" are interpreted The proviso to section 589 is to the effect that an appeal in insolvency matters shall lie—

(*a*) to the District Court where the order was passed by a Court subordinate to that Court, and (*b*) to the High Court in any other case

Section 2 of the Code declares that "every Court of a grade inferior to a District Court, and every Court of Small Causes shall, for the purposes of this Code, be deemed subordinate to the High Court and the District Court' The learned advocate contended that the Court by which the order declaring the applicants to be insolvents was made (whether that Court be considered to [58] be a Court of Small Causes or to be a Court of a Subordinate Judge) was in either case subordinate to the District Court, and that therefore the appeal lay to the District Court and not to this Court In our opinion, having regard to the clear and unmistakeable language of the proviso to section 589 and of section 2 the contention of the learned advocate is correct and must be sustained For the opposite side it has been contended that we must not take the words of the proviso to section 589 in their clear, grammatical meaning, but must import into and attribute to them a sense and meaning which, in our opinion, they cannot bear It was contended that in deciding which Court should hear the appeal, we are not to look to that which appears to us to be the real test in the case, namely, the question of subordination of Courts, but that the test we should apply is the value of the suit in execution of the decree in which the appellant has been arrested or his property had been attached In support of that contention we were referred to the case of *Venkatrayer* v *Jamboo Ayyan* (1) in which it was held that the words

(1) (1893) I L R 17 Mad 377

Musammat Jamna, the respondent to this appeal, filed an objection in the execution department claiming the property as hers. Her objection was disallowed. She forthwith instituted a suit under section 283 of the Code of Civil Procedure to establish the right which she claimed to the property in dispute. Her suit was dismissed on the 15th November, 1889. On the 9th December, 1889, she filed an appeal against the decree of the 15th November, 1889. On the 9th January, 1890, whilst Musammat Jamna's appeal was pending, the property in dispute was brought to sale in execution of Harpal's decree, and purchased by Sukhdeo Prasad, one of the appellants before us. Sukhdeo Prasad subsequently sold part of the property, which is house property in the town of Shamsabad, to Jawahir Lal, the other appellant in this case, who is said to have expended a considerable sum in improving it.

On the 17th November, 1890, Musammat Jamna's appeal was decreed, her right to the property now in dispute being held to be established. On the 23rd May, 1898, *i.e.*, 7½ years after the decree had been pronounced in her favour, Musammat Jamna instituted the present suit against the auction-purchaser, Sukhdeo Prasad, and his transferee Jawahir Lal, claiming to recover from them possession of the house property to which her right had been declared by the decree of 1890, and also asking to have the new constructions made by the defendants demolished.

The Court of first instance, purporting to apply the principle laid down in the case of *Zain-ul-abdin* v. *Muhammad Asghar Ali Khan* (1), held that the appellate decree of the 17th November, 1890, declaring the plaintiff's right to the property in [62] dispute, had not the effect of invalidating the auction sale in execution of Harpal's decree, and consequently dismissed the suit. The plaintiff appealed. On appeal the learned Subordinate Judge held that the auction sale at which the defendant Sukhdeo Prasad purchased the property was a transfer *pendente lite*, and that consequently the defendants were bound by the appellate decree of the 17th November, 1890, although they were no parties to the suit in which that decree was passed. From what the Subordinate Judge says in his judgment, it appears that he considered the case to be governed by the provisions of section 52 of the Transfer of Property Act. It is clear from section 2, clause (d) of that Act that section 52 does not apply to this case. The Subordinate Judge holding that the auction-purchaser had constructive notice of the pendency of the appeal, and might have applied to have himself brought on the record, arrives at the conclusion that he was not a *bonâ fide* purchaser, and that his transferee Jawahir Lal is in no better position. In this reasoning I am unable to follow the learned Subordinate Judge. If the learned Subordinate Judge is right in holding that the case is governed by the doctrine of *lis pendens*, the question of notice does not arise—vide *Bellamy* v. *Sabine* (2). If it is not, there is no ground whatever for impugning the *bonâ fides* of either of the defendants.

The lower appellate Court, holding that the Court of first instance had dismissed the suit on a preliminary point, and in so doing had acted on a mistaken view of the law, set aside its decree and remanded the case under the provisions of section 562 of the Code of Civil Procedure for the trial of other issues which the Munsif had framed.

(1) (1887) I. L. R. 10 All. 166. (2) (1857) 1 De. G. and J. 566.

1900 AUG 16

APPELLATE CIVIL

23 A 60= 20 A W N 199

It is against this order of remand that the present appeal is brought by the defendants

The first plea raised is that the Court below erred in applying the provisions of section 52 of the Transfer of Property Act

I have already shown that this contention is sound But this will not dispose of the case, for it may be governed by the doctrine of *lis pendens*, even though section 52 has no application

[63] The next plea is that the appellants, not having been parties to the decree in execution of which the property in dispute was sold, and having been *bona fide* purchasers for value, the suit against them is not maintainable This plea raises a question which is by no means free from difficulty , but after giving it careful consideration, and consulting all the authorities I have been able to discover, I arrive at the conclusion that it cannot be sustained

I would remark, in the first place, that this case is distinguishable from that class of cases in which property, admittedly the property of the judgment debtor, is sold in execution of an *ex parte* decree, which is afterwards set aside, or of a decree which is subsequently reversed on appeal The law in such cases is clear The purchaser at the sale in execution, provided he is not himself the decree holder, gets a good title by his purchase, even though the decree under which the property is sold is afterwards set aside But the facts of this case are different

Suppose *A* sues *B* for a certain landed estate *A s* suit is dismissed by the Court of first instance *A* files an appeal After the filing of the appeal and whilst it is pending, *B* transfers the property to *C* Here I think it will be admitted that the doctrine of *lis pendens* applies, and that *C* will be be bound by the result of the appeal, even if he has not been made a party to it and has in fact had no notice of it

Will the result be different if the property, instead of being voluntarily transferred by *B*, is sold by a Court in execution of a money decree against *B*, and purchased by *C* whilst *A's* appeal is pending ?

On the answer to this question depends the decision of the plea raised in the second ground of the memorandum of appeal in this case

There is, as is shown in pp 118—120 of Shephard and Brown s Commentaries on the Transfer of Property Act (Fourth Edition) a considerable conflict of authority on this point In the case *Chunder Nath Mullick* v *Nilakant Banerjee* (1) the learned Judges (Cunningham and Tottenham, JJ), observed that it did not follow that the rule of *lis pendens* would hold good " when [64] the alienation is not by the mortgagor, but by the Court acting on behalf of the creditors against the mortgagor, and where proceedings with a view to the sale had commenced before the suit was instituted " That case was taken in appeal to the Privy Council, but it was not necessary for their Lordships to decide the question we have to consider In their judgment, however, they said " whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted The reference is to an earlier passage in the judgment which is as follows —" Supposing the doctrine of *lis pendens* did not apply to this case, which may be arguable '

(1) (1882) I L R , 8 Cal 690

Messrs. Shephard and Brown show that the preponderance of authority is in favour of the view that the doctrine of *lis pendens* applies as well to sales in execution of decrees as to voluntary alienations. And this, in my judgment, is the correct view. The reasons in support of the view are well set forth in the judgment of Couch, C. J., in the case of *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (1). When a Court sells property as belonging to a judgment-debtor, the purchaser can acquire, and the Court can convey, no higher interest in the property than the judgment-debtor himself has. If there is an infirmity in the title of the judgment-debtor, that infirmity attaches to the title of the auction-purchaser, just as it would in the case of a private sale. As was observed in the case of *Ram Narain Singh* v. *Mahtab Bibi* (2)—"In judicial sales in execution of decrees of Court there is ordinarily no warranty of the title of the judgment-debtor in the property sold on the part of the decree-holder or of the officer conducting the sale." In my opinion when the property of the judgment-debtor is sold in execution of a decree against him, the purchaser can acquire no higher title than the judgment-debtor would be competent to convey were he selling the property privately. In this opinion I am borne out by what was said by their Lordships of the Privy Council in *Rajah Enayat Hossain* v. *Girdharee Lall* (3) at pp. 378 and 379 of their judgment, when they say that there is no foundation in principle or authority for making any distinction between the case [65] of a claimant under an execution sale, and a claimant under any other conveyance or assignment. In the case before us, any private transfer of the property in dispute by the judgment-debtors would have been invalid as against the plaintiff. The circumstance that the transfer of the rights and interests of the judgment-debtors was in execution of a decree against them would not, in my opinion, cure the infirmity of the judgment-debtors' title to the property arising from the fact that at the time of the transfer their right to the property was *sub judice*. I would, therefore, overrule the second plea in the memorandum of appeal, and hold, in concurrence with the lower Appellate Court, that the plaintiff's suit was maintainable.

In the course of the argument it was urged that the plaintiff might have applied for an injunction staying the sale of the property pending the decision of her appeal. It is true that she might have done this. But I do not think she was bound to do so; even if she had made such an application, it does not follow that it would have been granted.

It was further contended on behalf of the appellants that as they were not parties to the appeal which ended in a declaration of the plaintiff's right, they are entitled in this suit to have the validity of the plaintiff's title to the property re-tried as against them. In my opinion this is not so. The auction-purchaser might have applied to have himself brought on the record as a defendant whilst the case was under appeal (Sections 372 and 582 of the Code of Civil Procedure), but he did not choose to do so. To hold that he is entitled, owing to his purchase during the pendency of the appeal, to put the plaintiff again to proof of her title would be entirely opposed to the doctrine of *lis pendens* which applies to this case.

This may seem to bear somewhat hardly on purchasers at sales in execution of decrees, but it is only the application of the principle

(1) (1874) 21 W. R. 349.
(2) (1880) I. L. R. 2 All. 828.
(3) (1869) 12 Moo. I. A. 366; at pp. 378, 379.

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"*caveat emptor* A Court sells such rights and interests as a judgment debtor has in the property exposed for sale it does not guarantee that he has any If those rights and interests are nil, a purchaser, however complete may be his *bonâ fides*, acquires nothing If it turns out that the judgment debtor had no saleable interest in the property which purported to be sold [66] as his, the purchaser is not entitled to retain the property on the ground that he bought it at a sale held under the orders of the Court He is only entitled to receive back his purchase money from any person to whom the purchase money has been paid—*vide* Section 315 of the Code of Civil Procedure

In the last ground of appeal it is urged that Jawahir Lal being a *bonâ fide* transferee from the auction purchaser, and having been allowed by the plaintiff to spend a large sum of money on the property in dispute, is entitled to the benefit of Section 41 of the Transfer of Property Act, and to have the suit as against him dismissed I do not think this plea can succeed, as it is difficult to see how it can be held that the auction purchaser was in possession of the property with the plaintiff s consent

B it, in my opinion, certain equities have arisen between Jawahir Lal and the plaintiff, to the benefit of which the former is entitled As stated at the outset of this judgment, the plaintiff allowed upwards of 7½ years to elapse after she had got her decree before she took any steps to enforce her right against the defendants We asked the learned vakil who represents the plaintiff, whether he could offer any explanation of this long delay, but he was unable to do so

In connexion with this part of the case we referred the following issue to the lower Appellate Court for trial under Section 566 of the Code of Civil Procedure—whether or not the defendants, or either of them, have made any improvements upon the property in dispute to the knowledge of the plaintiff, and without any objection on her part? The lower Court finds that Jawahir Lal has made improvements on the property The position taken up by the plaintiff when this issue was under trial in the lower Court was that she had no knowledge of the improvements made by Jawahir Lal The lower Court finds that this is untrue, but it goes on to find that Jawahir Lal made the improvements *in spite cf objection* on the plaintiff s part As the plaintiff s case was that she had no knowledge of the construction, I do not think it was open to the lower Court to set up a different case for her and find that she had knowledge and did object There can, I think, be no doubt from the facts stated in the return to the order of reference that the plaintiff did know of the improvements Jawahir [67] Lal was making to the property As she endeavoured to make out that she knew nothing of the improvements, the conclusion to be drawn is that this was because she had allowed the constructions to go on with o it any objection on her part As held above, Jawahir Lal was a *bonâ fide* purchaser, and made additions to the house he had bought under the belief that he had a good title to it The plaintiff knowing this allowed him to do so In this state of circumstances, she is in my judgment, entitled to a decree for possession of the property in Jawahir Lal s hands only on condition of her compensating him for his outlay The result at which I arrive is that the order of remand should stand, and that the case should go back to the Court of first instance for disposal of the remaining issues with due regard to the observations now made

I would therefore dismiss the appeal against the order of remand. Under the circumstances I would make no order as to costs of this appeal. As to the costs hitherto incurred and hereafter to be incurred in the lower Courts, I would direct that they abide the event.

KNOX, ACTING, C. J.—I concur both in the judgment of my learned brother and in the order proposed.

The appeal is dismissed but without costs. Costs hereinbefore incurred and such as may be hereinafter incurred in the lower Court will abide the event.

Appeal dismissed.

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23 A. 67 (=20 A. W. N. 197.)

APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.

BHAGWATI PRASAD AND ANOTHER (*Defendants*) *v.* HANUMAN PRASAD SINGH AND ANOTHER (*Plaintiffs*).* [16th August, 1900.]

Landholder and tenant—Mukaddami Tenure—Nature of Mukaddami tenure considered.

In the absence of any special evidence to the contrary, the fact of a person holding land under what is known as a "mukaddami" tenure does not imply that the mukaddam has any heritable or transferable interest in the tenement.

[Ref. 6 Bom. L. R. 403.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Madan Mohan Malaviya*, for the Appellants.

[68] Pandit *Sundar Lal* and Babu *Jiwan Chandar Mukerji*, for the Respondents.

KNOX, ACTING C. J. (AIKMAN, J., concurring).—The suit out of which this appeal arises is a suit instituted by Babu Hanuman Prasad Singh and Babu Jadunath Singh, the respondents to this appeal. They pray to be put in possession of the entire village of Kot Kamarhya. They also add a claim for mesne profits from date of suit to date of possession. They base their claim upon the allegation that they alone, under the Hindu law, are the owners of, and entitled to, the entire estate of their maternal grandfather, Babu Paltan Singh, deceased.

The short history of the case is as follows. Babu Paltan Singh had a settlement made with him by Government early in the 19th century. The settlement was of a village called Kot Kamarhya. He died in 1822, leaving two widows, Asman Kuari and Harnam Kuari, him surviving. These widows entered into possession, and Government gave them a fresh lease over the village. Upon the death of Musammat Asman Kuari, Musammat Harnam Kuari, who remained in possession, sold her rights in the village to the predecessor in title of the present defendants, who are now in possession. Harnam Kuari died on the 5th of January, 1857, leaving three daughters. The last of these died on the 3rd of March, 1890. In 1894 the present respondents instituted the suit, which has led up to this appeal. The defendants pleaded limitation.

* First Appeal No. 48 of 1898, from a decree of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 18th November 1897.

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That plea succeeded in the Court below, but in this Court the plea of limitation did not prevail—*vide Hanuman Prasad* v *Bhaguati Prasad* (1), and the suit was remanded for trial of the remaining issues

The persons who are now in possession, *viz*, the defendants, derive title from a sale made by Harnam Kuari in favour of Harnam Singh, their ancestor The contention of the respondents is that Musammat Harnam Kuari had no interest in the property over and above a life interest, that Musammat Harnam Kuari on her death was succeeded by her three daughters, that their interest was no higher than the interest of Harnam Kuari, and now that all these persons, mother and daughters, are dead, the respondent s right to succeed has opened out, and hence the present suit

[69] The answer filed by the defendants rested mainly upon the assertion that Paltan Singh was never the owner of the property in dispute His interest in it was confined to a lease executed in his favour by the Government Upon that lease coming to an end, Musammat Harnam Kuari came into possession of the property under a new lease which the Government executed in her favour The property therefore was her self acquired property, and she was fully entitled to do what she pleased with it The Court of first instance held that Paltan Singh had a transferable and heritable right in the village, and that subsequently to his death his widows who entered into possession of the village, had no higher estate in it than that enjoyed by Hindu widows under such circumstances In appeal the whole controversy particularly turned upon what was the true nature of the interest that was possessed by Babu Paltan Singh in the property under dispute

The village when it passed under Paltan Singh s control was a tract of forest land It is agreed that the tenure of Paltan Singh over it was a tenure known by the name of mukaddami If there was any deed or writing by or under which the tenure was first granted to Paltan Singh, it is not forthcoming, and there is no evidence to show what were the terms of it The learned advocate for the respondents, who are out of possession, and on whom therefore the burden of proof, in the first instance, lies, contended that the mukaddami tenure was heritable and transferable He relied mainly for this assertion upon a despatch of the Court of Directors in the year 1830 This is to be found at page 199 of the circular orders of the Sudder Board of Revenue of Fort William, and runs as follows —" Like other terms employed in your revenue correspondence there is some uncertainty in the import of the term mukaddami settlement It is not ryotwar and it is not a settlement with what you call a recorded proprietor, but something between these two The mukaddam is a proprietor, but not what you call a 'recorded proprietor,' that is a proprietor entered in the Collector s book as having a title to be recorded as contractor, but when the engagement is made with the mukaddam, he also is a contractor, and he contracts for a certain amount of revenue to be derived by him from a certain number of contributors

[70] It is doubtful whether there is anything in this passage which is sufficiently clear in terms to be cited as authority for the contention of the respondents But, be that as it may, a reference to the rest of the circular shows that the mukaddams, to whom reference is made in it, are a very different class from men like Paltan Singh The mukaddams

(1) (1897) I L R 19 All 357

favour of Babu Paltan Singh was only for three years The terms of the lease which was granted after his death to Musammat Harnam Kuari, and which are to be found at page 3 of the appellant's book, no where assert existence of proprietary right properly so called The whole document reads just what it pretends to be as a lease for a period of 5 years with option of renewal, but still a lease, and not a document conferring any higher rights Reference has more than once been made to what is called the mukaddami right and mukaddami rate, but there is nothing to show the precise nature of these two There is a subsequent document to be found at page 5 of the appellant's book This too does not place the tenure upon any higher apparent level than that the lease is for 12 years When we bear in mind that the tendency would be in these documents towards the assertion of higher and [72] stronger rights than in the original document, whatever it was, which was granted to Babu Paltan Singh, we are confirmed in our view that it would not be safe to hold that Babu Paltan Singh had any heritable or transferable right We find that the plaintiffs have established none such The appeal therefore succeeds, and the claim brought by the respondents (who claim through him) must be dismissed with costs in both Courts

1900 AUG 16 — APPELLATE CIVIL. — 23 A 67= 20 A W N. 157.

Appeal decreed

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23 A. 72 (=5 C. W N 49=27 I A 183=2 Bom L R 942=7 Sar 752)

PRIVY COUNCIL

PRESENT

Lords Hobhouse, Macnaghten and Lindley, Sir Richard Couch, and Sir Henry De Villiers

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SURJAN SINGH AND OTHERS (*Plaintiffs*) v SARDAR SINGH AND OTHERS (*Defendants*). [22nd and 26th June and 21st July, 1900]

[*On appeal from the Court of the Judicial Commissioner of Oudh*]

Evidence—Pedigree table—Act No I of 1872 (*Indian Evidence Act*) *section* 32, *sub section* (6)

In a suit for an inheritance claimed by the plaintiffs, alleging themselves to be collateral relations and heirs of the last male owner through an ancestor common to him and to them, a pedigree table was received in evidence by the Court of first instance The persons from whose statements at no distant date the pedigree had been drawn up were absent, and it had not been shown in that Court that this had been for any one or other of the reasons contained in section 32 of Indian Evidence Act, 1872

Held, that the appellate Court had rightly rejected the document as inadmissible under that section The alleged relationship not having been proved, the claim failed.

[Ref 14 I C 339]

APPEAL from a decree (15th May 1897) of the Judicial Commissioner, reversing a decree (12th November 1894) of the Subordinate Judge of Kheri

The plaintiffs appellants brought their suit on the 29th November 1892, claiming as collateral relations to be heirs in default of male issue of Munnu Singh, deceased in 1858, the last male inheritor of the ancestral estate, Piparya Andu, a village in the Kheri district of Oudh

1900 AUG. 16. — APPELLATE CIVIL. — 23 A. 67= 20 A. W. N. 197.

referred to are not men admitted to contracts for the reclamation of forest lands, but men admitted to temporary settlements in villages where the settlement made with the proprietors has broken down. Paragraphs 3 and 4 of the circular under quotation show this to be the case, and the circular itself and the extract from the despatch of the Court of Directors has no reference to or bearing on the circumstances of the present case.

The learned advocate has also referred us to the definition of the word mukaddam to be found in Wilson's Glossary, and to a passage to be found in the Tagore Law Lectures for 1874 and 1875 at page 103, to the fourth paragraph of Regulation VII of 1822, and to the preamble of Regulation IX of 1824. The remarks we have already made above apply with equal force to these passages. They are all of too vague a nature and too undetermined in terms to allow of their being cited as proof of the assertion that a mukaddam was a man whose tenure was in every case transferable and heritable. To tell us that in some cases the mukaddam has been suffered to assume a character of a petty proprietor, or that in zilla Bhagalpur the malik mukaddams have particular rights, does not really help us to decide what were the particular attributes of the tenure granted to mukaddams of Gorakhpur. Regulation VII of 1822 and Regulation IX of 1824 are regulations which relate to a settlement of the district of Gorakhpur *inter alia*, but we do not find in them the word mukaddam specially referred to, and it would be dangerous to infer that the tenure in the present instance was of precisely the same nature as the zamindars or farmers mentioned by name in those Regulations. If anything is to be inferred from what is apparently the only instance where the word mukaddam is cited in those Regulations, *viz.*, section 24, it would be that mukaddams were men of the same class as "padans, ryots or other residents—" men who would not have an hereditary and transferable tenure. A case [71] was cited to us, *viz.*, *Zoolfikar Ali* v. *Ghunsam Baree* (1). It is a Gorakhpur case, and has reference to the settlement of lands under reclamation. But in this judgment the word mukaddam is nowhere used. The person with whom the clearing lease was made is called "abadkar," and there is nothing to show us that abadkars and mukaddams were on the same footing. The result is that we find no safe ground for holding that the tenure enjoyed by Babu Paltan Singh was either heritable or transferable. The respondents have not proved that they have any title to the land in dispute. We might end here, but we think it as well to add that there is on the other side a good deal of evidence which points in the opposite direction. Observations are to be found in the recent report of the Gorakhpur settlement published in 1891 and 1893. At page 56 the settlement officer sums up all that he has been able to ascertain with reference to mukaddami tenure in these words:—"The originally non-proprietary nature of this kind of mukaddam tenure is apparent, but after some oscillations in policy the mukaddams were acknowledged by Government as the subordinate proprietors and the engagements for revenue were taken from them." This is entitled to fully as much weight as, if not more than, what has been cited by the other side.

If again we look to the circumstances of the case, we are met with the following facts, which are very significant. The original lease in

(1) S. D. A., N. W. P., 1865, Vol. I., p. 92.

favour of Babu Paltan Singh was only for three years The terms of the lease which was granted after his death to Musammat Harnam Kuari, and which are to be found at page 3 of the appellant s book, no where assert existence of proprietary right properly so called The whole document reads just what it pretends to be as a lease for a period of 5 years with option of renewal but still a lease, and not a document conferring any higher rights Reference has more than once been made to what is called the mukaddami right and mukaddami rate, but there is nothing to show the precise nature of these two There is a subsequent document to be found at page 5 of the appellant s book This too does not place the tenure upon any higher apparent level than that the lease is for 12 years When we bear in mind that the tendency would be in these documents towards the assertion of higher and [72] stronger rights than in the original document, whatever it was, which was granted to Babu Paltan Singh, we are confirmed in our view that it would not be safe to hold that Babu Paltan Singh had any heritable or transferable right We find that the plaintiffs have established none such The appeal therefore succeeds, and the claim brought by the respondents (who claim through him) must be dismissed with costs in both Courts

1900 AUG 16.

APPELLATE CIVIL

23 A 67 = 20 A W N. 157

Appeal decreed

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23 A. 72 (=5 C W N 40=27 I A 183=2 Bom L R 942=7 Sar 752)

PRIVY COUNCIL

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Lords Hobhouse, Macnaghten and Lindley, Sir Richard Couch, and Sir Henry De Villiers

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Held, that the appellate Court had rightly rejected the document as inadmissible under that section The alleged relationship not having been proved, the claim failed

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Appeal decreed

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23 A. 72 (=5 C W N 40=27 I A 183=2 Bom L R 942=7 Sar 752)

PRIVY COUNCIL

PRESENT

Lords Hobhouse, Macnaghten and Lindley, Sir Richard Couch, and Sir Henry De Villiers

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Held, that the appellate Court had rightly rejected the document as in admissible under that section The alleged relationship not having been proved, the claim failed

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JULY 21
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5 C W N 49=27 I A 163=4 Bom L R 942=
7 Sar 752

" deceased Munnu Singh cannot in themselves be accepted as furnishing " the requisite evidence "

On this appeal

Mr *C W Arathoon*, for the appellant, argued that the judgment of the appellate Court erred in having reversed the judgment of the first Court on insufficient grounds The pedigree table which the Judicial Commissioners had rejected as inadmissible within section 32, sub section (6), of the Evidence Act, 1872, should have been admitted It was an original document recognised and accepted by the family as representing the actual genealogy of the plaintiffs and Munnu Singh and evidence of the correctness of every step was not required A settlement order of August 1869, and a wajib ul arz of village Aurangabad, were referred to as supporting the finding of the first Court that the alleged relationship of the plaintiffs to the last male proprietor had been sufficiently proved In regard to the evidence afforded by the wajib ul arz and that of similar records, referred to in connection with the alleged exclusion of females reference was made to *Rani Lekhraj Kuar* v *Babu Mahpal Singh* (1)

Mr *J D. Mayne*, for the respondents, argued that the appellants, had failed to make out their reversionary title The alleged pedigree table consisted of statements in fact made by certain persons who, for all that appeared, might have been called as witnesses It was therefore inadmissible within section 32 of the Indian Evidence Act, 1872, and the other evidence in the case [75] had not established the descent of the plaintiffs from the alleged common ancestor, Jagraj In regard to entries in the wajib ul arz it was not any entry that would be received, and on this point he referred to *Uman Parshad* v *Gandharp Singh* (2)

Mr. *C W Arathoon* replied On the 21st July their Lordships judgment was delivered by *Sir Richard Couch* —

The appellants in this case sued for possession of the village of Piparya Andu on the ground that on the death of Musammat Gulab Kuar the property devolved on them as the reversionary heirs of her deceased husband Munnu Singh He was the proprietor of the village, and the first summary settlement was made with him on the annexation of the Province of Oudh After that he died and the second summary settlement of the vilage after the Mutiny was made with Gulab Kuar The judgment of the Assistant Commissioner given on the 3rd August 1869, on a claim by her against the Government, stated that Munnu Singh being hereditary proprietor who held up to annexation, the summary settlement of 1857 was made with him, he died without leaving male issue and the settlement was therefore made with his widow And the Court decreed the proprietary right in the entire village in favour of Gulab Kuar and also in favour of a co sharer On the 7th January 1881 Gulab Kuar made a will by which she devised the village to her deceased daughter s three sons Sardar Singh and Baldeo Singh, the respondents, and Bahadur Singh, who died before her On the 8th July 1881 she made a gift of some land in the village to Durga Singh, the other respondent, their father Gulab Kuar died on the 12th July 1881, whereupon on the 10th August 1881 an order for mutation of names of Munnu Singh was made in favour of Sardar Singh and Baldeo Singh, the other claimants, the appellants, being referred to the Civil Court Their suit was

(1) (1879) L R 7 Ind Ap 63 I L R 5 Cal 744

(2) (1887) L R 14 Ind Ap 127, I L R 15 Cal 20

there can be very little doubt as to his identity. He was caught on the spot, and a loaded pistol was found upon him. It appears that the complainant, who was sitting up late on the night of the occurrence, heard a noise in the *abchak*, a narrow lane adjoining his house; that he roused a number of the inmates (some of whom he sent for the police), and some of his neighbours. The entrance to the lane was then blocked by the complainant and the other people who collected there. A pistol was fired by one of the gang, who were in the lane at the place where the wall was found to have been cut, apparently, in order to frighten away the people obstructing them. On the pistol being fired a [79] number of the gang made their escape, but Rahim Bakhsh was caught and seized. The others proceeded through the premises of one Bhola close by. Bhola attempted to stop them, but he was severely handled by the men, and they made their escape. Seven or eight men were seen to rush from Bhola's premises. These were followed by two of the witnesses, and the pursuit, after they had gone some distance, was taken up by the Sub-Inspector and a number of constables with him. Fortunately the men were never lost sight of, and were closely followed into a house. On reaching this house they endeavoured to shut the door in the face of their pursuers, but were unable altogether to close it. The police and the others who had gone in pursuit managed to effect an entrance, and then they found in a room four of the persons whom they had pursued, and with them were a pistol, a sword and an iron spike (ordinarily used for house-breaking). The pistol had just been fired. One of them Aladad, was identified by one of the witnesses who had not gone in pursuit as having been seen on the spot. As to these four men I think there can be no doubt as to their having been members of the gang. The other two appellants had endeavoured to escape with the four I have just referred to, but after going some distance separated, and they were similarly followed and arrested. Upon the evidence, I think there can be no doubt that they also were members of the gang. It has been argued that inasmuch as the only violence used was used in the endeavour to escape, the appellants could not be convicted under section 397 coupled with section 511, Indian Penal Code. No robbery or dacoity was committed, and it seems to me that the appellants could not be rightly convicted under section 397, coupled with section 511, of an attempt to commit the offence. See the case of *Queen* v. *Koonee*. (1).

I am of opinion, however, upon the evidence that the object was dacoity. The members of the gang were armed; and they were found endeavouring to break into the house of the complainant, and on the alarm being given they at once resorted to violence against those who endeavoured to prevent their escape. I think Rahim Bakhsh was rightly convicted under section 398, as [80] he was armed with a deadly weapon, viz., a pistol. There is no evidence to show who carried the other pistol and the sword. I am also of opinion that all the appellants were rightly convicted under section 399. They might have been convicted under section 402. I see no reason to interfere with the sentences, and dismiss the appeals, except in so far that I set aside the convictions under section 397 coupled with section 511.

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(1) (1867) 7 W. R., Cr. R., p. 48.

23 A 80 (=20 A W N. 204)

1900 Sep 12

REVISIONAL CRIMINAL

Before Mr Justice Aikman

REVISIONAL CRIMINAL

23 A 80= 20 A W N 204

QUEEN EMPRESS v RAZA ALI * [12th September, 1900]

Criminal Procedure Code section 118—Security for good behaviour—Discretion of Court—Security demanded not to be excessive

Where a Magistrate, acting under section 118 of the Code of Criminal Procedure required securities to an amount which the person to be bound over was totally unable to furnish in consequence of which he remained in jail for some two months and a half, the Court *held* that the Magistrate had not exercised a proper discretion in the matter and reduced the amount of the security *Queen Empress* v *Rama* (1) followed

THE facts of this case sufficiently appear from the order of the Court

Pandit *Tej Bahadur Sapru*, for the applicant

The *Government Pleader*, for the Crown

AIKMAN, J —In this case the applicant, Raza Ali *alias* Ghuran, was called upon to show cause why he should not give security for his good behaviour After recording evidence both for and against the applicant, the Joint Magistrate made the order absolute and directed the applicant to give his own bond in the sum of Rs 500, together with two sureties in the sum of Rs 500 each, for his good behaviour for a term of one year On appeal the District Magistrate saw no reason to disagree with the lower Court as to the necessity for taking security But he reduced the amount of the bond and sureties from Rs 500 to Rs 200 each An application for revision has been made to this Court, and it is urged that the amount fixed by the District Magistrate is still too high The second proviso to section 118 of the Code of Criminal [81] Procedure is that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive In my opinion the reduced amount fixed by the District Magistrate is excessive, having regard to the circumstances of the applicant Although upwards of two and a half months has elapsed since the date of the District Magistrate's order, the applicant has been unable to furnish the sureties as demanded, and is still in prison I agree with what was said by the Bombay High Court in the case of *Queen Empress* v *Rama* (1), and the remarks contained in paragraph 6 of the Government Review of the Police Administration Report of these Provinces for the year 1898, which are quite in accord with what was there said I do not interfere with the amount of the personal recognizance which the applicant was called on to give, but I reduce the amount of the sureties from Rs 200 to Rs 50

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* Criminal Revision No 463 of 1900

(1) (1892) I L R 16 Bom 372

23 A. 81 (=20 A. W. N. 205).

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* MUHAMMAD ALI AND OTHERS.*
[18th September, 1900.]

Act No. XLV of 1860 (*Indian Penal Code*), *section* 215—*Theft—Receiving gratificati to help the owner to recover stolen property—Section* 215 *not intended to apply to t actual thief.*

Section 215 of the Indian Penal Code was not intended to apply to the actua thief, but to some one who, being in league with the thief, receives som gratification on account of helping the owner to recover the stolen propert without at the same time using all the means in his power to cause the thie to be apprehended and convicted of the offence.

[Fol. 3 Cr. L. R. 436=15 Cr. L. J. 471=24 I. C. 351=26 M. L. J. 598; Ref. 7 Cr L. J. 464=14 Bur. L. R. 67=4 L. B. R. 199; 9 I. C. 421=12 Cr. L. J. 72.]

THE facts of this case were as follows:—

On or about the 12th February 1900 four bullocks were stolen from the sugar mill of one Baldeo Sahai. Baldeo Sahai obtained early information that four men, Muhammad Ali, Kures, Rahmat-ullah and Karim Bakhsh, had been seen driving away the bullocks. As these men were men of his own village, Baldeo Sahai did not at once report his loss at the thana, but entered into negotiations with the thieves through some of their relatives, with the result that Muhammad Ali and his friends agreed to return the bullocks on payment of Rs. 100. Two of the bullocks were returned as arranged and Baldeo Sahai paid Rs. 50 for their [82] recovery, but as the other two were not returned, a report of the theft was made at the thana on the 2nd March. The four persons above mentioned were arrested and put upon their trial upon charges under sections 330 and 215 of the Indian Penal Code. They were convicted and sentenced, each to two years' rigorous imprisonment, one year under each section. On appeal the Sessions Judge upheld the convictions and sentences. The convicts thereupon applied to the High Court in revision.

Mr. *G. W. Dillon*, for the applicants.

The *Government Pleader*, for the Crown.

AIKMAN, J.—The four accused, Muhammad Ali, Kure, Rahmat-ullah and Karim Bakhsh, were convicted of stealing four head of cattle, and sentenced to one year's rigorous imprisonment under section 380, Indian Penal Code. They were further found to have taken Rs. 50 from the owner for returning two of the cattle which they had stolen, and for this the Magistrate convicted them of the offence punishable under section 215, Indian Penal Code, and this conviction was upheld on appeal. A careful perusal of section 215 will show that it was never intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover the stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence. It is quite clear that the conviction under section 215 cannot stand. For the above reason I set aside the convictions of the four accused under section 215, Indian Penal Code, and the sentence of one year's rigorous imprisonment passed thereon. The conviction and sentence under section 380, Indian Penal Code, stand good.

* Criminal Revision No. 471 of 1900.

23 A 82=20 A W N 208

CRIMINAL REFERENCE

Before Mr Justice Aikman

1900 OCT 30

CRIMINAL REFERENCE

23 A 82= 20 A W N 208

QUEEN EMPRESS v KANGLA * [30th October, 1900]

Act No XLV of 1860 (*Indian Penal Code*), *section* 457—*House trespass by night with intent—Alleged intent theft—Proved intent adultery with complainant's wife—Evidence*

Where, on a charge under section 457 of the Indian Penal Code, it was proved to the satisfaction of the Court that the accused did enter the complain [83] ant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and further that he did so without the husband's consent, and the accused was convicted it was held that the conviction was proper It was not necessary under the circumstances that the complainant should bring a specific charge of adultery *Brijbasi* v *The Queen Empress* (1), referred to

[D 15 Cr L J 351=23 I C 703]

IN this case the complainant brought a complainant against one Kangla, charging him with an offence under section 457 of the Indian Penal Code, and alleging that the intent was to commit theft The case was tried by a Magistrate, and the Magistrate, came to the conclusion on the evidence that the real intent of the accused was to commit adultery with the wife of the complainant, and further, that the complainant was proved not to be a consenting party to any such intent On these findings the Magistrate convicted the accused and sentenced him to two months' rigorous imprisonment An application in revision having been presented on behalf of the accused, the Sessions Judge reported the case to the High Court under section 438 of the Code of Criminal Procedure, recommending that the conviction should be set aside for the following reasons :—" The husband in this case distinctly charged appellant with house trespass with intent to commit theft, and certain stolen property was produced The appellant admitted house trespass with intent to commit adultery, but the offence of criminal adultery cannot be established against any person unless and until the husband makes a specific charge of adultery It is not sufficient for conviction in this case to find that appellant admits that the husband did not consent If the husband chooses to make a false charge of trespass with intent to commit theft, the appellant should be acquitted, as the husband does not make any charge of trespass with intent to commit adultery "

Upon this reference the following order was made —

AIKMAN, J —In this case one Kangla was convicted by a Magistrate of the first class under section 457, Indian Penal Code, and sentenced to two months' rigorous imprisonment The offence, which the accused is found to have entered the complainant's house in order to commit, is adultery That such was his intention is clear from his own admission The husband was [84] the complainant in the case He, it appears, alleged that the intention with which the accused entered his house was to commit theft This was not made out to the satisfaction of the Magistrate But it was proved to the satisfaction of the Magistrate that the accused did enter

* Criminal Reference No 576 of 1900

(1) (1896) I L R 19 All 74

the complainant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and it was further proved that he did so without the husband's consent. The facts of the case—*Brijbasi* v. *The Queen-Empress* (1),—cited by the learned Sessions Judge who has made this reference, were different from those of the present case. In my opinion the conviction is not open to objection on the ground of illegality, and I decline to interfere with it. If the accused was released on bail under the orders of the Sessions Judge, he must surrender to undergo the remaining term of the sentence.

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23 A. 84=20 A. W. N. 205.

APPELLATE CRIMINAL.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* UMRAO LAL.* [1st November, 1900.]

Act No. XLV of 1860 (*Indian Penal Code*) *sections* 466, 471—*Forgery—Using as genuine a forged document—Person convicted of and sentenced for the forgery not also to be sentenced for the use.*

Held, that a person who, being himself the forger thereof, has used as genuine a forged document, cannot be punished as well under section 471 of the Indian Penal Code for the use as under section 466 for the forgery.

[Fol. 14 Cr. L. J. 183=19 I. C. 183=53 P. L. R. 1913; 15 Cr. L. J. 568=24 I. C. 976; Diss. 17 Cr. L. J. 73=32 I. C. 665.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Sital Prosad Ghose*, for the appellant.

The *Government Pleader* (Maulvi *Ghulam Mujtaba*), for the Crown.

AIKMAN, J.—In this case, one Umrao Lal, a village patwari, has been convicted by the learned Sessions Judge of Shahjahanpur of having forged a register kept by him in his capacity of patwari. He has also been convicted under section 471, Indian Penal Code, of having used as genuine this forged document. It appears that a Zemindar served a tenant with notice of ejectment under section [85] 36 of the North-Western Provinces Rent Act. The tenant filed an application before an Assistant Collector contesting his liability to be ejected. The main issue in the case was, whether or not the tenant had been in occupation of the land continuously for a period of twelve years so as to acquire a right of occupancy in it. The appellant, Umrao Lal, was called as a witness by the tenant to give evidence supporting the defence set up by him. In his evidence he stated "his tenure is twelve years." It appears that when he gave this evidence he had before him the village field book for 1306 F. An inspection of the entry in that book shows beyond any doubt that what was originally written was that the period of the tenant's cultivation was ten years, and that this entry has subsequently been tampered with so as make it appear that the term of the tenant's cultivation was twelve years. The learned Judge and one of the two assessors concurred in finding it proved that the patwari, Umrao Lal, had himself tampered with the register and made the alteration in the tenant's favour. After going through the record and listening to all that

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* Criminal Appeal No. 957 of 1900.

(1) (1896) I. L. R. 19 All. 74.

1900 NOV 1 — APPELLATE CRIMINAL — 23 A 84=20 A W N 205

can be urged by the learned vakil who appears in support of the appeal, I see no reason to differ from this finding The learned Judge also found him guilty of using this forged document as genuine and convicted him under section 471, Indian Penal Code Section 471 provides that whoever fraudulently or dishonestly uses any document as genuine, knowing or having reason to believe it to be forged, shall be punished in the same manner *as if he had forged such document* The concluding words of this section lead me to believe that it is directed against some person other than a person proved to be the actual forger The section is useful as an alternative charge, when it is not certain whether the accused person is himself the forger of a document or has merely used it as genuine But I cannot recall a case in which the forger has been punished both for forging a document and for using it as genuine The learned Judge has convicted the appellant under both sections and has imposed an aggregate punishment of five years rigorous imprisonment When an accused person is convicted of two different offences, separate punishment for each offence ought to be awarded If necessary the punishments may be made to run [86] concurrently For the reasons set forth above I am of opinion that the conviction under section 471 should not stand I assume that the punishment for each offence was 2½ years imprisonment I set aside the conviction under section 471 I sustain the conviction under section 466 and reduce the term of imprisonment to two and half years

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23 A 86 (=20 A W N 210)

APPELLATE CIVIL

Before Mr Justice Knox and Mr Justice Aikman

BECHA (*Plaintiff*) v MOTHINA AND OTHERS (*Defendants*) *
[15th November, 1900]

Hindu law—Hindu widow—Maintenance—Ancestral property not alienable in defeasance of widow s right of maintenance

The holder of ancestral property cannot where there exists a widow having a right to be maintained out of that property, alienate such property so as to defeat the widow s right to maintenance

Musammat Lalti Kuar v *Ganga Bishan* (1), *Jamna* v *Machul Sahu* (2) and *Devi Persad* v *Gunwanti Koer* (3) followed

[Ref 12 C W N 803=8 C L J 489 Dist 31 Cal 476]

THE facts of this case sufficiently appear from the judgment of the Court

Pandit Madan Mohan Malaviya (for whom Munshi *Gokal Persad*), for the appellant

Munshi *Gobind Prasad* and Munshi *Jag Bahadur Lal*, for the respondents

KNOX and AIKMAN, JJ —In this second appeal the appellant, Musammat Becha, is the widow of one Sheonandan Sheonandan was the

* Second Appeal No 363 of 1898 from a decree of Kunwar Mohan Lal Subordinate Jugde of Allahabad dated the 30th March 1898 reversing a decree of Babu Ram Chandar Chaudhri Munsif of Allahabad, dated the 1st December 1897

(1) (1875) 7 N W P H C Rep p. 261
(2) (1879) I L R 2 All. 315
(3) (1895) I L R 22 Cal. 410.

son of Debi Dat, and died in his father's lifetime. Debi Dat died some five years before the present suit out of which this appeal arises was brought. The respondents are Musammat Mothina, widow of Debi Dat, Baldeo Sahai and Dinbandhu, minor sons of Jagannath. Debi Dat made a will under which he bequeathed all his property, including some *birt jajmani*, to the sons of his daughters. The plaintiff instituted the present suit, asking for maintenance at the rate of Rs. 6 per [87] mensem during her lifetime, and she prayed that this maintenance might be charged upon both the house property left by Debi Dat and the *birt jajmani*. She also asked that she might be put into possession of one of the three houses left by Debi Dat for her residence during her lifetime. The Court of first instance decreed in her favour a monthly allowance of Rs. 5, and directed that this allowance be a charge on all the property left by Debi Dat. It also declared that Musammat Becha was entitled to reside in the smallest of three houses. On appeal the claim brought by Musammat Becha was dismissed *in toto*. The pleas taken in appeal before us are—(1) that the appellant is entitled to maintenance out of the ancestral property; and (2) that the fact that the property came into the hands of the respondents by will, and not by inheritance, made no difference so far as the appellant's right of maintenance and residence was concerned. We found ourselves compelled to remit an issue to the Court below in order that it might be ascertained whether the property left by Debi Dat, or how much of it, was ancestral. The return made is that all the three houses are ancestral property. No exception was taken to this finding, and we now have to consider whether, this being the case, the appellant is entitled to both maintenance and to residence.

As far back as the year 1875 a Full Bench of this Court, in the case of *Musammat Lalti Kuar* v. *Ganga Bishan* (1), held, under cricumstances similar to the present case, that a Hindu widow was entitled to be supported out of the joint and ancestral estate of the family, of which her husband was a member. After this decision, by which we are bound, there comes only the question whether Debi Dat, by the disposition he made, could free the ancestral property in his hands from the charge for maintenance to which the appellant was entitled. To this question also the answer will be found in the case of *Jamna* v. *Machul Sahu* (2). The learned Judges who decided that case held that a wife is, under the Hindu law, in a subordinate sense, co-owner with her husband; the husband cannot alienate his property, or dispose of it by will in such a wholesale manner as to deprive her of maintenance. The donee of the entire estate must be deemed [88] to have taken, and to hold it, subject to her maintenance. We find that the Calcutta High Court in *Devi Prasad* v. *Gunwanti Koer* (3), in a case similar to this, held that where the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's lifetime, enforced partition of that property, the plaintiff was entitled to maintenance, as the Hindu law provides that a surviving co-parcener should maintain the widow of a deceased co-parcener. The learned vakil for the appellant abandoned any claim for maintenance to be charged upon the *birt jajmani*, as one that could not be sustained. We decree the appeal so far as to set aside the decree of the lower appellate

(1) (1875) 7 N.W.P.H. C. Rep. p. 261.
(2) (1879) I. L. R. 2 All. 315.
(3) (1895) I L R. 22 Cal. 410.

Court, and give the appellant a decree ordering the respondents to pay her Rs 5 per mensem during her lifetime, and directing that this monthly allowance be a charge against the ancestral property, the house property set forth in the plaint of Debi Dat omitting the *birt jajmani* The decree will further direct that the appellant be put in possession for purposes of residence of house No 259 in mohalla Bahadur Ganj

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The respondents will pay the appellant's costs in proportion to appellant's success in all Courts The Registrar will calculate the amount of Court fees which would have been paid by the appellant if she had not been permitted to sue as a pauper, and such amount will be the first charge upon the subject matter of the suit

Decree modified

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23 A 88 (=20 A W N 209)

APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice and Mr Justice Banerji

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SHEONARAIN (*Appellant*), v CHUNI LAL AND OTHERS (*Respondents*) * [15th November, 1900]

Act No IV of 1882 (*Transfer of Poperty Act*), *sections* 92, 93—*Mortgage—Redemption—Application for enlargement of time—Application to be made to the Court of firt instance, not to the appellate Court*

Where a decree for redemption under section 92 of the Transfer of Property Act, 1882, has . . . . paragraph of se . . of first instanc . . . . *Oudh Behari Lal* v *Nageshar Lal*, (2) referred to

[Fol 31 All 328=6 A L J 251=2 I C 220 30 Mad 876 Expl 3 A L J 828= 1 06 A W N 203 Fol 13 C L J 459 2 L W 1074]

[89] THE facts of this case sufficiently appear from the order of the Court

Babu *Satish Chandra Banerji*, for the applicant

Babu *Jogindra Nath Chaudhri*, for the opposite parties

STRACHEY, C J and BANERJI, J —This is an application under the last paragraph of section 93 of the Transfer of Property Act, 1882, for postponement of the day fixed by a decree in a redemption suit passed by this Court in appeal under section 92 for payment of the amount due to the defendants on their prior mortgage By its decree this Court extended the time fixed by the Court of first instance for payment until the 9th of August of this year On the 8th of August this application was presented on behalf of the plaintiff for further postponement of the time on grounds which it is not necessary to state A preliminary objection has been taken to the application that it ought to have been made to the Court of first instance as the Court which would have executed the decree and ought not to be made to this Court We think that this objection must prevail The question is whether, where a decree for redemption under section 93 has been made by an Appellate

* Application in First Appeal No 100 of 1900

(1) (1900) I L R 23 Mad 521 (2) (1890) I L R 13 All 278

Court, an application under the last paragraph of section 93 should be made to that Court, or to the Court of first instance. That depends upon which of these Courts is "the Court" within the meaning of that paragraph. We think that the words "the Court" in the last paragraph of section 93 must be construed in the same sense as the words "the Court" in the second, third and fourth paragraphs of the same section. It has been held by the High Court of Madras in *Venkata Krishna Ayyar* v. *Thiagaraya Chetti* (1) that "the Court" referred to in the fourth paragraph of section 93 means, in a case such as that before us, not the Appellate Court that made the decree for redemption, but the Court of first instance. We agree with the observations of the learned Judges of the Madras High Court, whose conclusion, as they pointed out, is in accordance with the view adopted by the Full Bench of this Court in *Oudh Behari Lal* v. *Nageshar Lal* (2). If then "the Court" spoken of in paragraph 4 of section 93 to which an application for an order for sale should be made, is the Court of first instance and not the [90] Appellate Court, we think it follows that the Court mentioned in the last paragraph is the same Court, and that therefore the application for enlargement of the time fixed by the decree for payment should have been made to that Court and not to this. On this preliminary ground, therefore, without expressing any opinion as to the merits of the application, the application must be dismissed with costs.

Application dismissed.

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23 A. 90 (=20 A. W. N. 211.)

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* RAM SEWAK AND ANOTHER.*
[16th November, 1900.]

Act No. I of 1872 (*Indian Evidence Act*), *section* 118—*Evidence—Competency of witness of tender years.*

In this case a Sessions Judge purposely refrained from examining a small boy, who must, under the circumstances, have been an eye witness to a murder. On appeal the High Court observed :—" In our opinion the learned Judge, specially considering the importance of the witness, ought not to have refrained from examining him, unless, under the words of section 118 of the Indian Evidence Act, he considered that the boy was prevented " from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years."

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. Malcolmson*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

KNOX and AIKMAN, JJ.—This case has been submitted by the Sessions Court of Benares for confirmation of sentences of death passed on Ram Sewak and Bhagwan Das. Both the convicts have appealed, and their appeals are before us. The learned Sessions Judge of Benares in his judgment has set out a past history of the relations between the parties which we need not re-produce. In brief, it amounted to this,

* Criminal Appeal No. 1068 of 1900.

(1) (1899) I. L. R. 23 Mad. 521. (2) (1890) I. L. R. 13 All. 278.

that the deceased Sheonandan, who had begun by lending a small sum of money to Ram Sewak, appellant, had in due time sued out the bond for more than double the original debt He had then proceeded to take out execution of the decree which he obtained against Ram Sewak [91] and Ram Newaz, who had gone surety for Ram Sewak The property of Ram Sewak had been attached, objections lodged against the attachment disallowed and the property sold for a small sum After a year Sheonandan had begun to take further steps, and he again applied for attachment and sale of the moveable property of Ram Sewak Bhagwan Das, Ram Sewak's brother, made objections that the property was his, and the 1st September was the date fixed for hearing the objections The objections of Bhagwan Das were allowed and deceased ordered to pay costs Both parties were making their way back to the village, and, apparently talking over the case, began to abuse one another There is evidence that Ram Sewak said in the course of the mutual altercation that if he was sent to jail by Sheonandan, he would take Sheonandan's life and cut off his hands and legs That same night at midnight, or shortly after, Sheonandan, who had gone out to watch over his field, was murdered Two witnesses have come forward, who say that they were eye witnesses of the murder They are positive that Ram Sewak was the man who dealt the blows which caused the death of Sheonandan, they also say Bhagwan Das was present, and actually assisting by holding down the deceased while the blows were inflicted The evidence of these witnesses has been believed by both the learned Judge and the assessors We have heard all that the learned counsel could say in criticism of the evidence, and we are not prepared to differ from the view taken of it by the Court below Moreover, there is further evidence, *viz*, that of Deonandan, brother of the deceased, who, early the following morning, went to the *machan*, where he found his brother lying dead with two wounds on his neck and head, he corroborates the evidence as to what had been said the evening previously He does not so far appear to press the case, for while he says that being that night in his field he saw five or six men whom he took to be thieves, he does not pretend to identify these men, or to say that either Ram Sewak or Bhagwan Das was amongst them Apparently it was he who sent the woman Jamni to make the report at the Police Station Jamni in her report charges Ram Sewak, Bhagwan Das and others with the murder of her son We must say it is unfortunate that the learned Judge declined to examine the boy Sarju The reason he [92] gives is that he considers the boy cannot understand a solemn affirmation, and is too young to be examined In the judgment he adds that the boy was much to small in his opinion "to enter the box; he is a very small boy" Sarju was a most important witness, he was lying on the *machan* beside his father at the time he was murdered There is evidence which points to his having seen, as indeed he must have seen, what took place, and as to his having identified one, at any rate, of the murderers In our opinion the learned Judge, especially considering the importance of the witness, ought not to have refrained from examining him, unless, under the words of section 118 of the Indian Evidence Act, he considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years In spite of the boy's smallness he may have been a lad who could both understand questions and give rational answers to

1900 Nov 16

APPELLATE CRIMINAL

23 A 90=20 A W. N 211

Mittu Bibee (1), *Gopi Nath Birbar* v. *Goluck Chunder Bose* (2) and *In re Viswambhar Pandit* (3) referred to.

[Fol. 59 P. R. 1905=177 P. L. R. 1905 Ref. 64 P. R. 1916; Fol. 7 L. B. R. 103.]

THE facts of this case sufficiently appear from the order of Strachey, C. J.

Pandit *Sundar Lal*, for the applicants.

Mr. *D. N. Banerji* and Pandit *Moti Lal Nehru*, for the opposite parties.

STRACHEY, C. J.—These are three applications for leave to appeal to Her Majesty in Council from the decrees passed by this Court in certain connected appeals—First Appeals Nos. 115 and 116 of 1898 and Second Appeal No. 405 of 1897. These were disposed of in this Court by a single judgment, which will be found reported in the Indian Law Reports, 22 All. page 168. The applications have been resisted by the respondents with reference to the provisions of section 596 of the Code of Civil Procedure. It was objected in respect to the property which was the subject-matter of First Appeal No. 115, called Begam Bagh, that the amount or value of the subject-matter of the suit was less than Rs. 10,000. In the view which we take of this application we need not decide that point; but we will assume that the objection is untenable, and that the value of the subject-matter in the case of each appeal fulfils the requirements of the section. It was further objected, with reference to the last paragraph of section 596, that the decrees in the First Appeals affirmed the decision of the Court below, and that the proposed appeal to Her Majesty in Council did not involve any substantial question of law.

The first question is whether the decrees in the First Appeals did or did not affirm the decision of the Court of first instance in this case. Now the suits were brought by the purchasers of certain immoveable property, which was sold in execution of a decree, against subsequent purchasers of the same property at a second execution sale under another decree, to recover possession of that property. The sale to the plaintiffs had been set aside, and [96] after it had been set aside the same property was sold in execution of the decree under which the defendants pu[illegible] ed, and that second sale was confirmed. Subsequently the pla[illegible] ought a s[illegible] hey were entitled to do, to have the order [illegible] ide the sa[illegible] itself set aside, and to have their sale co[illegible] that s[illegible] not implead the subsequent purchasers, t[illegible] dants, The only persons whom they made de[illegible] t sui judgment-debtors, whose property had [illegible] y o decree against those judgment-debtors, a [illegible] ide they complained of, ar[illegible] ming the sa[illegible] d passed by the High C[illegible] eal on th[illegible] on the basis of that [illegible] hey br[illegible] defendants; claiming [illegible] to th[illegible] prior purchase conf[illegible] h C[illegible] described. The defe[illegible] su[illegible] title to the property [illegible] purchased it at a time [illegible] and that the prior con[illegible]

(1) (1876) I. L. R. 2 Cal.
(2) (1884) I. L. R. 16 Cal

ity, and (2) that the High Court's decree of the 14th May, 1888, could not, as against them, operate as a valid confirmation of the plaintiffs' purchase, inasmuch as it had been obtained by means of fraud and collusion between the plaintiffs and the judgment debtors, who were the only parties to the suit resulting in the decree The plea of fraud and collusion was distinctly raised by the defendants in their written statement, and it was made the subject of the fourth issue framed by the Court of first instance That part of the judgment which deals with that issue is rather obscurely expressed, but this much is clear that the Subordinate Judge finds upon that issue in the defendants' favour, and we think that it is reasonable to infer that he held that the fraud and collusion alleged had been proved That is the only inference we can draw from these words —" However, from what has been said above as regards the invalidity of the sale of the 20th November, 1885, it is evident that the defence of Ram Sarup and Behari Lal was a good one, and, had they fought out that case *bonâ fide*, the plaintiffs' suit would probably have been dismissed throughout The plaintiffs' decree of the 14th May, 1888 [97] was therefore not a good one" The Court of first instance dismissed the suits On the appeal to this Court the Court dismissed the appeals, holding that the plaintiffs' suits had been rightly dismissed by the Court below The judgments of this Court show that the main ground of the dismissal of the appeals was that this Court came to the conclusion upon the evidence that the decree of the 14th May, 1888, had been fraudulently and collusively obtained In my judgment dealing with the appeal, I gave another reason for dismissing the appeals, namely, the view which I was inclined to take of the respective legal rights of these two sets of purchasers. I was disposed to hold that the defendants' purchase was, even apart from the question of collusion, entitled to priority over the purchase of the plaintiffs At the same time I expressed considerable doubt on that point, and in view of that doubt, which was held still more strongly by my brother Banerjee, I did not decide the appeal merely on that ground, but decided it on the further ground of the collusive nature of the decree That is the only ground which my brother Banerji discussed in deciding the appeal Therefore I think it is correct to say that the true ground of the decision of this Court was its view, looking at all the evidence, and all the circumstances, that the decree of the 14th May, 1888, was obtained by fraud and collusion We certainly considered that in that view we were expressing our agreement with the conclusion of the first Court upon the evidence as to collusion That is expressly stated in the last sentence but one of my brother Banerji's judgment It is therefore not necessary for us to discuss the argument which was addressed to us to the effect that the words "affirm the decision" in section 596 of the Code must not be limited to a mere affirmance of the decree of the Court below, that the "decision" could not be said to be affirmed, where, although the "decree" was upheld, the High Court in its judgment disagreed with the findings of facts of the Court below In the present case, assuming that argument to be correct, I think that this Court decided the appeal substantially upon the same view of the facts as to collusion as that of the Court below, and affirmed that Court's decision

The next question is whether the appeal to Her Majesty in

Council involves some substantial question of law. The only [98] question of law, which it is said the appeal involves, is the question discussed in the earlier part of my judgment on the appeals to this Court. If the Privy Council should disagree with the findings of this Court and the Court below on the question of collusion, then no doubt that question of law will arise. But can it be said, those findings being as they are, that the appeal "involves" a substantial question of law? The word "involve" implies a considerable degree of necessity. It does not mean that in certain contingencies a question of law might possibly arise. The practice of the Privy Council is not to interfere with concurrent findings of fact of the Courts below. If we are right in holding that there are concurrent findings of fact on the question of collusion, the inference is that the Privy Council will decline to go behind those findings, and in that view it is conceded that no question of law arises, and that the suits were properly dismissed. No doubt it was held by Mr. Justice Prontifex in *Moran* v. *Mittu Bibee* (1), that the questions of law referred to in section 596 were not limited to questions arising out of the facts concurrently found by the Courts below. That view was accepted by Sir Richard Garth, C. J., and Mr. Justice Prinsep in *Gopi Nath Birbar* v. *Goluck Chunder Bhose* (2), but only with considerable doubt and hesitation. It is also apparently accepted by Mr. Justice Ranade in *In re Vishwambhar Pandit* (3), but Mr. Justice Jardine refrained from expressing any opinion on the point. When once it is borne in mind that the last paragraph of section 596 has reference to that practice of the Privy Council to which I have referred, I think it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which never can arise so long as the Privy Council maintains those concurrent findings of fact, is a substantial question of law, which the appeal to the Privy Council "involves." It cannot be said that an appeal involves a question of law which it is in a high degree improbable that the Privy Council will entertain, having regard to its established practice. That being the case, I think that these appeals do not involve any substantial question of law within [99] the meaning of section 596, and these applications must therefore be dismissed with costs.

BANERJI, J.—I am entirely of the same opinion. I am unable to hold that the appeal to the Privy Council involves a substantial question of law, unless that question arises upon the facts as found by the concurrent judgments of this Court and of the Court below. The mere circumstance that a question of law is raised in the case would not, in my opinion, justify the inference that the appeal involves a substantial question of law if the findings upon the facts do not necessitate a decision of that question. In this case I agree in holding that the Court below, in fact and substance, decided that the decree of the 14th May 1888, was obtained by collusion and fraud, and there can be no doubt that this Court affirmed that decision. There are thus concurrent judgments upon a question of fact, namely, whether the decree of the 14th May 1888, was a collusive and fraudulent decree. Having regard to this finding of fact and to the practice of the Privy Council, to which the learned Chief Justice has referred no question of law arises, a determination of which would be called for in the appeal to Her Majesty in Council. The appeal

(1) (1876) I. L. R. 2 Cal. 228.
(2) (1884) I. L. R. 16 Cal. 292, note.
(3) (1895) I. L. R. 20 Bom. 699.

therefore does not involve a substantial question of law within the meaning of the last paragraph of section 596 of the Code, and these applications must be dismissed

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APPELLATE CIVIL

23 A 94=20 A W N 8

Application dismissed

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23 A 99 (=21 A W N 1)

APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice and Mr Justice Banerji

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FAKHR UD DIN (*Defendant*) v GHAFUR UD DIN (*Plaintiff*) *
[26th November, 1900]

Civil Procedure Code, sections 89, 100, 101—Ex parte decree—Appeal—Service of summons on defendant residing out of British India—Burden of proof

Where a defendant against whom an *ex parte* decree has been passed appeals against that decree, it is sufficient in the first instance to establish that in the Court which passed the *ex parte* decree the necessary proof of service of summons on the defendant was not given by the plaintiff It is not incumbent on the appellant to show that the summons was in fact not duly served.

Where a summons is sent by post to a defendant residing out of British India it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient [100] proof of service to show that the summons was posted but there must be some evidence of its having been received by the defendant

Section 100 of the Code of Civil Procedure is not limited in its application to defendants residing within British India

[Ref 13 Bom L R 323=11 I C 351=35 Bom 213 53 I C 847=37 M L J 599=6 M L T 377=10 L W 606=1920 M W N 19=43 Mad 94, Fol 11 I C 345=14 O C 111]

THE facts of this case sufficiently appear from the judgment of the Chief Justice

Mr *Abdul Jalil* and Babu *Jogindro Nath Chaudhri*, for the appellant

Maulvi *Ghulam Mujtaba*, for the respondent

STRACHEY, C J —This is an appeal by the defendant against a decree of the Subordinate Judge of Bareilly passed on the 19th January 1898 The decree was passed *ex parte*, the defendant not having appeared The question is whether the Court was justified, under the circumstances, in proceeding with the hearing *ex parte* The substantial ground taken in the appeal is that the Court was not, having regard to section 100 of the Code, justified in proceeding *ex parte*, inasmuch as it was not proved that the summons was duly served It has been contended on behalf of the respondent that upon this appeal the *onus* lies on the defendant appellant of proving that the summons was not in fact duly served, as the defendant would have to do in the case of an application under section 108 to the Court by which the decree was made for an order to set it aside It appears to me that in an appeal from an *ex parte* decree passed under section 100 of the Code, all that the appellant has to do is to prove that the requirements of section 100 were not complied with, and that an *ex parte* decree was therefore not legally made An *ex parte* decree cannot legally be made under section 100 unless it is first proved that the summons was duly served, and therefore it is sufficient for the appellant, in my opinion, to establish that in the Court passing

* First Appeal No 59 of 1838, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 19th January 1838

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respect of the mortgage of the said village as well as in respect of bringing it to sale. The learned Subordinate Judge made the following observations in regard to the application for the surplus found on the revenue sale by the holders of the mortgage:—"They under the said application marked (1) proved to the public and by their own actions led every person to believe, that the said village, whosoever be its purchaser, was sold free from all incumbrance and liabilities, and that it was no longer subject to the charge under the decree passed on the mortgage of the decree-holders themselves. On this understanding they limited the amount of their mortgage only to the surplus amount of the sale proceeds amounting to Rs. 6,696, and being contented with this, they prayed for recovery of the said money under section 73 of the Transfer of Property Act. When the Court granted their prayer, they realized the sale proceeds of the sale aforesaid and put the same into their pocket. Thus they clearly relinquished their right in respect of the mortgage of the said village, as well as in respect of bringing it to sale." It has cost us some litle trouble to discover the precise nature of the estoppel which seems to have been found by the Court below. We are unable to see how the acceptance of the surplus proceeds of the auction sale could be [illegible] recover [illegible] foreover, [illegible] hat there [374] was any misrepresentation by word or action on the part of the mortgagees. They believed that the purchaser was a third person, who was taking with an absolutely clear title, and that therefore the village, which had been part of their security, was no longer answerable to their mortgage. That was practically a *bona fide* representation by them, if made at all; and moreover it was induced by the action of Raj Kumar himself, who, in putting forward a *benami* purchaser, allowed the world to believe that the property had passed unincumbered to such a purchaser. Tulshi, who bought from the widow of Raj Kumar, was aware of this deception. He knew that Raj Kumar was the real purchaser, and that the property had not gone unincumbered into the hands of a third person. It does seem to us somewhat remarkable that an estoppel should have been set up by a person who is the representative in title of the person by whom the original misrepresentation had been made. It is manifest, therefore, that no estoppel stands in the way of recovery by the mortgagees of the unpaid balance of the mortgage-debt. The objection that the property cannot be put up to sale a second time, the mortgagees having received and put into their pocket the surplus proceeds of the revenue sale of that very property, seems to have no weight. The principle of law applicable in parallel circumstances has been laid down in great breadth by the House of Lords in *Otter* v. *Lord Vaux* (1). The following extract from the judgment of the Lord Chancellor lays down the law as we believe it to have been always from that time acted upon in England, and as it has been accepted by the Indian Courts:—"The general principle that a mortgagor cannot set up against his own incumbrancer any other incumbrance created by himself is a proposition that I think has never been controverted." We fail to see any distinction between the case of a first incumbrance created by the acts of the parties, and an incumbrance created by the *laches* of the mortgagor. We see no

(1) (1856) 6 De Gex M. and G. 638.

to hold that there was proof, such as section 100 requires, that the summons was duly served Apart from the heading in the plaint, there was not one word to show that the defendant was in fact residing at Medina at the date of the suit, or at the time when the registered letter containing the summons was received at Medina There is nothing to show that the acknowledgments, dated the 12th June, 1897, were in the handwriting of the defendant, or any person authorised to sign for him There was nothing before the Subordinate Judge showing that the defendant was aware of the institution of the suit The facts of this case are therefore clearly distinguishable from those of *Aga Gulam Husain* v *Sassoon* (1) (see the observations of Candy, J, at pages 418 and 419 of the Report) No doubt cases may arise in which it would be a denial of justice to hold that service of a summons upon a defendant in a foreign territory could not be established without direct proof of the receipt or refusal by the defendant of the registered cover containing the summons In the case of a defendant unable to sign an acknowledgment, or seeking to put obstacles in the plaintiff's way by refusing to accept the cover, to hold that there was no proof of valid service, might operate very unjustly to the plaintiff Sections 16 and 114 of the Evidence Act show that in considering whether the summons or other communication through the post has reached a person or not, one may have regard to the fact of its having been posted in due [103] course, and one may presume that the usual course of the post has been followed But I think it would be dangerous to be satisfied by such proof of receipt where there was no sufficient evidence of any residence by the defendant in the place to which the register cover was addressed at or about the time when the letter would reach that place in the due course of the post It is only where that is shown, or where the defendant's knowledge of the suit is proved, that I think the presumptions in question arise, and that service can be held proved without direct proof of the cover having come into the hands of the defendants Here I am not satisfied, and the Court proceeding *ex parte* ought not to have been satisfied on the materials before it, that the defendant was at Medina at the time when the summons arrived there, or that he knew of the institution of the suit

It has been contended on behalf of the respondent that under section 89 of the Code, the summons was sufficiently served by being posted to the address of "Fakhr-ud din, of Bareilly, at Medina," even in the absence of proof that the defendant was then at Medina, and that the expression "forwarded by post is satisfied by proof of posting, and does not require proof that the defendant received the summons In my opinion "forwarded by post' does not mean merely put into the post, and considering that the whole object of service of summons is to give the defendant an opportunity of appearing to defend the suit, it is, I think essential, in the case of service under section 89, to prove that the summons has been not merely posted, but received by the defendant, the proof required being of the nature which I have already explained

We have been asked, under section 568 of the Code, to allow a document to be admitted in evidence which was not before the Court when the *ex parte* decree was made That document consists of an endorsement upon one of the copies of the summons which was sent to Medina It is admittedly in the handwriting of the defendant, but the date which

(1) (1897) I L R 21 Bom 412

the *ex parte* decree that necessary proof was not given by the plaintiff. If the appellant establishes that the *ex parte* decree was wrong, it is not necessary for him to prove further that the summons was not in fact duly served upon him. In the case of an application under section 108, a defendant against whom a decree has been passed *ex-parte* has the privilege of a special summary remedy not open to other defendants, in addition to the ordinary remedy by way of appeal, and it is reasonable that, as a condition of that special [101] summary remedy, he should have to satisfy the Court, not merely that the proof required by section 100 was not given by the plaintiff, but that in fact the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. The question then is, whether the defendant appellant here has shown that the plaintiff at the *ex parte* hearing did not so prove the due service of the summons as to entitle the Court to proceed *ex parte*. The plaint, which was filed on the 15th March 1897, set forth in the heading that the defendant was a "resident of Bareilly, at present residing in Medina, in Arabia." Apart from the heading of the plaint there was at the *ex parte* hearing no evidence adduced by the plaintiff, either by affidavit or otherwise, that the defendant was residing at Medina, or in any other specified place. But upon the statement that the defendant was at Medina summonses were, on the 1st April, 1897, issued by the Subordinate Judge, through the Court of the District Judge, and addressed to "Fakhr-ud-din' of Bareilly, at Medina," for appearance on the 2nd September, 1897, as the date fixed for the hearing. From the order of the Subordinate Judge it appears to have been intended that the summons should be served under section 90 of the Code, which provides for the Service of summons upon a defendant in a foreign territory where there is a British Resident, Agent, Superintendent, or Court. Why the Subordinate Judge should have considered it necessary, in a case where a summons was to be served under section 90, to send that summons through the Court of the District Judge instead of sending it himself, I do not know. However, the summons appears to have been sent to the District Judge; but the Court of the District Judge, for some reason which does not appear, instead of sending the summons in the manner provided by section 90, caused it to be sent by registered post addressed direct to "Fakhr-ud-din, of Bareilly, at Medina"—apparently under section 89. The evidence as to all this is not very clear, but I infer that the summons was sent through the District Judge from a proceeding recorded by the Subordinate Judge on the 2nd September, 1897, and I infer that the summons was sent direct from the District Judge to Fakhr-ud-din, of Bareilly at Medina, from the notices of receipt appeearently issued [102] by the Medina Post Office, and printed at pages 9 and 10 of the appellant's book. The acknowledgments returned through the Post Office purported to be signed by "Muhammad Fakhr-ud-din of Bareilly" on the 12th June 1897. A copy of one of the summonses was received back by the Court of the Subordinate Judge on the 17th August, 1897. It bears an endorsement, dated the 5th July, 1897, purporting to be signed by Abdul Rahman, agent of Maulvi Fakhr-ud-din, and resident of Delhi, at present residing at Medina. But there is no evidence to show who this Abdul Rahman was, or that he had any connection with the defendant. That is the whole of the evidence as to the service of the summons upon the defendant, which was before the Court at the time when the *ex parte* decree was made. It appears to me impossible

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mons was duly served on the defendant I am also unable to accede to the contention of the learned vakil for the respondent that in the case of a defendant residing out of British India, it would be sufficient proof of service if it is shown that the summons was issued by post in the manner required by section 89 That section requires that the summons should be "forwarded" to the defendant This evidently means that the summons must reach him, and therefore, in order to satisfy the Court that the summons was duly served, there must be proof from which the Court may reasonably conclude that the summons has reached the defendant It is true that in the great majority of cases it will be difficult to prove that the registered cover actually reached the hands of the defendant, and I do not say that in every case such proof would be required There must, however, be such evidence before the Court as would justify the inference that he actually received the cover, for example, that at the time when the cover was, in the ordinary course of business, to have been delivered by the post office the defendant was residing at the place to which the cover was sent, or that the acknowledgment of the cover is in the handwriting of the defendant. Such evidence is wanting in this case, and I fully agree with the learned Chief Justice in the reasons which he [106] has given for coming to that conclusion I think the Court below had not sufficient material before it to warrant its proceeding *ex parte* against the defendant, and the *ex parte* decree should be set aside

Appeal decreed and cause remanded *

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23 A 106 (=21 A W N 4)

APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice and Mr Justice Banerji

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BITHAL DAS AND ANOTHER (*Plaintiffs*) v NAND KISHORE AND OTHERS (*Defendants*) † [28th November, 1900]

Civil Procedure Code, section 295—Execution of decree—Rateable distribution of assets—Hindu Law—Joint Hindu family—Effect of attachment of joint family property in ke ping alive the remedy of the decree holder

A decree holder who held a decree against one member of a joint Hindu family consisting of two brothers, in execution of his decree attached his judgment-debtor s interest in a portion of the joint family property Subsequently to the attachment, but before sale, the judgment debtor died.

Upon the rights and interests of the judgment debtor in attached property being brought to sale, certain persons who held decrees against the same

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Their applications were granted but on appeal in a suit by the decree holder who had attached in the life time of the judgment-debtor, it was *held* that the attachment enured only for the benefit of the decree holder who had made it and that the non attaching decree holders were not entitled by virtue of section 295 of the Code to share in the assets realized by sale under such attachment *Suraj Bansi Koer* v *Sheo Prosad Singh* (1), *Deendyal Lal* v. *Jugdeep Narain Singh* (2), *Maniklal Venilal* v *Lakha* (3), *Gangadin* v.

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* *Cf* Wray v Wray, 17 Times Law Reports, p. 212

† First Appeal No 95 of 1898 from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 24th December 1897

(1) (1878-79) L R 6 I A 88
(2) (1877) L R 4 I A 247
(3) (1880) I L R 4 Bom. 429

it bears is the 18th of April 1898, many months after the *ex parte* decree was passed. Assuming that such evidence might be allowed to be given under section 568, I do not think that substantial cause for its admission has been shown. It is fully consistent with the summons [104] not having been served upon the defendant in 1897, that he should receive and return another copy of that summons in April, 1898. For these reasons it appears to me that the proceeding with the case *ex parte* was in contravention of the provisions of section 100 of the Code.

It has been contended on behalf of the respondent that section 100 has no application to the case of a defendant residing out of British India, but must be construed as limited to defendants residing within British India. It is said that in the case of the non-appearance of a defendant residing out of British India the proper procedure is that prescribed, not by section 100, but by section 104 of the Code, which does not, like section 100, require proof that the summons was duly served, but allows the Court to direct that the plaintiff be at liberty to proceed with his suit in such manner and subject to such conditions as the Court thinks fit. I do not think that this contention is well-founded. There is nothing in section 100 to limit its application to any defendants resident in British India, and there is nothing in section 104 to exempt the plaintiff, where the defendant resides out of British India, from proving the due service of the summons before the hearing can proceed *ex parte*. I am not aware of any case in which section 104 of the Code has been considered. But I am inclined to think that its provisions were intended as a special protection for defendants residing out of British India, who certainly, one would imagine, do not require less protection than defendants residing within British India, and in whose case the ordinary reasons requiring proper proof of service of summons are fully applicable. I am disposed to think that in addition to what section 100 requires, section 104 was enacted to enable a Court, in the case of defendants residing out of British India, to impose conditions upon the plaintiff before allowing him to proceed with the suit, even where due service of summons is proved. It may be added that in the present case no application under section 104 appears to have been made. The result is that I think this appeal must be allowed, and the *ex parte* decree set aside, and the cause remanded to the Court below, under section 562, for trial on the merits. All costs, including the costs of this appeal, to abide the result.

[105] BANERJI, J.—I also would make the order proposed by the learned Chief Justice. The question we have to determine in this appeal is whether the Court below acted legally in proceeding *ex parte* against the defendant appellant. I cannot accept the contention of the learned vakil for the respondent, that in the case of a defendant residing out of British India section 100 of the Code of Civil Procedure does not apply. That section, in my opinion, is applicable to the case of all defendants, and section 104 of the Code controls section 100 to this extent, that in the case of a defendant residing out of British India, it is competent to the Court to impose conditions upon the plaintiff when the plaintiff asks the Court to proceed against such defendant *ex parte*. I agree with the learned Chief Justice in the view that section 104 was enacted in the interests of the defendant, and not of the plaintiff, that that section does not dispense with the requirements of section 100, and that the Court may proceed *ex parte* only when it is proved that the sum-

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passage —" The result is that if the deceased debtor is an ordinary co parcener, who has left neither separate nor self acquired property, the creditor, who has not attached his share before his death, is absolutely without a remedy' The principle is explained in the judgment of their Lordships of the Privy Council in *Suraj Bunsi Koer* v *Sheo Proshad Singh* (1) It is this, that in the absence of any attachment the undivided share of the judgment debtor passes on his death to his co parceners by survivorship, and thenceforth there is nothing which can be regarded as assets of the judgment debtor in the hands of his legal representatives against which execution could be enforced The creditor's loss of remedy, in other words, is the necessary result of the principle of survivorship, as distinguished from succession, applicable under the Hindu Law to a joint Hindu family For this purpose there appears to me to be no distinction in principle between those of the defendants res pondents who obtained decrees during Harihar Dat's life time which they took no steps to enforce, and those who did not obtain their decrees until after his death The mere obtaining of a decree would create no charge such as would defeat the operation of the principle of survivorship in the manner which I have described On the other hand, the plaintiffs, who had during the life time of Harihar Dat not only obtained a decree against him, but had, in execution of it, attached his undivided share in the joint family property, stand in a different position, the nature of which is explained at page 109 of the report of the judgment of the Privy Council in *Suraj Bunsi Koer's* case Their Lordships there say — "They think that, at the time of Adit Sahai s death, the execution pro ceedings under which the mauza had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment creditor a valid charge upon the land, to the extent of Adit Sahai's undivided share and **[109]** interest therein, which could not be defeated by his death before the actual sale' Now it is quite clear, I think, that the Privy Council in recognising the charge which they thus describe, did not intend in the smallest degree to derogate from the status of the co-parceners or the nature of the joint property in a joint Hindu family, or to suggest that a mere attachment of an undivided share had the effect of destroying either the co-parcenary bond or the character of the joint family pro perty That I think is clearly shown both by the judgment in *Suraj Bunsi Koer s* case and by a passage at page 255 of the report of the judgment in the case of *Deendyal Lal* v *Jugdeep Narain Singh* (2) where Their Lordships say —"It seems to Their Lordships that the same principle may and ought to be applied to sharers in a joint and undivided Hindu estate, and that it may be so applied without unduly interfering with the peculiar status and rights of the co parceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place In other words, the recognition of the charge is not inconsistent with the recogni tion of the continuance of the family union All that is implied is that the ordinary operation of survivorship is prevented in favour of the attaching creditor to the limited extent stated That survivorship takes place subject only to the right which the attaching creditor has acquired of selling to a purchaser the judgment debtor's undivided share, that is,

(1) (1878 79) L R 6 I A 88, at pp 108 and 109

(2) (1877) L R 4 I A 247

Khushali (1) and *Gurlingapa* v. *Nandapa* (2) referred to. *Sorabji Edulji Warden* v. *Govind Ramji* (3) distinguished.

[Ref. 8 O. C. 86; 6 P. R. 1903; 14 C. W. N. 396=11 C. L. J. 69=3 I. C. 105; 8 I. C. 1176; Dist. 21 C. L. J. 624=30 I. C. 49.]

THE facts of this case sufficiently appear from the judgment of Strachey, C. J.

Messrs. *W. K. Porter* and *W. Wallach*, and Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Moti Lal Nehru* and Munshi *Gokul Prasad*, for respondent No. 10.

[107] Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for certain of the other respondents.

STRACHEY, C.J.—This is a suit brought under the penultimate paragraph of section 295 of the Code of Civil Procedure to compel a refund of assets realized at an execution sale held at the plaintiff's instance, on the ground that the defendants are not entitled to receive such of the assets as have been paid to them. The suit was dismissed by the Court below as against all the defendants, and from that dismissal the plaintiffs now appeal. The plaintiffs were holders of a decree for money against one Harihar Dat, who formed with his brother Shankar Dat a joint Hindu family. In execution of their decree the plaintiffs obtained the attachment of a house and garden belonging to the joint family; that is to say, what was attached was not merely the judgment-debtor's undivided interest, but the house and garden themselves. Thereupon Shankar Dat objected to the attachment so far as his undivided share in the property was concerned, and the Court allowed the objection, and released Shankar Dat's interest from the attachment, so that thenceforth the attachment had effect on the undivided share in the house and garden of the judgment-debtor Harihar Dat only. The judgment-debtor then died. The property attached was sold in execution of the plaintiffs' decree and realized about Rs. 12,000. The defendants-respondents applied, under section 295 of the Code, that the assets so realized might be rateably distributed. Their applications were granted, and this led to the present suit.

There are ten defendants-respondents to this appeal, all of whom hold decrees for money against either Harihar Dat or his representatives, and all admittedly applied for execution of their decrees prior to the realization. The defendants 1 to 5 obtained their decrees after the death of Harihar Dat. The defendants 6 to 9 obtained their decrees during the life-time of Harihar Dat, but did not during his life-time take any step in execution of those decrees. The defendant No. 10, in the life-time of Harihar Dat, obtained a decree, and also in execution of that decree attached the same garden which was attached and sold in execution of the plaintiff's decree. So that as regards the defendants, except the defendant No. 10, all are in the position of persons obtaining [108] decrees against a member of a joint Hindu family, now deceased, and who, during his life-time, had taken no steps to attach, in execution of their decrees, his undivided share in the joint family property. The position of the creditors in these circumstances is correctly stated by Mr. Mayne in his book on "Hindu Law" (6 ed., p. 417), in the following

(1) (1885) I. L. R. 7 All. 702.
(2) (1896) I. L. R. 21 Bom. 797.
(3) (1891) I. L. R. 16 Bom. 91.

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ciple was not expressly laid down, I think the decision essentially depends upon the principle that a man is not to be allowed under section 295 to share in the proceeds of an execution sale of property where he could not lawfully have himself had that property taken in attachment and sale of his own decree Against this view Pandit Sundar Lal, who appears for the respondents Nos 1, 2 and 6, relied on the decision of the Bombay High Court in *Sorabji Edulji Warden* v *Govind Ramji* (1) It was held by Mr Justice Telang in that case that certain decree-holders who attached property after its assignment by a judgment debtor pending and subject to a previous attachment by other creditors, were persons having claims enforceable under that prior attachment within the meaning of section 276 of the Code, because they could have applied under section 295 for a share of the assets realized by sale under the prior attachment, and that the assignment was void against them as well as against the first attaching creditor Pandit Sundar Lal argues that in that case the subsequent decree holders who could not themselves have attached and sold the property after the assignment, were nevertheless enabled by the prior attachment to come in under *section 295 and share in the proceeds Now it is not necessary to* decide whether we should agree with all the observations of Mr Justice Telang in that case, though I may say that his judgment is in apparent conflict in many respects with that of this Court in *Gangadin* v *Khushali* (2) But the distinction in principle between the Bombay case and the present appears to be this· in that case the subsequent decree holders could not only have [112] applied under section 295 of the Code for a share of the proceeds of the sale, but they were themselves in a position to proceed againt the property by an attachment of their own They were in a position to do so notwithstanding the assignment, because the assignment was held to be void as against them It was void, that is to say, not only against the attaching creditor, but against all creditors But the difficulty in the way of the defendants in this case is that, according to the doctrine laid down by the Privy Council in *Suraj Bunsi Koer's* case the operation of survivorship is defeated by an attachment only in favour of the attaching creditors, and not in favour of other creditors That clearly appears from the passage which I have already read (at page 109 of the report) The mere fact that these defendants had made applications for execution would not place them in the position of attaching creditors to whom the Privy Council expressly limit the charge of which they speak It has also been contended by Mr Malaviva, who appeared for the defendants respondents Nos 3, 3, 4, 5 and 9, that the effect of the attachment made by the plaintiffs was to make a separation of the undivided interest of the judgment debtor, a separation which, though not amounting to a partition, was nevertheless sufficient to make the share lose to some extent the character of joint family property, and make it available in the future for all creditors without their being liable to defeat by the principle of survivorship For this contention no authority was cited by the learned vakil, and it appears to me to have no legal justification, but on the contrary to be opposed to the principles laid down by the Privy Council The judgment of the Bombay High Court in *Gurlingapa* v *Nandapa* (3) is also strongly opposed to the learned

(1) (1891) I L R 16 Bom 91
(2) (1885) I L R 7 All 702
(3) (1896) I L R 21 Bom 797.

strictly speaking the right which the judgment-debtor might himself have exercised of compelling a partition of the joint family property. Now that being my view, it would follow that the plaintiffs alone are entitled to the proceeds of the sale of this property, and that the other defendants, except the defendant No. 10, are not entitled to share. But against this conclusion the terms of the first paragraph of section 295 of the Code have been relied on. It has been contended on behalf of the defendants that, having regard to those terms, the attachment made by the plaintiffs enured for the benefit of all persons holding decrees for money against the same judgment-debtor, and who complied with the conditions specified [110] in the section. That is to say, that, provided the defendants have prior to the realization applied to the Court holding the assets for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, they are, without any attachment of their own, entitled to share rateably with the plaintiffs in the proceeds of the sale, although in the absence of the plaintiff's attachment they could not themselves, after the judgment-debtor's death, have enforced execution against this property. That argument is to some extent favoured by the language of section 295, but I think it is clear that that section cannot be read absolutely literally. If it were to be read literally, without any regard to its real object and policy, the result would be an absurdity, because the only condition expressly required is the existence of applications for execution made by the persons specified prior to realization, irrespective altogether of the result of such applications or any objections to them, however well founded. But it has been held, and it could not otherwise have been held, that an application for execution which was barred by limitation, or an application which had for any reason been rejected, would not entitle the applicant to share rateably, under section 295 ; and therefore it is clear that one must give the section a common-sense construction, and see what sort of case it really provides for. Now the object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property. Now if those were the objects of the section, it was not designed to enlarge in any way the rights of decree-holders or place at their disposal the proceeds of property which they could not have themselves attached. It entitles to share in the proceeds only those decree-holders who [111] could have themselves attached and sold the property. It was not meant to enable a decree-holder to indirectly get the benefits of an execution which he could not himself have enforced directly. Where the decree-holders are persons who could have themselves attached and sold the property then, but only then, I think, the attachment and sale by one are correctly described as enuring for the benefit of all. I think that this view of the section is supported by the decision of the Bombay High Court in *Maniklal Venilal* v. *Lakha* (1). Although in that case the prin-

(1) (1880) I. L. R. 4 Bom. 429.

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Jugdeep Narain Singh (1) In that case their Lordships held that, although the undivided interest of a member of a joint Hindu family could be sold by auction, such sale would not interfere with the status of the family until partition was effected at the instance of the auction purchaser For the above reasons I agree in holding that the plaintiffs were entitled to be paid out of the assets realized by the sale of Harihar Dat's property in preference to such of the defendants as had not taken out attachments on the interests of Harihar Dat during his lifetime

Appeal dismissed

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23 A 114 (=20 A. W N. 214)

APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Aikman

KISHEN LAL (*Plaintiff*) v CHARAT SINGH AND OTHERS (*Defendants*) *
[27th November 1900]

Civil Procedure Code, section 276—Mortgage alleged to have been made pending an attachment—Attachment when to be considered as raised—Execution of decree

Where a party prosecuting a decree is compelled to take out another execution, his title should be presumed to date from the second attachment *Pud domonee Dassee* v *Mathoora Nath Chudhry* (2) and *Hafiz Suleman* v *Sheikh Abdullah* (3) referred to

[Ref 13 M L T 115=18 I C 691=1913 M W N 821 1 L W 932 19 C L J 248=20 I C 149 62 I C 121 Dist 26 I C 81 Rel 26 C W N 338]

THE suit out of which this appeal arose was one for sale on a mortgage of the 27th March 1885 There were impleaded as defendants (1) some of the original mortgagors and representatives of others, and (2) the representatives of a certain person who [115] had purchased one half of the mortgaged property at a sale in execution of a simple money decree held by him The defendants, second party pleaded, *inter alia*, that section 276 of the Code of Civil Procedure was a bar to the plaintiff's claim, inasmuch as at the date of the execution of the mortgage in suit, the property was under attachment in execution of the decree held by their predecessor in title The attachment relied on by the defendants, second party, was made in 1883 No sale took place thereunder, and the proceedings appear to have been dropped, though no evidence was placed upon the record to show precisely in what way they terminated A fresh attachment was, however, taken out in 1887, and it was under this attachment that the property was sold

The Court of first instance (Munsif of Koil) considered that section 276 of the Code of Civil Procedure applied to the facts as stated, and dismissed the suit An appeal filed by the plaintiff was dismissed by the lower appellate Court (District Judge of Aligarh) The plaintiff thereupon appealed to the High Court

Munshi *Gobind Prasad*, for the appellant

Mr *S S Singh* and Pandit *Moti Lal*, for the respondents

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* Second Appeal No 506 of 1898 from a decree of L G Evans, Esq, District Judge of Aligarh, dated the 12th April 1898, confirming a decree of Maulvi Muhammad Shafi, M A, Munsif of Koil, District Aligarh, dated the 2nd August 1897

(1) L R 4 I A 247 I L R 3 Cal 198
(2) (1873) 12 B L R. 411
(3) (1894) I L R 16 All. 133

vakil's argument. The result of this view of the case is that the defendants, other than the defendant No. 10, are not, in my opinion, entitled to share in the proceeds of the property sold, and as regards them, I think that the appeal should be allowed, the decree of the Court below set aside, and the plaintiff's suit decreed with costs in both Courts.

As regards the defendant No. 10, it is admitted that so far as the garden, which he had attached, is concerned, he stands in [113] the same position as the plaintiffs, and as regards him therefore the appeal fails and must be dismissed with costs.

BANERJI, J.—I have arrived at the same conclusion. If section 295 of the Code be read literally, no doubt the plaintiff's suit must fail. But having regard to the policy of that section, it is difficult to hold that the Legislature intended to enlarge by the provisions of that section the rights of a judgment-creditor. As has been pointed out by the learned Chief Justice, one of the objects of that section is to prevent multiplicity of procedure, and that scramble by several judgment-creditors which used to take place under the provisions of section 271 of Act VIII of 1859. I agree in thinking that the section must be reasonably construed, and when it is so construed it is difficult to hold that under that section any judgment-creditors are entitled to a rateable division of the assets, who could not, if they had so chosen, have proceeded by execution against the property of the debtor by the sale of which the assets were realized. I do not think this view militates against the ruling of the Bombay High Court in the case of *Sorabji Edulji Warden* v. *Govind Ramji* (1). In that case it was held that the judgment-creditors who claimed a rateable division of the assets were entitled to such division because the assignment by the judgment-debtor was void as against those creditors by reason of the provisions of section 276. It is not necessary for us to consider the reasoning by which the learned Judge who decided that case came to the conclusion that the assignment was void. But he certainly did not hold that a judgment-creditor who could not have proceeded against the property sold was entitled to a rateable share of the money realized by the sale of it if he applied under section 295 of the Code. If this view is correct, the defendants, other than the defendant No. 10, were not entitled to share in the proceeds of the sale of the property which was sold in execution of the decree held by the plaintiffs. It is only because the plaintiffs had caused that property to be attached in the lifetime of Harihar Dat that they could, according to the ruling of the Privy Council in *Suraj Bunsi Koer's* case, defeat the right of those members of the joint family to whom his interest in the joint family property [114] passed by right of survivorship. But as the defendants mentioned above did not take any steps to enforce their decrees during Harihar Dat's lifetime, they could not proceed against the property in the hands of the surviving member. It was, however, contended by Mr. Malaviya that in this case a severance of the joint family had taken place by reason of the attachment placed on Harihar Dat's interest in the joint family property, and the exemption from attachment of the interest of his brother Shanker Dat. That argument is based upon an erroneous view of the law, and is certainly contrary to what the Privy Council laid down in the case of *Deendyal Lal* v.

(1) (1891) I. L. R. 16 Bom. 91.

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sanction of the Court under section 305 of the Code of Civil Procedure, sold the mortgaged property to Gobardhan Rai and others, and with the price thereof paid up the Maharaja's decree Meanwhile, in 1885, after the suit of the Maharaja of Dumraon had been instituted, Radha Madhab Prasad executed a mortgage of the same property in [117] favour of Bishan Prasad and others On this mortgage the mortgagees obtained a decree in 1891, and in execution thereof had the property mortgaged advertised for sale Gobardhan Rai accordingly brought the present suit asking for a declaration that one third of the mortgaged property which had been purchased by him as aforesaid was not affected by the decree obtained by Bishan Prasad and others

The Court of first instance (Subordinate Judge of Ghazipur) dismissed the suit, holding that it was barred by reason of section 244 of the Code of Civil Procedure, the plaintiff being, within the meaning of that section, a representative of the judgment debtor The plaintiff appealed, but the lower appellate Court (District Judge of Ghazipur) agreed with the Court of first instance and dismissed the appeal In the appellate Court it was orally suggested that, even if the suit did not lie, the plaint should not have been dismissed, but should have been treated as an application under section 244 As to that the District Judge remarked —"The cases "quoted (in support of the above contention) do not, in my opinion, apply, "because, in those proceedings the suits were decreed in the first "instance, and the High Court merely held that the discretion had been "properly exercised That is a very different matter from reversing a "decree of dismissal on a plea impugning the exercise of a discretion and "not mentioned in the memorandum of appeal I do not think that I "ought to enter into such a plea' The plaintiff appealed to the High Court

Babu *Jogindro Nath Chaudhuri*, Pandit *Madan Mohan Malaviya* and Munshi *Gobind Prasad*, for the appellant

Mr *Abdul Majid*, for the respondents

BLAIR and AIKMAN, JJ —Two pleas and two only are raised in this appeal The first is that the plaintiff is not the "representative' of the judgment debtor within the meaning of section 244 of the Code of Civil Procedure There are decisions of this Court, by which we are bound, that an auction purchaser at a sale held in execution of a decree is not a representative within the meaning of section 244 It has also been held by this and other Courts that a private purchaser is such a representative The plaintiff in this suit occupies what may be called an intermediate [118] position He has purchased under a private arrangement made in pursuance of the leave given by an executing Court under the provisions of section 305 of the Code of Civil Procedure The Court in such a case must have granted a certificate authorising the judgment debtor to sell The money produced by such sale must have been paid into Court The sale must have become absolute by virtue of confirmation by the Court But the contract of sale and its precise terms must have been arrived at by agreement and by the consent of the parties The property in that way would pass from the vendor to the vendee without any intermediary between their proprietary rights Now it seems to us that such a sale partakes more of the nature of an ordinary private sale by a judgment debtor to a purchaser than of a sale by a Court at an auction held in execution of a decree If there were no other reasons, we should still

BLAIR and AIKMAN, JJ.—This was a suit brought by one Kishen Lal for enforcement of a mortgage lien. It has been found by the Court below that the mortgage was void under the provisions of section 276 of the Code of Civil Procedure. The Court below finds that there was, at the date of the mortgage, a subsisting attachment. That finding we conceive to be erroneous. There had indeed been a prior attachment in 1883 in the execution proceedings. Proceedings in relation to that matter had been struck off some considerable time before the mortgage was made. Indeed the defendant's ancestor, under the money-decree in the suit in which the attachment had been made had gone far to confirm Kishen Lal's position by himself applying in 1887 for an attachment in execution of the same decree. If there was a subsisting attachment, such an application was wholly superfluous. If there was no attachment, the mortgage was a good mortgage. We have the Privy Council's authority in the case of *Puddomonee Dossee* v. *Muthoora Nath Chowdhry* (1) for the proposition [116] that where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. There is no evidence to disturb that presumption. The ruling of the Privy Council has been acted upon by this Court in the case of *Hafiz Suleman* v. *Sheikh Abdullah* (2). The result is that the decree of the lower appellate Court will be set aside, and the case will be remanded under section 562 of the Code of Civil Procedure through the lower appellate Court to the Court of first instance for trial upon the merits. The appellant will have the costs already incurred by him in the lower appellate Court and the costs of this appeal. The remaining costs will abide the result.

Appeal decreed and cause remanded.

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23 A. 116 (=20 A. W. N. 215.)

APPELLATE CIVIL.

Before Mr Justice Blair and Mr Justice Aikman.

GOBARDHAN RAI (*Plaintiff*) *v.* BISHAN PRASAD AND OTHERS (*Defendants*).* [28th November, 1900].

Civil Procedure Code, sections 244, 305—*Execution of decree—Representative of a party to the suit—Purchaser under a private sale sanctioned by the Court under section* 305.

Held that a purchaser from a voluntary seller who has sold with the consent and authority of the Court under section 305 of the Code of Civil Procedure is a representative of the judgment-debtor within the meaning of section 244, clause (*c*).

[Ref : 26 All. 447 (F.B.)=1904 A. W. N. 61].

THE facts of this case are as follows :—

On the 23rd March 1869 Radha Madhab Prasad and Radha Mohan Prasad and others executed a mortgage deed for Rs. 56,000 in favour of the Maharaja of Dumraon. The mortgagee instituted a suit on the 13th August 1885, and obtained a decree on the 24th December 1885. When this decree was put in execution the judgment-debtors, with the

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* Second Appeal No. 407 of 1900 from a decree of R. Greeven, Esq., District Judge of Ghazipur, dated the 13th March 1900, confirming a decree of Maulvi Syed Zainul Abdin, Subordinate Judge of Ghazipur, dated the 19th July 1898.

(1) (1873) 12 B. L R. 411. (2) (1894) I. L. R. 16 All. 133.

having regard to section 18 of the Specific Relief Act, in the position of a person, who had agreed to lease having an imperfect title,' and who had subsequently acquired such an interest in the property as enabled him to carry out his agreement, and that, although the lease to N and others could not, under the circumstances, be set aside, the plaintiff was entitled to a decree for "specific performance' of the agreement to lease to him, to take effect after the determination of the lease which had been granted to V and others

1900 DEC. 5

APPELLATE CIVIL

23 A 119=21 A W N 11.

[Dist 2 A L J 156=1905 A W N 35]

THE plaintiff in this case came into Court alleging that one Sarju Prasad Singh had, on the 9th July 1897, agreed to lease to him, for a term of fifteen years and under certain conditions specified in the plaint, certain immoveable property, which lease was to have been executed and registered at Jianpur on the 22nd [120] July 1897, but that the said Sarju Prasad Singh had not carried out his agreement, and had, on the contrary, completed a lease of the said property in favour of Nazir Ahmad and others for a term of two years, the said lessees being aware of the existence of the agreement with the plaintiff to lease to him The plaintiff accordingly asked that the lease given to Nazir Ahmad and others might be set aside, and that Sarju Prasad Singh might be directed to execute a lease in favour of the plaintiff according to the terms stated by him

The Court of first instance (Subordinate Judge of Azamgarh) found that the lessees had, as a fact, no knowledge of the agreement to lease to the plaintiff, and gave the plaintiff a decree against Sarju Prasad Singh for the execution of a lease in favour of the plaintiff after the expiry of the term of Nazir Ahmad's case On appeal the lower appellate Court (District Judge of Azamgarh) upheld that decree The defendant Sarju Prasad Singh accordingly appealed to the High Court

Messrs *W K Porter* and *R Malcomson*, for the appellant

Mr *Abdul Raoof* (for whom Maulvi *Muhammad Ishaq*), for the respondent.

BLAIR and AIKMAN, JJ —The plaintiff complained that defendant No 1, having promised to execute to him a lease for 15 years, after that promise rendered himself unable to fulfil it by granting to other persons, the second class of defendants, a lease for two years The plaintiff, alleging the defendant s second party had taken their lease with notice of his claim, asked for specific performance of his contract with defendant No 1 and the avoidance of the interest which, upon his own showing subsequently accrued to the second set of defendants who stood in his way The Court below found that the defendants second party had no notice of his interest, and had taken their lease in good faith Upon that finding the Court below maintained the rights of the second party of defendants to a two years' lease and decreed that at the termination of that period the plaintiff should obtain a lease from the first defendant for the period and on the terms originally agreed upon It is that decree which is impeached in this appeal It seems to us that the case is one within the meaning, if not within the words, of section 18 of Act No I of 1877, and it is also consistent with the rulings of [121] the English Courts that when a party enters into a contract without power to perform that contract, and subsequently acquires power to perform the contract, he is bound to do so. In this case the defendant No 1 by his own action rendered himself temporarily unable to perform the contract Certainly his position, in our opinion, can be in no sense

feel ourselves bound by the *dicta* of the Privy Council that enjoin upon the Courts the widest possible interpretation of section 244, a section expressly framed to prevent multiplicity of suits. We therefore, there being no decision upon the question, hold that a purchaser from a voluntary seller, who has sold with the consent and authority of the Court under section 305, is a representative of the judgment-debtor within the meaning of section 244, clause (*c*). That is our answer to the first question raised in the grounds of appeal.

The second plea is that, if the appellant was a representative of the judgment-debtor, the plaint should have been treated as an application under section 244, and that the Court was wrong in dismissing the suit. We have asked in vain, as far as any satisfactory answer is concerned, by what authority we can now reverse the decision of the Court below. We are not authorised by law to correct every error, to do right at large, but only to reverse those decisions which are open to objection under one or other of the three clauses of section 584 of the Code of Civil Procedure. It is not contended that any of those clauses applies unless it be the first, and we find it impossible to say that the decision was contrary to any specified law or usage having the force of law. Undoubtedly upon the rulings of this and other Courts, the Court of first instance could in its discretion have treated the plaint as an application and allowed the proceedings [119] to go on as upon an application, but it was not asked to do so. When the plaintiff entered this appeal to the first appellate Court, he took his stand upon various grounds, but entirely omitted to impugn the action of the first Court in defeating the suit as a suit and in dismissing it and not treating it and entertaining it as an application. It is impossible for us to say that either one or the other Court violated any rule having the force of law. We therefore, while finding that the plaintiff is a representative, and, as such, bound to proceed by application under section 244, and, not by a suit, find ourselves unable to interfere in second appeal with the decree impugned. The appeal is dismissed with costs.

Appeal dismissed.

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23 A. 119 (=21 A. W. N. 11).

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

SARJU PRASAD SINGH (*Defendant*) *v.* WAZIR ALI (*Plaintiff*).*
[5th December, 1900.]

Agreement to lease—Subsequent lease to third party taking in good faith without notice of agreement—Specific performance—Act No. I of 1877 (*Specific Relief Act*), *section* 18.

S agreed to lease certain immoveable property to *W* for a term of fifteen years and to execute and register the lease on a certain specified day. Before the day fixed for executing the lease arrived, *S* executed a lease of the same property for two years in favour of *N* and others, who had no knowledge of the agreement to lease to *W*. *W* thereupon sued *S* and his lessees, claiming cancellation of the two years' lease to *N* and his co-lessees, and specific performance of the agreement to lease to him for fifteen years. *Held* that *S* was,

* Second Appeal No. 531 of 1898 from a decree of H. D. Griffin, Esq., District Judge of Ajamgarh, dated the 16th April 1898, confirming a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 12th January, 1898.

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tion 584 of the Code of Civil Procedure The only ground taken in appeal was that the lower appellate Court was wrong in refusing to admit additional documentary evidence, which was tendered at the hearing of the appeal The learned Judge says that "it is a matter in the discretion of the appellate Court to admit additional evidence If it refuses to exercise that discretion, I do not think that such refusal is a substantial error or defect in procedure" Now if the learned Judge meant to lay down that a refusal by a Court entertaining an application under section 568 to exercise its discretion would not be a substantial error or defect in procedure, within the meaning of section 584, I should not be able to agree with him Under section 568 in my opinion the Court is bound to exercise a judicial discretion If the learned Judge meant, as I think he did mean, that the refusal of a Court, in the exercise of its discretion, to admit additional evidence is not a substantial error or defect in procedure within the meaning of section 584, then I agree with him In other words, a refusal to exercise discretion would be an error or defect in procedure, because section 568 distinctly implies that discretion must be exercised, but a refusal, in the exercise of discretion, to admit additional evidence is undoubtedly not such an error or defect The first paragraph of section 568 expressly lays down that the parties to an appeal shall not be entitled to produce [123] additional evidence, and there is nothing in the section which in any case requires a Court to allow such evidence to be produced The cases referred to by the learned Judge in his judgment do not go any further than the view which I have just explained Therefore, what I have to see here is whether the lower appellate Court, in refusing to admit additional evidence, exercised the discretion which it was bound to exercise under section 568, and if it did, then I quite agree that we cannot in second appeal go on to consider whether the refusal was erroneous Now the application under section 568 was made under these circumstances The appellant was defendant in a suit for redemption of a mortgage, and had in the first Court contested the suit upon the footing that her deceased husband was the mortgagee of the property, and that there was a subsisting mortgage Her memorandum of appeal to the lower appellate Court proceeded upon the same view Before the hearing of the appeal she presented the application under section 568, and the documents for which she sought admission were, she said, documents showing that there had been an actual sale of the property to her husband, who, at the time of his death, consequently held not merely mortgagee rights, but absolute proprietary rights in the property, so that there was no mortgage which the plaintiffs were entitled to redeem The lower appellate Court in its order rejecting that application set forth as its reason that neither in the pleadings nor in the memorandum of appeal was there any suggestion as to the sale now set up by the appellant, that the documents in question appeared to have been in existence at the time of the trial of the suit in the Court below, and that, in the opinion of the Court, the appellant had all along been aware of their existence It appears that the principal document tendered was a copy produced from the Registrar's office The application was silent as to the original of that copy, and was also silent as to when it was that the appellant first became aware of the existence of the document *Prima facie*, one would expect the original to have been in the possession of the appellant's husband, and after his

better than that of a person who laboured under the same disability before he entered into the contract. In the absence of authority to the contrary, and holding a strong opinion that the decree of the lower appellate Court is sound upon the principles of equity and justice, we dismiss this appeal with costs.

Appeal dismissed.

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23 A. 121 (=21 A. W. N. 11.)

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

RAM PIARI (*Defendant*) *v.* KALLU AND OTHERS (*Plaintiffs.*)*
[6th December, 1900].

Civil Procedure Code, sections 584, 568—*Appeal—Admission of additional evidence in appeal—Discretion of Court.*

The refusal by an appellate Court to exercise the discretion vested in it by section 568 of the Code of Civil Procedure with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of section 584 of the Code, because section 568 distinctly implies that discretion must be exercised. But a refusal in the exercise of discretion to admit additional evidence is undoubtedly not such an error or defect.

[Fol. 33 All. 379=8 A. L. J. 175=9 I. C. 265 ; Ref. 53 I. C. 274=10 L. W. 122=37 M. L. J. 125=1919 M. W. N. 625=26 M. L. T. 246 (F.B.).]

THIS was an appeal under section 10 of the Letters Patent, 1866, from the following judgment of a Judge of the Court sitting singly.

"The sole ground taken in the memorandum of appeal in this case is that the lower appellate Court was wrong in refusing to admit additional documentary evidence, which was tendered at the hearing of the appeal. In my opinion such ground does not fall within any of the grounds set forth in section 584 of the Code of Civil Procedure. It is a matter in the discretion of the appellate Court to admit additional evidence. If it refuses to exercise that discretion, I do not think that such refusal is a substantial error or defect in procedure. It was held in the case of *Beckwith* v. *Kisto Jeebun Buckshee* (1), which was followed in *Golam Mukdoon* v. *Mussammat Hafeezoonissa* (2) [122] no special appeal lay in such a case. The same view was taken in *Kulpo Singh* v. *Thakoor Singh* (3). It is true that these decisions were under section 365 of the former Code, but the language of that section does not differ in any material point from the language of section 568 of the present Code. In my opinion this appeal does not lie. I dismiss it with costs."

In appeal Mr. *R. Malcomson* for the appellant urged the same points which had been taken before the Single Bench, namely, that the learned Subordinate Judge was wrong in refusing to consider copies of certain documents tendered to him under section 568 of the Code of Civil Procedure. The facts of the case sufficiently appear from the judgment of the Chief Justice.

STRACHEY, C. J.—The appeal from the Court below was dismissed by Mr. Justice Aikman on the ground that it would not lie under sec-

* Appeal No. 37 of 1900 under section 10 of the Letters Patent.

(1) (1863) Marshall, p. 278.
(2) (1867) 7 W. R. C. R. 489.
(3) (1871) 15 W. R. C. R. 429.

under their clothes none of them had any license to carry arms A further fact, of which we are bound judicially to take notice, is that at that period the district of Agra was notorious as the scene of frequent and recent dacoities Are the above facts in the absence of any explanation given by the accused as to why they were assembled together at such a time and under such circumstances sufficient to permit the inference being drawn that they were assembled for the purpose of committing a dacoity? The facts are certainly not inconsistent with the idea that a dacoity was about to be committed and had there been evidence that at or about that time and in that vicinity a dacoity had been committed, all the facts above mentioned would have been relevant facts which would have gone far to establish a case of dacoity against the appellants

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It cannot be denied that the assembly of these men under the circumstances established by the evidence, was of a nature to excite suspicion The object for which they had assembled and for which they were carrying guns and swords concealed about their persons was a fact specially within their knowledge The Crown alleged that the object for which they had assembled was the object of committing dacoity If their object was an innocent or proper one the explanation could have been given without difficulty In the absence of any explanation we think that the existence of an intention to commit dacoity has been proved by the evidence given of the conduct of the accused and the circumstances under which they were arrested From such conduct and the circumstances we are entitled to infer as so probable the existence of an intent to commit dacoity that a prudent man would act upon the supposition that such intention did exist The burden [126] of proving the contrary would, in accordance with the provisions of section 106 of the Indian Evidence Act, rest upon the accused In the view we take of this case we are supported by the precedents —*The Deputy Legal Remembrancer* v *Karuna Baistobi* (1), *Balmakund Ram* v *Ghansam Ram* (2) and *Queen Empress* v *Papa Sani* (3) We dismiss the appeal

Appeal dismissed

23 A 126 (=21 A W N 15)

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

HARBANS LAL (*Plaintiff*) v THE MAHARAJA OF BENARES (*Defendants*) * [22nd December 1900]

Evidence—Presumption—Tenant at fixed rate—Ownership of trees standing on fixed rate tenant's holding

A tenant at fixed rates having a transferable right in his holding the presumption is that the trees standing thereon are the property of the tenant and not of the Zamindar

[Ref 4 N L R 101]

* Second Appeal No. 601 of 1899 from a decree of Babu Mohan Lal, Subordinate Judge of Benares dated the 21st June 1899 reversing a decree of Babu Srish Chander Bose Munsif of Benares dated the 15th December 1897

(1) (1891) I L. R. 22 Cal 164
(2) (1894) I. L. R. 22 Cal 391
(3) (1899) I L. R 23 Mad 159

death in that of the appellant. Under these circumstances it seems to me that, whether rightly or wrongly, the lower appellate Court did exercise its discretion in considering the application under section 568, and [124] that therefore its refusal to admit the evidence was not an error or defect in procedure within the meaning of section 584. The learned Judge was right in dismissing the appeal before him, and this Letters Patent appeal must also be dismissed.

BANERJI, J.—I am of the same opinion. Under section 568 of the Code, a party to an appeal is not entitled to produce additional evidence in appeal as of right, but the Court may in its discretion admit additional evidence. Where the Court has exercised its discretion and in the exercise of its discretion has refused to admit additional evidence, it cannot be said that a substantial error or defect in procedure has taken place which affords a ground of second appeal under section 584.

Appeal dismissed.

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23 A. 124 (=21 A. W. N. 16.)

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* BHOLU AND OTHERS.* [21st December, 1900].

Act No. XLV of 1860 (*Indian Penal Code*), *section* 402—*Assembling for the purpose of committing dacoity—Evidence.*

Several persons were found at 11 o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, snd none of them could give any reasonable explanation of his presence at the spot under the particular circumstances. *Held*, that these persons were rightly convicted under section 402 of the Indian Penal Code of assembling together with intent to commit dacoity. *The Deputy Legal Remembrancer* v. *Karuna Baistobi* (1) *Balmakund Ram* v. *Ghansam Ram* (2) and *Queen-Empress* v. *Papa Sani* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

KNOX and BURKITT, JJ.—The five appellants in this case have been convicted by the Sessions Court at Agra of an offence under section 402 of the Indian Penal Code, and sentenced each of them to seven years' rigorous imprisonment.

[125] The learned counsel who appears for the appellants does not contest the facts of the case. He contends that even upon those facts as proved no offence is established under section 402, inasmuch as there is no evidence from which it can be inferred, either directly or indirectly, that the appellants, when arrested, were assembled for the purpose of committing dacoity.

Now what are the facts? The appellants were arrested at 11 p. m. at night on the 26th of May, 1900. They were all of them heavily armed with guns and swords, and these guns and swords were concealed

* Criminal Appeal No. 685 of 1900.

(1) (1894) I. L. R. 22 Cal. 164.
(2) (1894) I. L. R. 22 Cal. 391.
(3) (1899) I. L. R. 23 Mad. 159.

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to the effect that the plaintiff had [128] been out of possession of the trees twelve years prior to the suit, that would have been sufficient to dispose of the claim I have carefully studied the judgment, and I am unable to find in it any clear finding, or in fact any finding at all, on this issue In order to enable us to dispose of the appeal I would therefore refer the following issue to the lower appellate Court for trial under the provisions of section 566 of the Code of Civil Procedure, namely, whether the plaintiff was in possession of the trees in suit at any time within twelve years prior to the 23rd of October, 1895, on which date this suit was instituted In my opinion this issue should be tried upon the evidence already on the record

BANERJI, J —I agree with my learned colleague that the Subordinate Judge was wrong in the view that in the case of trees existing on the holding of a tenant at fixed rates the presumption is that they belong to the landholder As has been pointed out by my learned colleague, since a tenant at fixed rates has a transferable right in respect of his holding, he has a similar right in respect of the trees which grow on the holding The Subordinate Judge is clearly in error when he says that unless such a tenant can prove that he planted the trees, or that he acquired a title by prescription, he cannot be deemed to be the owner of the trees Still, in order to entitle the plaintiff to a decree, he is bound to prove his possession within twelve years of the suit I should have taken the finding of the lower Court on the question of possession to be a finding that the plaintiff has not proved such possession But as my learned colleague is of opinion that the finding is not very clear, I have no objection to the order proposed by him The order of the Court is, that the issue mentioned in the judgment of my brother Aikman be referred to the Court below under section 566 of the Code for trial on the evidence already on the record On return of the finding ten days will be allowed to either party for filing objections.

Issue referred under section 566 of the Code of Civil Procedure

On return being made that the plaintiffs had been in possession within twelve years, the appeal was allowed, the decree of the lower Appellate Court set aside, and that of the first Court restored with costs

Appeal allowed

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23 A 129 (=21 A W N. 18)

[129] APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

UMRAO SINGH (*Plaintiff*) v DALIP SINGH AND OTHERS (*Defendants*) * [2nd January, 1901]

Guardian and minor—Pre-emption—Refusal of guardian on behalf of minor to claim pre-emption—Minor bound by such refusal

The guardian of a minor is competent to exercise on behalf of the minor, or to refuse to exercise, a right of pre emption accruing to the minor, and if he refuses in good faith and in the interests of the minor, the minor is bound by such refusal *Lal Bahadur Singh* v *Durga Singh* (1) referred to

[Ref 35 Cal 575]

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* Second Appeal No 531 of 1898 from a decree of Babu Baij Nath, Rai Bahadur, Subordinate Judge of Saharanpur, dated the 22nd June 1898, confirming a decree of Pandit Mohan Lal, Munsif of Deoband, dated the 25th May 1897.

(1) (1881) I L R 8 All 437.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi *Haribans Sahai*, for the Appellant.

Babu *Satya Chandra Mukerji* (for whom Mr. *Abdul Raoof*), for the Respondent.

AIKMAN, J.—This appeal arises out of a suit brought by one Harbans Lal against the Maharaja of Benares. The case of the plaintiff was, that three tamarind trees stood in the holding, of which he was a tenant at fixed rates, that the defendant three years previously had taken the fruit of the said trees, and in the month of June preceding the institution of this suit, had sold by auction some branches of the trees and appropriated the proceeds thereof. He accordingly prayed for a declaration of his right to the trees, and asked for a decree of maintenance of possession. In the alternative he prayed that if the Court were of opinion that he was out of possession, a decree might be given for possession. He also asked for damages. For the defendant it was pleaded that neither plaintiff nor his ancestors ever had anything to do with the trees, which, it was asserted, were in the possession of the defendant; that the plaintiff had not been in possession of the [127] trees within twelve years preceding the suit, and that the trees stood, not in the plaintiff's holding as alleged by him, but on waste land, the property of the defendant. The Court of first instance gave the plaintiff a decree for possession. In appeal by the defendant a plea was taken that as the trees in question were recorded in the Government papers as the property of the Government, the Secretary of State was a necessary party to the suit. In disregard of the clear provisions of section 34 of the Code of Civil Procedure the lower Appellate Court entertained this plea, set aside the decree of the Munsif and remanded the case under the provisions of section 562 of the Code of Civil Procedure for trial on the merits after making the Secretary of State a party. When the case went back to the Munsif, Government did not dispute the plaintiff's claim. The Munsif then disposed of the case as he had previously done, giving the plaintiff a decree for possession of the trees. This decree was appealed. One of the pleas taken by the defendant is to the effect that the evidence on the record does not prove the plaintiff's possession of the trees within twelve years. The Subordinate Judge finds that the trees grow on the land of which the plaintiff is a tenant at fixed rates, and of which the defendant is the Zemindar. He states that this being so, the presumption is that the property in the trees is with the Zemindar, and that the plaintiff could only become owner of the trees by prescription; further, that to establish his ownership the plaintiff had to prove his possession for full twelve years, ending on the date of institution of the suit. The Subordinate Judge goes on to say that the allegations in the plaint are of themselves sufficient to establish the defendant's possession and the plaintiff's dispossession. I am unable to agree with the proposition laid down by the Subordinate Judge that the presumption regarding trees on land held by a tenant at fixed rates is that the trees belong to the landholder. In my judgment the presumption is the other way. The general rule is that trees go with the land. A tenant at fixed rates has a transferable right in his holding, and the presumption is that he has also a transferable right in the trees thereon and is the owner thereof. Still, had the Subordinate Judge come to any definite finding on the plea raised by the defendant

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Where no objections under section 561 of the Code of Civil Procedure have been filed by the respondent, an appellant has an absolute right to withdraw his appeal at any time before judgment, but where such objections have been filed the appellant, if he wishes to withdraw his appeal, must do so before the hearing of the appeal has commenced. *Ajudh Bakhsh* v. *Niamat Ali* (1) and *Jafar Husain* v. *Ranjit Singh* (2) referred to *Venkataramanayya* v. *Kuppa* (3) and *Dhondi Jagannath* v *The Collector of Salt Revenue* (4) distinguished

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Babu *Jogindra Nath Chaudhuri* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Gokul Prasad*, for the respondents.

STRACHEY, C J.—The question is, whether an appellate Court is entitled, after the hearing of the appeal has been concluded, but [131] before judgment, to refuse to allow the appellant to withdraw his appeal, the first Court's decree having been wholly in favour of the respondents, and there being consequently no objections filed by the respondents under section 561 of the Code of Civil Procedure. The appellant here brought this suit, in which he claimed, first, to eject the defendants from a house which he alleged that they occupied as his tenants, and of which they had denied his title as landlord; and secondly, the demolition of a wall built by the defendants on land near the house which the plaintiff alleged belonged to him. The defence was that both the house and the land on which the wall was built, belonged absolutely to the defendants and not to the plaintiff The Court of first instance in its judgment decided the questions of title in the plaintiff's favour on both points, but dismissed the suit, the main ground being, as regards the house, that the plaintiff had not served notice to quit on the defendants in accordance with section 106 of the Transfer of Property Act, 1882; and as regards the wall, that though built on land belonging to plaintiff, it was merely built in the place of an old *kachcha* wall that had for a long time stood on the land. The decree of the first Court wholly dismissed the plaintiff's suit. Against that decree the plaintiff appealed to the Court of the District Judge. No objections to the decree were filed by the defendants under section 561 of the Code As the decree was wholly in their favour, they could not have filed such objections, any more than they could have brought a cross appeal against the decree. They were, under the first part of section 561, entitled to support the decree of the first Court upon any ground decided against them in the Court below; that is, they were entitled to contend, and the judgment now under appeal shows that they did contend, that the first Court ought to have decided the questions of title in their favour and to have dismissed the suit on that ground. After the argument on the appeal had been concluded, but before judgment had been delivered, the appellant presented an application which was somewhat ambiguously worded, but which the Judge took to be an application for permission to withdraw the appeal The application was expressly described as one under section 373 read with section 582 of the Code. In it the appellant did not ask the [132] Court to grant him permission to bring a fresh suit for fresh appeal Its prayer was that the appeal might be dismissed; but, having

(1) Weekly Notes, 1884, p. 23
(2) (1895) I. L. R. 17 All. 315.
(3) (1867) 3 Mad. H. C Rep. 302.
(4) (1884) I. L. R. 9 Bom. 28.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

STRACHEY, C. J. and BANERJI, J.—The judgment of the lower appellate Court is a short one, but upon the second issue, which is the only point we have to deal with, the Subordinate Judge, we think clearly adopts both the conclusion and the reasoning of the Munsif. Reading the observations of the Munsif with those of the Court of the Subordinate Judge on this point, we think that the Subordinate Judge clearly finds that the plaintiff's mother and guardian acquiesced in the sale, which is the subject of this pre-emption suit, and we do not agree with the contention that that finding as to the acquiescence is merely an inference from the fact that the plaintiff's mother was present at the time of the sale and kept silent. We think, on the contrary, that the finding of acquiescence is based on all the circumstances of the case connected with the sale, among which the standing by with silence of the mother and guardian would no doubt be a material element. We must take it, then, that the plaintiff's guardian acquiesced in the sale in the sense that she gave up, so far as she was competent to do so on behalf of the minor, the minor's right of pre-emption in respect of that sale. The only remaining question is whether the minor is bound under the circumstances by her acquiescence in the sale. As to this it was held in the case of *Lal Bahadur Singh* v. *Durga Singh* (1) that **[130]** the guardian of a minor is fully competent to assert a right of pre-emption, and to refuse or accept an offer of the share in pursuance of such right, and that the minor would be bound by his guardian's act if done in good faith and in his interest. Here the refusal of the guardian is treated as binding on the minor in the same way and to the same extent as an acceptance would do; and if that is correct, we think it must be held that an acquiescence in the sale, if in good faith, and in the minors interest, would stand upon the same footing as an express refusal to accept the property in pursuance of the pre-emptive right. It has not been contended that here the guardian's act was not done in good faith, and in the minor's interest, and indeed the Courts below virtually find that the act was done in good faith, and expressly find that it was in his interest. The result is that this appeal must be dismissed with costs.

Appeal dismissed.

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23 A. 130.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

KALYAN SINGH (*Plaintiff*) *v.* RAHMU AND ANOTHER (*Defendants.*)*
[10th January, 1901.]

Civil Procedure Code, sections 373, 561—*Appeal—Right of appellant to withdraw his appeal at any time before judgment.*

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* Second Appeal No. 666 of 1898, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 21st July 1898, confirming a decree of Maulvi Muhammad Shafi, Munsif of Koil, dated the 1st November 1897.

(1) (1881) I. L. R. 3 All. 437.

so as to prevent the respondent's cross objections being heard, though he could have done so at any time before the hearing began The cases are collected in *Jafar Husain* v *Ranjit Singh* (1) The reason is that cross objections under section 561 are in the nature of an appeal—a remedy which a respondent has against a decree which is partly unfavourable to him, and although they so far differ from a cross appeal that they depend on the hearing of the appeal, and cannot be heard if the appeal is not heard, yet if the hearing has commenced, the Court becomes seised of the cross objections, and the respondent cannot then be deprived of his remedy because the appellant chooses to abandon his But in no case has it been held that where the decree being wholly in the respondent's favour, he could neither appeal nor file objections under section 561, the appellant cannot exercise his [134] ordinary right to withdraw his appeal at any time up to its actual decision Mr Gokul Prasad contended that the principle laid down in the cases is applicable where the respondent, though not filing objections under the second part of section 561, supports the decree under the first part of the section on any of the grounds decided against him in the Court below I think that is clearly not so Where the decree is wholly in favour of the respondent his right to contest any of the conclusions in the first Court's judgment is only for the purpose of supporting the decree, and if the appeal is withdrawn that purpose is fully secured, because the decree is left standing, and the right to dispute the conclusions in the judgment is no longer of any use to him To withdraw the appeal in such a case does not, as in the case of cross objections filed under the second part of section 561, deprive the respondent of any remedy whatever For these reasons it appears to me that the learned Judge ought to have treated the appeal before him as withdrawn, and that we ought now to give effect to that withdrawal by allowing the present appeal, setting aside the decree of the lower appellate Court, and restoring that of the Court of first instance The appellant will have the costs of this appeal, and will pay the respondent's costs in the lower appellate Court As to the costs in the first Court, they are provided for in that Court's decree, which we restore

BANERJI, J —I am entirely of the same opinion I think the learned Judge of the Court below was wrong in holding that he was competent to refuse leave to the appellant to withdraw his appeal Had the appellant asked the Court to allow him to withdraw from the appeal with liberty to bring a fresh suit or appeal, certainly the leave of the Court would have been necessary, but as his application was for a withdrawal from the appeal without any reservation of a right to bring a separate suit the Court was bound to record the withdrawal, and it had no power to refuse to allow the appellant to withdraw The learned Judge appears to have confused the two classes of cases referred to in section 561 of the Code of Civil Procedure Under that section a respondent may support the decree of the Court of first instance upon grounds which may have been decided against him by that Court, and if a part of the decree is adverse to him he has the [135] right to object at the hearing of the appeal to that part of the decree without filing a separate appeal The learned Judge seems to think that both these cases are of an analogous character In the case

(1) (1895) I L R 17 All 518

regard to the context, I think that the learned Judge was clearly right in his view that what the appellant wanted was to withdraw the appeal. No doubt he wanted to do so because he was afraid that the Judge was going to dismiss the suit, not upon the first Court's grounds, but upon the questions of title, and he did not want to have the suit dismissed in a manner which would operate as *res judicata* upon those questions. The learned Judge, however, refused to allow the appeal to be withdrawn. He gave judgment dismissing the appeal and the suit on the ground that the plaintiff had failed to establish his title to either the house or the land occupied by the wall, and that the defendants had acquired a title by twelve years' adverse possession. He gave his reasons for refusing to allow the appeal to be withdrawn as follows:—"I may add that appellant has filed an application after arguments were heard, asking for leave to withdraw his appeal. This cannot be allowed against the wish of the respondents, as the application has obviously been made in order to prevent a decision of the title against the appellant. The appellate Court, after an appeal has been heard, is seised of the case, including the respondent's objections, and the appeal cannot be withdrawn so as to prevent these objections being heard and determined. I refer to the cases of *Venkataramanaiya* v. *Kuppi* (1) and *Dhondi Jagannath* v. *The Collector of Salt Revenue* (2)." The plaintiff now appeals against the dismissal of his suit by the lower appellate Court, on the ground that the learned Judge ought to have allowed him to withdraw the appeal, and ought not to have passed a decree dismissing it. In the first place, I think that no application for leave to withdraw the appeal was necessary. Subject to a qualification which I shall mention presently, I think that an appellant has an absolute right to withdraw his appeal at any time before the decision. That a plaintiff has an absolute right to withdraw his suit without any permission from the Court was held in the case of *Allah Bakhsh* v. *Niamat Ali* (3). An appellant has a similar right to [133] withdraw his appeal. That is only common sense. Why should a Court compel an unwilling plaintiff or an unwilling appellant to proceed with the suit or appeal? If no permission is given to him to sue again he cannot do so, and the result in the case of an appeal is that the decree of the first Court remains, and matters are just as if no appeal had been preferred at all. Section 373 of the Code requires the permission of the Court, not for the withdrawal but for the bringing of a fresh suit or appeal, and paragraph 2 shows that a suit or appeal may be withdrawn without permission, the result being that in that case a fresh suit or appeal in the same matter cannot be brought. Therefore I think that the Judge ought to have treated the appellant's application, not as an application for permission to withdraw the appeal, but as an intimation of withdrawal, and should not have proceeded to decide the appeal. The cases referred to by the learned Judge deal with a very different state of things. In each of them the first Court's decree, instead of, as here, being wholly in favour of the respondents, was in part against him, and the respondent had taken objections under section 561, or under the corresponding section 348 of the Code of 1859. The cases show that where a respondent has under section 561 taken objections to the first Court's decree, which he could have taken by way of appeal against a decree partly against him, then, if the hearing has begun, the appellant cannot withdraw the appeal

(1) (1867) 3 Mad. H. C. Rep. 302.
(2) (1884) I. L. R. 9 Bom. 28.
(3) Weekly Notes, 1892, p. 53.

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no right to object to its attachment It consequently disallowed the objection which had been raised by the judgment debtor Against this order the judgment debtor appeals In my opinion the view taken by the lower Court is wrong It is clear from the words of the first paragraph of section 266 of the Code of Civil Procedure, that it is money over which the judgment debtor has a disposing power which he may exercise for his own benefit which is liable to attachment Now in this case it appears to me that the money in question was not money over the whole of which the judgment debtor had such a disposing power An auctioneer is entitled to a certain commission on the price of articles sold by him, which belonged to the persons who sent the things to him for auction It may also be that some of the articles sold may have been Mr Smith's own property Over the commission in one case and the price of the articles in the latter case Mr Smith had a disposing power which he could exercise for his own benefit With regard to the objection that Mr Smith had no right to object to the attachment, I am of opinion that it is without force I see nothing to prevent a judgment debtor contending that he is the trustee or bailee of certain property, and that therefore it is not liable to attachment [137] under the provisions of section 266 Taking the above view of the case, I allow the appeal, and, setting aside the order of the lower Court, remand the case to that Court, in order that it may determine over what portion of the money attached the judgment debtor had a disposing power which he could exercise for his own benefit Costs here and in the lower Court will abide the result

Appeal decreed and cause remanded

[23 A 137 (=27 I A 168=2 Bom L R 967=5 C W N 1= 10 M L J 279=7 Sar 767)

PRIVY COUNCIL

PRESENT

Lords Hobhouse, Macnaghten and Lindley, Sir Richard Couch and Sir Henry De Villiers

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HODGES AND ANOTHER (*Defendants*) v THE DELHI AND LONDON BANK, LIMITED (*Plaintiff*) [28th, 29th June, 3rd, 21st July, 1900]

On appeal from the Court of the Judicial Commissioner of Oudh

Principal and surety—Act No IX of 1872 (*Indian Contract Act*), *section* 135—*Stipulation against discharge of surety by time being given to the debtor—Pardanashin women as a class protected*

The first of the two appellants represented the estate of a deceased surety for the repayment by the borrower of money lent on his bond by the respondent bank The second was another surety Both had agreed that, though in relation to the principal debtor they were to be regarded as sureties only, they were, upon default by him to be in the position of debtors to the bank for the amount secured, and thus not to be discharged from liability in consequence of any dealings between the bank and the principal debtor, whereby in the absence of this stipulation they would have been exonerated

Default was made by the principal, and time was allowed to him by arrangement between him and the bank

of the decree of the first Court being partially adverse to the respondent, the section allows him the right to take objections to that part of the decree, and when he has done so and the appeal has proceeded to hearing, the Court, being seised of the objections, is bound to decide them, although the appellant may have withdrawn from the appeal; but where the respondent has preferred no objections under the second paragraph of the section, the Court cannot refuse to allow the appellant to withdraw the appeal because the result may be that the respondent will not be able to challenge the findings of the Court below which are adverse to him. As has been pointed out by the learned Chief Justice, the respondent does not suffer, and is not prejudiced in any way, by the withdrawal. He could have supported the decree upon grounds other than those on which the decree was passed. But when the appellant withdraws the appeal the decree remains as it is, that is, as a decree in favour of the respondent, and the respondent has no occasion to support it upon any grounds other than those on which the Court of first instance passed it. That being so, the learned Judge was wrong in proceeding to hear the appeal and in deciding it on the merits. I agree in the order proposed.

Appeal decreed.

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23 A. 135 (=21 A. W. N. 20.)

APPELLATE CIVIL.

Before Mr. Justice Aikman.

T. H. SMITH (*Judgment-debtor*) *v.* THE ALLAHABAD BANK, LTD. (*Decree-holder*).* [11th January, 1901.]

Civil Procedure Code, section 266—Execution of decree—Attachment of money payable to an auctioneer by purchasers of goods sold by him at auction.

Held that money payable to an auctioneer by purchasers of goods entrusted to him for auction could not be attached by the creditors of the auctioneer except as to such an amount as the judgment-debtor had a disposing power over which he could exercise for his own benefit; and further, that if such money was attached the auctioneer was a proper person to raise the objection that it was not attachable under section 266 of the Code of Civil Procedure.

[136] THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. K. Sorabji*, for the appellant.

Munshi *Jang Bahadur Lal*, for the respondent.

AIKMAN, J.—This appeal arises out of proceedings in execution of a decree obtained by the Allahabad Bank, Limited, against the appellant, T. H. Smith. From the facts stated in the judgment of the lower Court it appears that the judgment-debtor is an auctioneer, to whom the public send articles for sale by auction, and that the respondent, the Allahabad Bank, has attached in the hands of the purchasers of certain articles sold by Mr. Smith as auctioneer, the amounts these purchasers bid at auction, but which they had not on the date of attachment paid to the auctioneer. The judgment-debtor objected to the attachment on the ground that the money was the proceeds of the sale of articles which did not belong to him. The lower Court on the above facts expressed an opinion that the money belonged to Mr. Smith, and further that he had

* First appeal No. 218 of 1900 from an order of Syed Muhammad Sirajuddin, Judge of the Court of Small Causes, exercising powers of a Subordinate Judge, at Allahabad, dated the 2nd August 1900.

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was alleged, she was incompetent to enter into having led a secluded life Crasters defence was that he had been misled as to the nature of his liability on the contract with reference to dealings between the bank and the principal debtor

The Civil Judge of Lucknow discharged from liability both the present appellants, on the ground that the bank had given time to the debtor without the consent of the sureties In his judgment, which exonerated the estate of Katherine Hodges, he found that she was not illiterate or uneducated, and that she was neither a *purda nashin* nor a "*quasi parda nashin*, that having been the term employed to denote her alleged position There had been no evidence whatever to show that the bank was aware of their having been any undue influence exercised over her, nor was there any such influence or misrepresentation

The judgment of the Judicial Commissioners Court, on the bank s appeal, was to a different effect The Commissioners found, however, in concurrence with the first Court, that Katherine Hodges was in an independent position and entered into the contract of suretyship without being influenced unduly by her son in law or anyone Her act in so doing was a reasonable one, and she had executed the bond with a free will and with intelligence.

As to the plea that the bank had discharged the sureties by giving time to the principal debtor, the Court was of opinion that there was no contract to grant time from September 1886 to the December following, and that as to the allowance of time from July 1888 to May 1889, the contract to grant it was between the bank and Mrs Oldham, and not between the bank and the principal debtor The sureties, therefore, in the judgment of the Appellate Court were not discharged, and a decree was made against both for the amount claimed

[140] Sir *W H Rattigan*, Q C, Mr *J Ashton* and Mr *L De Gruyther*, for the two appellants who had filed separate cases, submitted that there was error in the judgment of the appellate Court, which had been grounded on the construction of the sureties' agreement in reference to the effect of dealings between the bank and the principal debtor For the first appellant it was argued that Katherine Hodges had not entered into a valid contract binding upon her estate, either in purporting to become a surety for Colonel Oldham, or in executing the deed which contained the clause to prevent the operation of the ordinary law from taking its course, that the giving time by the creditor should exonerate her—Indian Contract Act, 1872, section 135 The defence had been throughout set up, and it was contended now that, if she was not actually a *parda nashin* in the strict sense of the term, she was in a position resembling a lady of that class, and from her limited experience of life and knowledge of social matters, entitled to the equitable relief afforded to that class when they had been sued on contracts which they had purported to enter into The term *quasi parda nashin*, which had been used, was not one by which this argument stood or fell But it was contended that having lived in much seclusion, according to the usages of the Muhammadan ladies among whom she was born, she was so situated as that it could be claimed for her that, unless it had been proved that due care had been exercised in explaining the transaction to her, she should not be held bound by it, and that it should also be considered how open such a person might be to the persuasion of those about her This was an improvident act on her part to involve her

The deceased surety, by birth a Kashmiri, had been, and was found by both Courts below to have been, intelligent and quite competent to manage business affairs, and to have executed of her own volition. Neither of the sureties could avoid liability in the absence of proof of misrepresentation or undue influence, and no evidence was given of these.

A woman who is not a *pardanashin* cannot be regarded as under the same protection of law that regulates the making of contracts by women of that class. Where it is alleged that a woman not of that class is wanting in sufficient capacity for business, that fact must be proved in order to show that those who have contracted with her, in good faith, as an ordinary person, were legally bound to take special precautions.

[Ref ; 4 Bom. L. R. 146 ; 3 I. C. 330=12 C. L. J. 115 ; (Pardanashin women)].

[138] APPEAL from a decree (4th February 1893) of the Court of the Judicial Commissioner, reversing a decree (14th April 1896) of the Additional Civil Judge of Lucknow.

In this suit the respondent bank sued for the principal and interest secured by a bond of the 29th January 1886, executed by Colonel Oldham, who made no defence, for the repayment of money lent to him by the bank. He had agreed to make repayment by monthly instalments, default in one making the whole to become due ; and the sureties agreed that they were to become on any default principal debtors to the bank, dealings between whom and the borrower were not to have the effect of discharging them. The sureties were Mrs. Katherine Hodges, mother of Colonel Oldham's wife, and Lieutenant Craster.

So much of the deed as is material to the main question, and all the facts of the case appear in their Lordships' judgment.

Default was made in the following month of September. Colonel Oldham's wife, who was also a defendant, and who also made no defence, charged her separate interest in certain property settled upon her, obtaining time thereby for her husband by arrangements with the bank. Katherine Hodges died in 1886, and was represented by R. N. Hodges, her executor.

This suit was brought on the 2nd May 1889 against the four persons abovenamed; with a fifth who was discharged on a preliminary matter. The plaint, not having been verified in due manner was rejected at first ; and this matter having been appealed (1), the suit was not heard on the merits until 1896. Robert N. Hodges, with Craster, defended the suit. Their defences were not identical. They raised the questions which were decided on the present appeal. The first, common to both, was, whether or not the sureties had been released from their liability by the fact that time had been given to the principal debtor by the bank. Upon this the Courts below had differed. The Court of first instance had been of opinion that they had been released. The Appellate Court held that they had not been exonerated, in consequence of there having been a clause in the contract between the parties preventing this result.

[139] The first appellant, Hodges, raised a question in reference to the liability of the estate of Katherine Hodges :—Whether she would have been entitled to be relieved from her contract on the ground of her having been a person under the same conditions as a *pardanashin*, and therefore to be regarded as entitled to have had explanations made to her before entering into the contract ; and no such precautions having been taken, whether her estate could be held bound by a contract which, as it

(1) (1893) *Delhi and London Bank* v. *Oldham*, I. L. R. 21 Cal. 60 ; L. R. 20 I. A. 139.

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Afterwards, on the 21st July 1900, their Lordships' judgment was delivered by LORD HOBHOUSE —

The appellants in this case were defendants in the suit brought by the respondent bank. They had different defences, and their reasons in support of the appeal are different For defendants so situated to join in a single appeal is an irregular proceeding, and might easily result in inconvenient consequences. But they have been allowed to lodge separate cases, and their Lordships have heard them by separate counsel, and as matters turn out the misjoinder in appeal will not cause any embarrassment

On 29th January 1886 three documents were executed for the purpose of securing a loan made by the bank to Colonel, then Major, Oldham of the 12th Native Infantry, then quartered at Lucknow The first is an indenture made between Colonel Oldham of the first part, Katherine Hodges, widow, of Loodiana, and the defendant, Captain Craster, then a Lieutenant in the same regiment of Infantry, of the second part, and the bank of the third part After reciting that Rs 4,500 had at the request of the other three parties been advanced by the bank to Oldham upon an agreement for repayment as thereinafter provided, it is witnessed that the three parties jointly and severally covenant with the bank that Oldham shall pay the principal and interest and the premiums on a life policy by monthly instalments of Rs 300, beginning on the 10th March next; the whole amount to be recoverable on failure to pay any instalment The last clause of the deed runs as follows —

[illegible] although as between the [illegible] J C B Craster the said [illegible] as sureties only for the [illegible] Hodges, J C B Craster [illegible] er are to be considered as [illegible] odges and J C B Craster, "their heirs, executors or administrators, or either of them shall not be discharged "or exonerated by any dealings between the said Arthur Oldham, his heirs, executors or administrators and the said bank, whereby the said K Hodges and J C B. "Craster as sureties only for the said Arthur Oldham would have been so discharged "or exonerated"

The second of the three documents is a letter written by Mrs Hodges to the bank It states that she hands to the bank certain certificates for shares in other banks with a power of attorney to enable the bank to sell them In the event of her loan account with the bank (joint and several with Oldham and Craster) becoming out of order by infringement of any of the conditions of the bond securing it, the bank may sell for the credit of the loan account The third document is the power of attorney mentioned in the letter.

On 8th June 1886 Mrs Hodges died, and the appellant Robert Hodges is her administrator In September 1886 Colonel Oldham failed to pay the instalment due to the bank He applied for delay, but was informed by the bank that it could not be granted without the consent of his sureties. Craster consented to a delay of four months, but no consent could be given on the part of Mrs Hodges' estate to which no representative had then been appointed

After this much time was consumed in applications by the bank for payment and proposals on the part of Oldham for delay. On the 26th July 1888 Mrs Oldham, wife of the Colonel executed a bond whereby she charged her interest under her father's will in consideration of the

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estate, and it was not apparent that the contingent consequences of her act were known to her. The case had required that she should have had the advice of some competent and independent person, or at least have had an opportunity to consult such a person. Reliance was placed on propositions showing the extent to which a contracting party was bound to make known facts as stated in the judgment in *Davies* v. *The London and Provincial Insurance Company* (1). The plaintiff was under the obligation to show that the whole transaction had been fully understood by Katherine Hodges, not that at this stage there was [141] a question of burden of proof, as the whole evidence was before this Committee, but, instead of that necessity, the plaintiff was in the position that the transaction might be declared invalid. There had been no sufficient evidence that the transaction had been understood by Katherine Hodges, and that she had entered into it of her free will. Reference was made to *Wajid Khan* v. *Raja Ewaz Ali Khan* (2), *Mariam Bibi* v. *Sakina* (3), *Lalli* v. *Ram Prasad* (4). The extent of the liability of the first appellant to pay out of the estate of Katherine Hodges had not been rightly defined. The judgment below had held him liable for all the balance of her late husband's estate that was in her ostensible possession at her death. But there were claims upon that estate under her late husband's will which might be preferred. It was a matter of account to what extent the representative of Katherine Hodge's estate was liable in respect of it upon the present claim, if at all.

As regards the second appellant Craster, he was a surety only by the terms of the deed on its general purport, and he was entitled to rely on the ordinary rights of a surety, including the right to be relieved of liability when the bank by a binding contract with Colonel Oldham had given time to the latter as the principal debtor.

Mr. A. *Cohen*, Q.C., and Mr. *J. D. Mayne*, argued that there was no act that the bank had done whereby the sureties' discharge from their liability could be claimed. The stipulation in the deed that no dealings between the bank and the principle debtor should effect their release was valid and operative. Nor was there anything inequitable in enforcing that stipulation. It was true that sureties did not become principal debtors on the execution of the deed, but remained sureties as long as the debtor continued to pay instalments. They became principal debtors as soon as Colonel Oldham, the borrower, made default in the terms fixed for repayment of the debt. The sureties were liable, and section 135 of the Contract Act, 1872, did not apply to them.

Regarding Katherine Hodges, there was no such position recognised by law as that of *quasi-parda-nashin*. The evidence [142] showed that she was not a *parda-nashin*, and that she was a person of superior mind and of business capabilities. Thus she could not be considered to be a person requiring the protection claimed. They referred to *Muhammad Buksh Khan* v. *Hosseini Bibi* (5). As to costs, reference was made to *Marshall* v. *Willder* (6), where an executor had defended a suit.

Sir *W. H. Rattigan*, Q. C., replied.

(1) (1878) L. R. 8 Ch. D. 469.
(2) (1891) L. R. 18 I. A. 144; I. L. R. 18 Cal. 545.
(3) (1891) I. L. R. 14 All. 8.
(4) (1886) I. L. R. 9 All. 74.
(5) (1888) L. R. 15 I. A. 81; I. L. R. 15 Cal. 684.
(6) (1829) 9 B. and C. 655.

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forbearance of the bank from suing Oldham, Hodges and Craster till the 1st May 1889. This suit was brought on 2nd May 1859 to obtain payment from the parties personally liable and from the estate of Mrs. Hodges.

The defences raised by Robert Hodges, which are now material, are these: First, he says that Mrs. Hodges was a *quasi-parda-nashin* lady, of no education, unable to read or write English, and quite incapable of understanding the terms of the three instruments in question; which were not explained to her, [144] and on which she had no independent advice. Secondly, he says that her execution of the instruments was obtained by undue influence and misrepresentation on the part of Colonel and Mrs. Oldham. Thirdly, that the bank had given time to the principal debtor and had thereby discharged the surety.

The fourth and fifth issues stated by the first Court were as follows:—

"4. Was Katherine Hodges a *quasi-parda-nashin* lady and "uneducated?"

"5. Did Katherine Hodges execute and understand the documents" alleged to have been executed by her?"

The first Court answered the fourth issue in the negative (*Rec. p.* 267). On the fifth issue the learned Judge thought that Mrs. Oldham explained the deeds to Mrs. Hodges, and he says it is apparent that Mrs. Hodges was not a person to sign deeds without first knowing what they contained. He therefore answered the fifth issue in the affirmative. But this latter finding must be taken as qualified by a subsequent part of his judgment.

It will be convenient here to state the position and character of Mrs. Hodges. The main features are summed up shortly in the judgment delivered by one of the learned Judges in the Judicial Commissioner's Court:—

"Mrs. Hodges was by birth a Kashmiri, sister of a well-known Kashmiri "gentleman, a political pensioner. Mr. Hodges was employed in the Kapurthala "estate, and died during the Mutiny. Mrs. Hodges continued to live in Ludhiana "till October 1885, staying during the hot weather with the Reverend J. Wood-"side at Landour. In October 1885 she began to live with her son-in-law, Major "Oldham, at Lucknow. She was a woman of superior mental capacity. She could "not understand English, but could read and write Urdu in the Roman character. "Her habits were those of a native in this country. She did not appear before "strangers, but had a limited circle of friends, either natives of the country or "Europeans connected with natives of the country, before whom she appeared. "According to Mr. Woodside, though Mrs. Hodges had great ability, she was in-"capable of doing business such as getting interest on her Government promissory "notes. According to Colonel and Mrs. Oldham she managed all her affairs. The "respondent Hodges has admitted that, with the exception of certain remittances "to England, Mrs. Hodges transacted all other business herself (Exhibit 25.) "There can be no doubt that for 27 years she managed her affairs with prudence and "success, possibly with some assistance from friends."

A few particulars may usefully be added. Her marriage with Mr. Hodges is said to have taken place in the year 1838 [145] when she must have been hardly fifteen years old. It was solemnized by the Reverend Mr. Rogers according to the rites of the Presbyterian Church. She then took the Christian name of Katherine and retained it during her life, instead of her birth name of Piyari Phundo Khanum. Her children, five in number, were all baptized into the Christian Church. Her husband was killed at Delhi in 1857. It does not appear that she ever ceased to be Muhammadan in religion, and she

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Colonel Oldham says that he told Craster what Langdon had told him; that all would be jointly and severally liable. "The bank may "come down on you directly without reference to me" (p. 254). And again (p. 255) "I took the bond to him myself. I did not read it to him. "I explained it to him fully that he was responsible irrespective of me. "It was fully explained to him that he would jointly and severally be "liable."

In fact both Langdon and Oldham, if they correctly remember what they said, appear to have represented the liability of [150] the sureties not as something less but as something greater than it actually was, *viz.*, as an immediate liability to the bank instead of one dependent on Oldham's default.

Captain Craster also relies on Langdon's refusal to give time upon Oldham's first application without consent of the sureties. That however cannot affect the legal rights of the parties; and indeed at this Bar it is only used in a legitimate way, as showing Langdon's real belief that Craster was a surety pure and simple, and so lending probability to Craster's statement that Langdon had misled him into believing the same thing. But this reference to sureties may have been merely a point of courtesy or of unnecessary caution, or perhaps only a civil excuse to Colonel Oldham for not giving the indulgence he asked. It is no more evidence that Langdon really misrepresented the effect of the deed to Captain Craster, than his acting at a later time without reference to the sureties would be evidence the other way. It ought to be treated as wholly insignificant.

Their Lordships have already mentioned their reasons for thinking it highly improbable that those who incurred the substantial liability of the whole debt would have scrupled at this particular clause. It has become important now, and Captain Craster may think that he would have treated it as of vital importance then, if all the consequences had been explained to him. But it has been before stated that he was a man who ought to have been, and probably was, able to look after his own affairs. He admits that the effect of the deed is plain to his understanding; only he did not take the trouble to read it. It would be a very dangerous thing to allow people who have induced others to advance money on the faith of their undertakings, to escape from the plain effect of those undertakings on the plea that they did not understand them. It requires a clear case of misleading to succeed on such a plea. The District Judge seems to have acted on Captain Craster's statement alone. He does not mention the counter-statements of Oldham and Langdon. Taking Craster's statement, it hardly amounts to more than that Langdon under-rated the risk he was running, and said that he was to be surety (which was the fact) without any particular mention of the last clause in the deed; which very likely was not mentioned. That would not suffice to show that Langdon misled [151] Craster. But, putting all the evidence together, their Lordships are satisfied that Craster was given to understand, perhaps even too broadly, that in his liability to the bank he stood upon an equal footing with Colonel Oldham and Mrs. Hodges.

The District Judge granted a decree against the Oldhams and dismissed the suit as against Hodges and Craster with costs. The Court of the Judicial Commissioner gave a decree against all the defendants. This their Lordships hold to be right, though they differ as regards the grounds

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inasmuch as the prior part of the deed created Mrs Hodges and Captain Craster sureties, the latter part cannot make them principal debtors Their Lordships cannot understand this argument, nor was it supported at this Bar They have above given their view of the meaning of the deed

The Judicial Commissioners however, did not support the District Judge, because they thought that the bank did not contract with Colonel Oldham to give him time It seems, however to their Lordships that having taken Mrs Oldham's security, as the result of a correspondence with her husband in consideration of forbearance from suing the three debtors the bank effectually precluded itself from suing between July 1888 and May 1889 If they could agree with either Court on the effect of the deed, they would hold that Mrs Hodges was discharged, but as they think that the construction of the High Court is wrong and that the District Judge is wrong in disregarding the final clause of the deed, they must affirm the liability of her estate to the bank

Captain Craster's case is different and much more simple His personal position is in no way peculiar He was a man living in the world 32 years of age and had been working with his regiment for about three years He does not allege any improper influence on the part of his superior officer Colonel Oldham who procured his execution of the deed His case is that Langdon the bank manager, misled him as to the nature of the deed This is his account of what happened with Langdon

> "I saw Mr Langdon in his office and said 'Colonel Oldham tells me that he is ... your bank and I have come down to see you ... o you consider that if I stand security to your ... incurring any unnecessary risk?' Mr Langdon ... itherine Hodges [149] will be security with 'you She is lodging bank shares as extra security Colonel Oldham's life 'will be insured for a sum of Rs 14 000, and Colonel Oldham will 'repay the loan at the rate of Rs 300 per mensem' I said 'Well you "must recollect I have no other means besides my pay, and should anything '*happen to prevent Colonel Oldham paying up I can t do so*' *Mr Langdon said* 'In the face of the security of Mrs Hodges and the shares that she has lodged ... ured I do not see how we can run any ... Rs 300 a month and in the event of ... rance' *I said* '*Very well, you accept* ... I Yes a deed will be drawn up by ..."

Langdon says that this account is correct in the main but he will not speak to every detail (p 257) afterwards adding that he is convinced that he told Captain Craster that he would be a principal debtor only that the bank would not call upon him unless Oldham failed (p 258)

The deed was brought to Craster for his signature by Oldham on the Rifle Range at Lucknow He executed it without making any attempt to read it relying as he says on Oldham, who told him that it was the bond drawn up in accordance with his agreement made with Langdon As to the tenor of the deed he says —

> ... ian that of surety I ... assage in Exhibit A I ... 'I would never have ... have borrowed money ... i't remember if that ... he paper I signed for ... imp above and writing ... ald the money'

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JULY 10, 21.

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27 I. A. 209=
5 C. W. N.
52=2 Bom.
L. R. 978=10
M. L. J. 290.

A decree, dated the 12th November 1887, made by a District Court for the possession of land, awarded to the plaintiff future mesne profits. This decree after having been reversed by the High Court was restored and affirmed by the order of the Queen in Council, dated the 11th May 1895. In excution of the decree relating to mesne profits the Court ordered on the 22nd July, 1896 that they should be recovered from the 12th November 1887 to the 12th November 1890—that being for three years from the date of the decree:

Held, that the order of the 22nd July was essentially final in its nature and within the meaning of section 2 of the Code of Civil Procedure, so that it was appealable under section 540 of the Code, though not one of those enumerated in section 588 as appealable.

Held, also, that the Queen's order of the 11th May 1895 was the only operative decree, and that mesne profits were in effect decreed by the order with reference to its own date, and not to that of the original decree of the 12th November, 1887—the period for which mesne profits were due was from the institution of the suit on the 23rd September 1886 down to the 30th November 1895, when possession was delivered.

[**Dist.** 31 Mad. 28=17 M. L. J. 495=3 M. L. T. 26 ; 58 P. R. 1905=59 P. L. R. 1905; 16 I. C. 45=12 M. L. T. 309=1912 M. W. N. 1122 ; 3 M. L. T. 26 ; 16 I. C. 799 =14 M. L. T. 194; **Foll.** 35 Cal. 1017; **Ref.** 29 Cal. 758 (F. B.) ; 30 Cal. 660 (F. B.) ; 37 Mad. 29; 1 Pat. L. W. 781; 3 Pat. L. J. 116 ; 14 C. L. J. 489=12 I. C. 745; 21 M. L. J. 1063 ; **Appl.** 64 I. C. 470 ; 44 Mad. 714.]

APPEAL from a decree (11th February 1897) of the High Court (1) reversing an order (22nd July, 1895) of the Judge of the Mirzapur district.

[153] This appeal arose out of an order made in execution of a decree dated the 12th November 1887. The present appellant and respondent were plaintiff and defendant in the suit which resulted in the above decree against the Raja for possession of the estate claimed "with future mesne profits." The order of the District Court executing that decree was made on the 22nd July 1896. To this they were parties as petitioner and objector, and afterwards, on this appeal, the former was represented by Lal Raghu Saran Singh.

On the 19th July 1889 the decree of the District Judge, dated the 12th November 1887, was reversed on appeal to the High Court. This decree, however, was affirmed and restored by an order of the Queen in Council, dated the 11th May 1895, and possession of the land was delivered to the decree-holder on the 30th November 1895. His petition then filed for execution of the decree for future mesne profits claimed them from the 23rd September 1886, the date of the filing of the suit, down to the day of possession. To this the counter-petitioner objected, on the ground that mesne profits were restricted to the period of three years from the date of the decree by section 211, Civil Procedure Code, and that this date was the 12th November 1887. The Court executing the decree originally of that date, but affirmed by the Queen's order eight years later, held on the 22nd July 1896 that the proper date for fixing the commencement of the three years was that on which the decree was originally made, the 12th November 1887, as that decree had been affirmed in every particular by the order of the Queen in Council on the 11th May 1895.

On an appeal to the High Court (KNOX and BURKITT, JJ.) a preliminary objection was taken that the order made in execution on the 22nd July 1896 was not appealable under the Code of Civil Procedure. This objection was disallowed by order of the 8th February 1897, the Judges being of opinion that the order in question was in the nature of a final order, practically dismissing the claim of the decree-holder to mesne profits for a period of between five and six years.

(1) (1896) I. L. R. 19 All. 296.

on which it should rest The decree, however, is against all the defendants personally to pay the whole sum found due or accruing due That does not recognise the representative position of Robert Hodges, who is only brought here as administrator of his mother's estate In delivering judgment the learned Judicial Commissioner states that Mrs Hodges was in the possession of her husband's estate and remained the ostensible owner of the balance with consent of her sons, and that she was treated as the owner of the entire property by the defendant Hodges in his application for probate He states a formal finding on the sixth issue, thus "I find that the defendant Hodges is liable to the extent of the "entire estate in the possession of Mrs Hodges" It does not appear that this record contains the requisite materials for trying such a question, which is more appropriate for a separate inquiry, and it is not disputed by the plaintiff's counsel that, as Hodges has not admitted assets, it would be more regular to ascertain the measure of his liability by inquiries in the execution of the decree Their Lordships think that it would be right to add to the decree as follows:—"But as regards "the defendant Robert Nathaniel Hodges this decree is, except as regards "the costs hereby ordered to be paid, made against him in his representative capacity Let all proper inquiries be made, and accounts "taken for the purpose of ascertaining the amount of the estate of "Katherine Hodges, and the liability of the bank shares pledged by her, "and of her administrator Robert Nathaniel Hodges, to make good the "debt due to the plaintiff bank" Their Lordships will humbly advise Her Majesty to dismiss the appeal, and, with the qualification just mentioned, to affirm the decree As regards the costs of the appeal, the case of Captain Craster has wholly failed, and the case [152] of Robert Hodges has failed on the most material points Their Lordships think that the modification now made ought not to affect the cost; especially considering that no attempt was made in the Court below to review the judgment on this point The appellants must pay the costs

1900 JUNE 28, 29 JULY 3, 21

PRIVY COUNCIL

23 A 137=27 I A 168=2 Bom L R 967=5 C W N 1=10 M L J 279=7 Sar 767

Appeal dismissed Decree affirmed with amendment

Solicitors for the appellants —Messrs *Young, Jackson, Beard* and *King*.

Solicitors for the respondent bank:—Messrs *Lyne* and *Holman*

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23 A 152 (=27 I A 209=5 C W N. 52=2 Bom L R. 978=10 M L J 220)

PRIVY COUNCIL

PRESENT

Lords Hobhouse, Macnaghten and Lindley, Sir Richard Couch and Sir Henry Strong

BHUP INDAR BAHADUR SINGH (*Appellant*) v BIJAI BAHADUR SINGH (*Respondent*) [10th, 21st July, 1900]

[*On appeal from the High Court for the North-Western Provinces*]

Civil Procedure Code, section 211—Decree for future mesne profits—Order in execution fixing the period over which they were to extend—Such order appealable—Civil Procedure Code, sections 2, 5, 40—Date of decree affirmed by Order in Council

1900 JULY 10, 21.

PRIVY COUNCIL

23 A 152= 27 I.A. 209= 5 C. W. N. 52=2 Bom. L. R. 978= 10 M. L. J. 290.

profits." The defendant, now appellant, appealed to the High Court, who on the 19th July 1889 reversed the decree and dismissed the suit. The plaintiff then appealed to the Queen in Council, who on the 11th May 1895 ordered that the decree of the High Court should be reversed and the District Judge's decree of the 12th November be affirmed.

After that the plaintiff prosecuted his claims in execution of the decree so affirmed by the Queen in Council. He recovered possession on the 30th November 1895. Then he proceeded to recover mesne profits. He claimed them from the 23rd September 1886, on which day his suit was brought, down to the recovery of possession by him. The defendant objected that no decree remained to be executed except that of the Queen in Council which made no mention of mesne profits; but the District Judge held that the Queen's order had come down for execution and "its effect causes reference to be made to the original decree of this "Court as a final decree in all applications for execution."

Having thus settled that the Queen's order gave mesne profits by reference to the original decree, the District Judge went on to frame issues. The second of such issues was, "For what period are mesne "profits recoverable?" It was arranged that this issue should be treated as preliminary to taking [156] accounts, and should be argued separately. That was done, and the District Judge decided that mesne profits were due for the three years next after the date of the original decree, *i.e.*, from the 12th November 1887 to the 12th November 1890.

From this decree the plaintiff appealed to the High Court, who in the first instance addressed themselves to a preliminary objection made by the defendant that no appeal is given by the Procedure Code in such a matter. The High Court overruled that objection. As it has been renewed here, and earnestly pressed upon their Lordships by Mr. Ross, it may be convenient to dispose of it in the first instance.

The High Court felt considerable difficulty on the point. They allowed the appeal on the ground that the District Judge had tried the question separately, and had embodied his finding in a formal order. They remark it practically dismisses the claim of the decree-holder for some five or six years' profits; and that in a way which in the Court of the District Judge is final. Therefore they hold it to be an appealable order.

Treating the question as if it were whether the order under consideration is final or interlocutory in its nature, and testing it by the ordinary principles applicable to such questions, their Lordships think, not only that the High Court are right in the particular circumstances of the case, but that there is not any need to rely upon the accident that the District Judge took the convenient course of trying the liability to account in a separate issue and deciding it in a separate judgment. His decision is a final one in its essence, and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a cause, which is final against the party denying liability to account, and is appealable; though it is also in another way interlocutory and may result in exoneration of the accounting party or even in the award of a balance in his favour. And it can make no difference in point of principle whether the decision be in favour of or against the liability to account. It is equally final in its effect, and as such equally open to appeal.

1900 JULY 10 21 — PRIVY COUNCIL — 23 A 152=27 I A 209=3 C W N 52=2 Bom L R 978=10 M L J 290

Having, accordingly, heard the appeal, the High Court set aside the order Their judgment is reported at length in *Bijai* [154] *Bahadur* v *Raja Bhup Indar Bahadur Singh* (1) The result was that in their opinion the decision of the Court below as to the date which was to be accepted as that of the decree awarding future mesne profits was wrong They stated in their judgment that it was admitted before them that the decree to be enforced was the order in Council of the 11th May 1895 But they gave as their reason that the decree as embodied in that order and taking its date from it was the only enforceable decree, and they applied section 211, Civil Procedure Code They found that the plaintiff was entitled to recover mesne profits from 23rd September 1886, the date on which the suit was instituted, down to 11th May 1895, the date of the order in Council, and thereafter from 11th May 1895 down to the 30th November 1895, the date on which the appellant obtained possession in execution of the order in Council

The counter petitioner having appealed against this order,

Mr *G E A Ross*, for the appellant, argued that there was error in the judgment of the High Court on the question whether the order of the High Court of the 22nd July 1896 was appealable or not That order fixed the period for mesne profits, but was a preliminary and interlocutory order, and would be followed by an order after the necessary inquiry It was not one of the orders enumerated as appealable in section 588 of the Code of Civil Procedure

On the main question decided by the High Court relating to the date from which the three years in section 211 of the Code of Civil Procedure were to commence, it was argued that the order in Council of the 11th May 1895, by restoring the order of the 12th November 1887 in its entirety, with no alteration of the date from which mesne profits were to be calculated had left the date of the original decree, for the purpose of fixing that date, as remaining the only one authorized By the right application of the provision in section 211 of the Code of Civil Procedure the period would be as the Court executing the decree for future mesne profits had decided it to be, that was from the 12th November 1887 to 12th November 1890 The course open to the respondent for the recovery of mesne profits for any period in addition to that would [155] be, according to the Civil Procedure Code, by bringing a suit for them He referred, in connection with the question raised, to *Fakharuddin Mahomed Ahsan Chowdhry* v *Official Trustee of Bengal* (2), *Puran chand* v *Roy Radhakishan* (3), *Anundokishore Das Bakshi* v *Anundo kishore Bose* (4), *Govind Chunder Lahiri* v *Shikhareswar Roy* (5)

Mr *W A Raikes*, for the respondent, was not heard

Afterwards on the 21st July, their Lordships' judgment was delivered by LORD HOBHOUSE —

This appeal is presented against an order made in the course of execution proceedings The plaintiff in the suit who was the original respondent in the appeal, claimed possession of land On the 12th November 1887 the District Judge passed a decree in his favour, ordering possession, and adding the plaintiff is also entitled to future mesne

(1) (1896) I L R 19 All 296
(2) (1881) L R 8 I A 197 I L R 8 Cal 178
(3) (1891) I L R 19 Cal 132
(4) (1889) I L R 14 Cal 50
(5) (1900) L R 27 I A 110 I L R 27 Cal 951

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standing against him must have come to naught, is not easy to say. And if he were now to bring a fresh suit, or if he had done so in 1895 after reversal of the adverse decree, a substantial part of his just claim would be barred by article 109 of the Limitation Act. But their Lordships will not further discuss the exact bearings of the two cited sections of the Code, because the High Court has given the simple and obvious solution of the difficulty which puzzled the District Judge.

The Court is now executing, not the District Judge's decree of 1887, but the Queen's order of 1895, which by affirming the District Judge's decree has adopted its terms and has carried on their effect down to a later date. All that the Courts below had to do, and all that this Board has now to do, is to construe the order of May 1895 and to carry it into execution. Its meaning is hardly open to doubt. It affirms the District Judge's decree which awarded "future mesne profits". That signifies profits future to the 12th November 1887. The order of 1895 speaking with the language of the decree of 1887 clearly carries all profits up to its own date. If there had been delay for three years after the 11th May 1895, section 211 would be called into operation with reference to the order of that date. But to call it into operation with [159] reference to the decree of the 12th November 1887 is to deprive the later order of its obvious meaning. It is true that one of the arguments used for the defendant was that the later order has no meaning as regards mesne profits, because they are not expressly mentioned; but that is clearly wrong and was hardly pressed at this Bar.

Agreeing with the High Court, their Lordships will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow and Rogers.*
Solicitors for the respondent:—Mr. *T. C. Summerhays.*

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23 A. 159 (=21 A. W. N. 30.)

REVISIONAL CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* KEDAR NATH.* [3rd January, 1901.]

Criminal Procedure Code, section 133—Nuisance—Encroachment upon unmetalled portion of a Government road.

Held that any obstruction upon a public road is a nuisance within the meaning of section 133 of the Code of Criminal Procedure, whether in point of fact it causes practical inconvenience or not.

THIS was a reference made by the Additional Sessions Judge of Agra under section 438 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the order of the Court.

The *Government Pleader* (Maulvi *Ghulam Mujtaba*) in support of the order of the Magistrate.

BLAIR and AIKMAN, JJ.—This matter has been referred to us by the Additional Sessions Judge of Agra, with a recommendation that all proceedings held in a certain case to be hereafter described should

* Criminal Reference No. 625 of 100.

But then Mr Ross urges that we are not testing the question by general principles, but by the expressions of the Code which [157] relate to appeals That is true, and their Lordships turn to the Code to see what it says

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Section 540 gives a right to appeal to the proper Court from the decrees or from any part of the decrees of Courts exercising original jurisdiction By section 2 a decree is thus defined, "The formal expression of an adjudication upon any right claimed or defence set up in a "Civil Court, when such adjudication so far as regards the Court expressing it decides the suit An order determining any "question mentioned or referred to in section 244, but not specified "in section 588, is within this definition" Section 244 is that which gives to the Court engaged in executing a decree jurisdiction to determine questions arising between the parties relating to the execution of the decree Section 588 specifies a large number of orders from which appeals lie, including many made in execution proceedings but not including such an order as the one under discussion It appears to their Lordships that the plain meaning of section 2 is to make this order a decree appealable under section 540 Mr Ross has not shown any reason why the words of the Code should not be construed in their plain and obvious sense On the contrary, the obvious sense is that which best accords with ordinary convenience and ordinary rules of practice

23 A 15 27 I A 20 5 C W 52=2 Bo L R 97 10 M L 290

Turning from this purely technical question to the substance of the appeal, the High Court found the issue before them to be very simple The District Judge held that it turned on the construction of sections 211 and 244 of the Code Section 244 prescribes that questions arising in execution including this question should be decided in the execution and not by separate suit Section 211 enacts that in suits for possession of immoveable property "the Court may provide in the "decree for the payment of rent or mesne profits in respect of such pro "perty from the institution of the suit until the delivery of possession to "the party in whose favour the decree is made, or until the expiration of "three years from the date of the decree (whichever event first occurs)"

The effect of the District Judge's application of these sections is somewhat startling, because, though executing the Queen's order, he holds himself to be limited in point of time as though he was executing his predecessor's decree made in his own Court, [158] and he counts the three years for which alone he thinks he has the jurisdiction to estimate mesne profits, not from the date of the Queen's order, but from the date of the decree of his own Court

Now the plaintiff, it must be held, was entitled to possession *throughout In 1887 he got a decree for it, and had that been executed he* would have had the profits But there was an appeal, and in 1889 the High Court took a view adverse to him and passed a decree, in the face of which he could claim nothing Five years afterwards he succeeded in displacing that decree and in re establishing his original right to possession Then he is told that from the 12th November 1890 down to the 30th November 1895 the law debars him from recovering the income of his property and allows his opponent to keep it

The District Judge expresses an opinion that the plaintiff might have brought a separate suit for this income, and that if he has lost some years profits it is by his own laches How he could be charged with laches for not instituting a suit which with the decree of the High Court

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PRIVY COUNCIL.

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standing against him must have come to naught, is not easy to say. And if he were now to bring a fresh suit, or if he had done so in 1895 after reversal of the adverse decree, a substantial part of his just claim would be barred by article 109 of the Limitation Act. But their Lordships will not further discuss the exact bearings of the two cited sections of the Code, because the High Court has given the simple and obvious solution of the difficulty which puzzled the District Judge.

The Court is now executing, not the District Judge's decree of 1887, but the Queen's order of 1895, which by affirming the District Judge's decree has adopted its terms and has carried on their effect down to a later date. All that the Courts below had to do, and all that this Board has now to do, is to construe the order of May 1895 and to carry it into execution. Its meaning is hardly open to doubt. It affirms the District Judge's decree which awarded "future mesne profits". That signifies profits future to the 12th November 1887. The order of 1895 speaking with the language of the decree of 1887 clearly carries all profits up to its own date. If there had been delay for three years after the 11th May 1895, section 211 would be called into operation with reference to the order of that date. But to call it into operation with [159] reference to the decree of the 12th November 1887 is to deprive the later order of its obvious meaning. It is true that one of the arguments used for the defendant was that the later order has no meaning as regards mesne profits, because they are not expressly mentioned; but that is clearly wrong and was hardly pressed at this Bar.

Agreeing with the High Court, their Lordships will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant :—Messrs. *Barrow and Rogers.*
Solicitors for the respondent :—Mr. *T. C. Summerhays.*

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23 A. 159 (=21 A. W. N. 30.)

REVISIONAL CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* KEDAR NATH.* [3rd January, 1901.]

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THIS was a reference made by the Additional Sessions Judge of Agra under section 438 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the order of the Court.

The *Government Pleader* (Maulvi *Ghulam Mujtaba*) in support of the order of the Magistrate.

BLAIR and AIKMAN, JJ.—This matter has been referred to us by the Additional Sessions Judge of Agra, with a recommendation that all proceedings held in a certain case to be hereafter described should

* Criminal Reference No. 625 of 100.

be set aside It appears that one Kedar Nath made an application to the District Magistrate of Muttra on the 30th of January 1900, asking for leave to erect a watering trough for cattle on land described by him in his petition as *nazul land*, and forming part of, or adjacent to, the public road between [160] Muttra and Dig We find it difficult to understand how such permission should have been sought if the site of the intended trough had been the private property of the petitioner, there being no Act in force in the locality to prevent a man from building as he chose upon his own land The Magistrate referred the question to the Tahsildar for report The Tahsildar, accepting the position taken up by the petitioner as to the proprietorship of the land, reported that no public inconvenience would be caused by the erection The matter was then referred to the District Engineer, who reported that the erection would be an encroachment on public land, and ought not to be sanctioned Thereupon the District Magistrate made an order, no doubt intended to be an order under section 133 of the Code of Criminal Procedure, but which, owing to some mistake in the office, was wholly meaningless The mistake, however, was found out, and the Magistrate issued a fresh and valid order on the 12th of June 1900 At some time before these last mentioned orders the petitioner, without waiting for the granting of his petition by the Court, had erected the watering trough, and, it appears to us beyond substantial doubt, on the very site on which he had asked leave to erect it The Additional Sessions Judge in his order of reference remarks that a contention was raised by Kedar Nath that, when he failed to get the permission applied for on the 30th of January, he built a watering trough on his private land We find no trace of any such contention on the record. It appears to us that the site upon which he erected was the very site upon which he had asked leave to erect it, but that, finding himself confronted with the difficulty that the land was public land, he withdrew his admission to that effect and set up the contention that this land was his own private land When this plea was raised before the District Magistrate, he overruled it, holding in substance and effect that this was not a *bona fide* contention. Therein he was acting within his discretion, and acting rightly The contention of the applicant upon the matter of jurisdiction having been overruled, the Magistrate, in accordance with the application of the petitioner, appointed a jury to try whether the order made by him was a reasonable and proper order A jury of five was accordingly appointed The 13th of July was fixed as the date [161] upon which their verdict should be delivered Before that date, *i e*, on the 7th of July, two jurors nominated under the provisions of the Act by Kedar Nath, both of whom were practising pleaders, applied to the Court of the District Magistrate for an enlargement of the time within which to deliver their verdict, on the ground that professional engagements rendered them unable to attend on the 12th to accompany the other jurors to view the locality For some reason or other unexplained no order was passed on their application until the 11th of July, and it was then rejected, apparently on the ground that it was too late The order appointing the jurors was dated the 4th of July, and we think that the application for enlargement of time made on the 7th and upon the grounds stated was neither a tardy nor otherwise an unreasonable application There is, however, one ground of objection taken by the

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23 A 159=21 A W N 30

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applicant for revision in his petition which does not appear to have attracted the notice of the Additional Sessions Judge; and it is one which, in our opinion, goes to the root of all proceedings held after the due and legal appointment of the jurors. This application ought to have been dealt with by the Magistrate who appointed the jury and by no one else. In some unexplained way it came before Mr. Dewar, who had been appointed foreman of the jury, and who took it upon himself to deal with and reject the application. Such rejection had, under the circumstances, no legal validity. The application upon which that order was made must be taken to be as yet undisposed of by any judicial authority. Until it has been so disposed of, no proceedings can be held to be valid. The ultimate order made by the Magistrate and purporting to be an order under section 141 of the Code of Criminal Procedure must therefore be set aside, no duly empowered Magistrate having exercised his discretion whether or not to extend the time to the jurors to give their verdict. Such an exercise of discretion is a condition precedent to the passing of such an order. The power to extend or refuse to extend time is expressly conferred by the last clause of section 138 of the Code of Criminal Procedure.

In our opinion the explanations given by the District Magistrate entirely meet the objections of the Additional Sessions Judge. But the Additional Sessions Judge has not dealt with the matter [162] to which we have called attention. We wish specifically to indicate our approval of the view taken by the District Magistrate, that the motive with which a public highway is obstructed is absolutely irrelevant. We also agree that any obstruction on a public road is a nuisance, whether in point of fact it causes practical inconvenience or not. The land upon which it is built may not be at the time necessary for the continuous use of the road. An increased traffic might make it so.

We may add that, although the verdict of the majority of the jury must be accepted by the Magistrate, this means that the jury should have heard together and tried the matter which had been referred to them; the decision of three of them acting in the absence of the other two is wholly invalid. For these reasons we set aside the order of the 11th of July, refusing to grant to the jurors enlargement of time, and all proceedings and orders subsequent thereto. We direct the District Magistrate to take up the case from that point, and to deal with the application of the two jurors for enlargement of time to the best of his discretion.

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23 A. 162 (=21 A. W. N. 31.)

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

KALKA DUBE (*Decree-holder*) *v.* BISHESHAR PATAK AND OTHERS (*Judgment-debtors*).* [15th January, 1901.]

Execution of decree—Limitation—Act No. XV of 1877 (*Indian Limitation Act*), *Sch. II, Art.* 179.

Held, that an application for execution of a decree, which was defective only in that it stated incorrectly the date of a previous application for execution (such

* Second Appeal No. 706 of 1898 from a decree of J. Denman, Esq., District Judge of Allahabad, dated the 30th June 1898, confirming a decree of Babu Mohan Lal, Subordinate Judge of Allahabad, dated the 29th January, 1898.

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be set aside It appears that one Kedar Nath made an application to the District Magistrate of Muttra on the 30th of January 1900, asking for leave to erect a watering trough for cattle on land described by him in his petition as *nazul land*, and forming part of, or adjacent to, the public road between [160] Muttra and Dig We find it difficult to understand how such permission should have been sought if the site of the intended trough had been the private property of the petitioner, there being no Act in force in the locality to prevent a man from building as he chose upon his own land The Magistrate referred the question to the Tahsildar for report The Tahsildar, accepting the position taken up by the petitioner as to the proprietorship of the land, reported that no public inconvenience would be caused by the erection The matter was then referred to the District Engineer, who reported that the erection would be an encroachment on public land, and ought not to be sanctioned Thereupon the District Magistrate made an order, no doubt intended to be an order under section 133 of the Code of Criminal Procedure, but which, owing to some mistake in the office, was wholly meaningless The mistake, however, was found out, and the Magistrate issued a fresh and valid order on the 12th of June 1900 At some time before these last mentioned orders the petitioner, without waiting for the granting of his petition by the Court, had erected the watering trough, and, it appears to us beyond substantial doubt, on the very site on which he had asked leave to erect it The Additional Sessions Judge in his order of reference remarks that a contention was raised by Kedar Nath that, when he failed to get the permission applied for on the 30th of January, he built a watering trough on his private land We find no trace of any such contention on the record It appears to us that the site upon which he erected was the very site upon which he had asked leave to erect it, but that, finding himself confronted with the difficulty that the land was public land, he withdrew his admission to that effect and set up the contention that this land was his own private land When this plea was raised before the District Magistrate, he overruled it, holding in substance and effect that this was not a *bona fide* contention Therein he was acting within his discretion, and acting rightly The contention of the applicant upon the matter of jurisdiction having been overruled, the Magistrate, in accordance with the application of the petitioner, appointed a jury to try whether the order made by him was a reasonable and proper order A jury of five was accordingly appointed The 13th of July was fixed as the date [161] upon which their verdict should be delivered Before that date, *i e*, on the 7th of July, two jurors nominated under the provisions of the Act by Kedar Nath, both of whom were practising pleaders, applied to the Court of the District Magistrate for an enlargement of the time within which to deliver their verdict on the ground that professional engagements rendered them unable to attend on the 12th to accompany the other jurors to view the locality For some reason or other unexplained no order was passed on their application until the 11th of July, and it was then rejected, apparently on the ground that it was too late The order appointing the jurors was dated the 4th of July, and we think that the application for enlargement of time made on the 7th and upon the grounds stated was neither a tardy nor otherwise an unreasonable application There is however, one ground of objection taken by the

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APPELLATE CIVIL.

23 A. 164=21 A. W. N. 50.

23 A. 164 (=21 A. W. N. 50.)

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

HARSHANKAR PRASAD SINGH (*Judgment-debtor*) v. BAIJNATH DAS AND OTHERS (*Decree-holders*).* [18th January, 1901.]

Civil Procedure Code, section 266—Execution of decree—Attachment—Annuity payable to vendor by vendee of immoveable property.

Held that where a person made over property to the Court of Wards, partly in consideration of a present payment and partly in consideration of an annuity payable to the vendor, such annuity was property of the vendor which was capable of being attached in execution of a decree against the vendor. *Haridas Acharjia* v. *Baroda Kishore Acharjia* (1) and *Maniswar Das* v. *Babu Bir Pertab Sahu* (2) referred to. *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (3) distinguished.

[**Dist.** 31 All. 304=6 A. L. J. 227=1 I. C. 186 : **Ref.** 38 Cal. 13 ; (annuities charged in an estate when alienable).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jang Bahadur Lal*, for the appellant.

Munshi *Gokul Prasad*, for the respondents.

BLAIR and AIKMAN, JJ.—One question—and one only—is urged in this appeal. A judgment-debtor sold his property to the Court of Wards for consideration, part of which was present payment and part of which was an annuity payable to the judgment-debtor. We can see no distinction between the Court of Wards and other purchasers. It is urged upon us that under the deed of sale the judgment-debtor undertook not to alienate such annuity. In our opinion such a stipulation is wholly inoperative to defeat the claim of a judgment-creditor. It seems to us that the annuity falls within section 266 of the Code of Civil Procedure as being money belonging to the judgment-debtor.

The decree was obtained in 1874, and at that time and up to the period, not less than six years later, at which the property was **[165]** taken in charge by the Court of Wards, it was liable to be taken in execution of the decree. When the property was re-transferred by the Court of Wards to the judgment-debtor, it was equally chargeable, and we find it impossible to say that the proceeds of the subsequent sale to the Court of Wards are in any way exempt from liability whether the payment was immediate or deferred. Moreover, a promise not to alienate cannot *per se* operate as a bar to expropriation by the act of a Court.

We have had cited to us the case of *Haridas Acharjia* v. *Baroda Kishore Acharjia* (1), in which it was held that there could not be a valid attachment of any portion of a maintenance allowance by a prohibitory order issued to the person bound to pay such allowance of a date anterior to the time when the same falls due to the judgment-debtor. The learned Judge relied upon a passage reported in the ruling *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (3). We find that the subject-matter of that case was totally different from that which forms the subject-matter of this appeal.

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* First Appeal No. 81 of 1900, from a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 15th January 1900.

(1) (1899) I. L. R. 27 Cal. 38.
(2) (1871) 6 B. L. R. 646.
(3) (1871) 14 Moo. I. A. 40.

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APPELLATE CIVIL.

23 A 162= 21 A W N 31

Limitation Act, 1877 *Gopal Chunder Manna* v *Gosain Das Kalay* (1), followed [Ref. 116 P R 1907, 5 N L R 8=1 I C 240, 63 I C 971]

THE facts of this case sufficiently appear from the judgment of the Chief Justice

[163] Mr *J. Simeon*, for the appellant

Pandit *Sundar Lal*, for the respondents

STRACHEY, C J (BANERJI, J, concurring) —We entirely agree with the view expressed by the Full Bench of the Calcutta High Court in *Gopal Chunder Manna* v *Gosain Das Kalay* (1) In the present case the decree was passed on the 10th September 1894 On the 10th September 1897 an application was made by the decree holder for execution of the decree That application was entirely in accordance with law, except in one particular : it stated a previous application for execution as having been made on the 8th September 1894, whereas the correct date was the 27th of August 1894 That defect was wholly immaterial, because, whether the correct date of the previous application was the 8th September or the 27th of August 1894, the application of the 10th September 1897 was equally within time On the 17th of September 1897 the Court passed an order returning the application for amendment within two days, and the application was returned for amendment on the 18th of September On the 21st September the order was complied with, and the application amended On the 28th September 1897 the Court "struck off" the application on the ground that there had been delay in complying with the order—a delay of two days only in making an amendment of this extremely trivial defect. On the 30th September the decree holder made a fresh application for execution, and that has been dismissed on the ground that the application of the 10th September was not an application for execution in accordance with the law, so as to give a fresh starting point for limitation under article 179 of the second schedule of the Limitation Act, 1877 The result then of that trivial defect, which was remedied almost immediately, has been that execution of the decree has been altogether denied to this decree holder, who now brings this appeal The only possible way to deal with this case is to treat the defect as too trivial to prevent the application of the 10th September 1897 from being an application for execution substantially in accordance with law We agree with the Calcutta and Madras High Courts in holding that that is what article 179 means Any other view would only [164] be in the interest of technicality, and would be productive of serious injustice to decree holders The appeal must be allowed, and the orders of the Courts below set aside, and we direct the first Court to proceed with the application of the 10th September 1897 for execution in accordance with law The appellant will have his costs of this appeal

Appeal decreed

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(1) (1898) I L R 25 Cal 591

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Haribhai v. *Ransordas Dulabhdas* (1), shows that it does not follow because a wagering contract is void that contracts collateral to it cannot be enforced, and "the fact that a person has constituted another person his agent to enter into and conduct wagering transactions in the name of the latter but on behalf of the former, the principal, amounts to a request by the principal to the agent to pay the amount of the losses, if any, on those wagering transactions"—see also *Thacker* v. *Hardy* (2). There is in these Provinces no enactment similar to the Gaming Act, [167] 1892) 55 Vic., cap. IX), and Bombay Act III of 1865, according to which contracts collateral to or in respect of wagering transactions cannot support a suit. It is contended, however, that there is nothing in the present case to show that the defendant ever authorized the plaintiff to enter into transactions in differences only or other than genuine transactions of sale and purchase, that the plaintiff in entering into gambling transactions exceeded his authority, and that consequently the defendant is not liable either to make good the losses or to pay the commission. We construe the judgment of the lower appellate Court, however, as finding that the defendant was aware of and authorized the plaintiff to enter into the transactions in question. That being so, the order of the lower appellate Court remanding the case under section 562 is correct, and this appeal must be dismissed with costs.

Appeal dismissed.

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23 A. 167 (=21 A. W. N. 39).

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

HABIB BAKHSH AND OTHERS (*Defendants*) *v.* BALDEO PRASAD AND OTHERS (*Plaintiffs*).* [30th January, 1901.]

Civil Procedure Code, sections 562, 564, 566—*Appeal—Remand—Power of appellate Court to remand for trial on the merits otherwise than under the provisions of section* 562.

Section 564 of the Code of Civil Procedure must be read subject to the other provisions of the Code; for example, those contained in section 27, section 32 or section 53. An appellate Court has power to make an order under any of those sections; and in order to give effect to the provisions of the section which is applicable, it is necessary that it should in certain cases send back the case to the Court of first instance. Under such circumstances section 564 of the Code will not preclude an appellate Court from remitting a case to the Court of first instance. *Rameshur Singh* v. *Sheodin Singh* (3), *Maghu Kuar* v. *Faujdar Kuar* (4), *Mullu Khan* v. *Khan Singh* (5), *Durga Dihal Das* v. *Anoraji* (6), *Salima Bibi* v. *Sheikh Muhammad* (7), *Mihin Lal* v. *Imtiaz Ali* (8), *Rajit Ram* v. *Katesar Nath* (9), *Ganesh Bhikaji Juvekar* v. *Bhikaji Krishna Juvekar* (10) and *Kelu Mulacheri Nayar* v. *Chendu* (11) referred to.

[Ref. 44 All. 180; 64 I. C. 878; 2 L. B. R. 277; 28 Mad. 437=15 M. L. J. 236; 33 Cal. 927=3 C. L. J. 67; 12 O. C. 25=1 I. C. 329; 7 I. C. 75=12 C. L. J. 368;

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* Second Appeal No. 780 of 1898, from a decree of Babu Sanwal Singh, Judge of the Court of Small Causes, Agra, with powers of a Subordinate Judge, dated the 24th June 1898, reversing a decree of Khwaja Abdul Ali, Munsif of Agra, dated the 29th March 1898.

(1) (1875) 12 Bom. H. C. Rep. 51.
(2) (1873) L. R. 4 Q. B. D. 685.
(3) (1889) I. L. R. 12 All. 510.
(4) Weekly Notes, 1891, p. 105.
(5) Weekly Notes, 1891, p. 187.
(6) (1894) I. L. R. 17 All. 29.
(7) (1895) I. L. R. 18 All. 131.
(8) (1896) I. L. R. 18 All. 332.
(9) (1896) I. L. R. 18 All. 396.
(10) (1886) I. L. R. 10 Bom. 398.
(11) (1895) I. L. R. 19 Mad. 157.

Our attention was also called to the case of *Maniswar Das* v *Babu Bir Pertab Sahu* (1) as an authority for the proposition that future maintenance can be attached

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APPELLATE CIVIL

23 A 164=21 A W N 60

In our opinion to hold that the deferred payments in this case are exempt from attachment would be contrary to common sense, equity and good conscience

We consider the Court below was right, and we dismiss the appeal with costs

Appeal dismissed

23 A 165 (=21 A W N 33)

APPELLATE CIVIL

Before Sir Arthur Strachey, Kt, Chief Justice and Mr Justice Banerji

SHIBHO MAL (*Defendant*) v LACHMAN DAS (*Plaintiff*) *
[18th January, 1901]

Act No IX of 1872 (Indian Contract Act) Section 30—Wagering contract—Contract collateral to a wagering contract not unenforceable

Although by reason of section 30 of the Indian Contract Act 1872 a wagering contract is void a contract collateral to such a contract is not necessarily unenforceable and the fact that a person has constituted another [166] person his agent to enter into and conduct wagering transactions in the

[Fol 79 P R 1908=130 P W R 1908 33 All 219=7 A L J 1143 (Appr) 14 M L J 326 Ref 17 C P L R 67]

THE facts of this case sufficiently appear from the judgment of the Court

Babu *Durga Charan Banerji*, for the appellant

Babu *Satish Chandar Banerji*, for the respondent

STRACHEY, C J and BANERJI, J —This was a suit brought by an agent to recover from his principal a balance due to him on account of commission and losses incurred by him in the business of his agency which was the purchase and sale of grain The substantial defence was that the transactions were not, as they professed to be, genuine transactions of sale and purchase of grain, but were merely gambling transactions in differences The Court of first instance took that view of the transactions and dismissed the suit On appeal the Additional Subordinate Judge set aside the first Court's decree, and remanded the case under section 562 of the Code of Civil Procedure, to the lower Court for trial on the merits The lower appellate Court held that, notwithstanding that the transactions effected by the plaintiff on behalf of the defendant with third parties were gambling transactions only, the defendant was nevertheless bound to make good the losses incurred in those transactions to the plaintiff and pay the commission claimed In that view we think the Court was right Section 30 of the Indian Contract Act shows that a wagering contract is void but it does not say that it is illegal The judgment of Sir Michael Westroop, C J in *Parakh Govardhanbhai*

* First Appeal from Order No 98 of 1900 from an order of Pandit Giraj Kishore Dat Additional Subordinate Judge of Saharanpur dated the 2nd May 1900.

(1) (1871) 6 B L R 616
(2) (1875) 12 Bom H C Rep, 51
(3) (1873) L R 4 Q B D 685

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23 A. 167=21 A. W. N. 39.

that "an appellate Court shall not remand a case for a second decision, "except as provided in section 562;" and there can be no doubt that the order of remand in question was not of the nature contemplated by section 562, because the first Court had disposed of the suit, not upon a preliminary point, but upon the merits after trial of all the issues. The appellants further rely on the judgments of the Full Bench of this Court in *Rameshur Singh* v. *Sheodin Singh* (1). It was there held that where the first Court had decided the suit, not upon a preliminary point but upon the merits, and on all the evidence and on all the issues, the lower appellate Court had no jurisdiction to remand the case under section 562; and that, having regard to section 564, both the remand order and all the proceedings subsequent thereto were *ultra vires* and illegal. The Court further rejected the contention that such a defect in the order of remand would be covered by the provisions of section 578. It is to be observed that in that case the order of remand expressly purported to be made under section 562; whereas here the lower appellate Court evidently considered that section applicable only [170] by way of analogy, and evidently therefore conceived itself to be justified by some other provisions of the law. Further, in that case no provision of the Code other than section 562 was suggested as possibly justifying the remand. Again the Full Bench of the Court, in dealing with that case, themselves remanded it to the lower appellate Court, with a direction to restore the appeal to the file, and to dispose of it according to law; and as the lower appellate Court had not disposed of the case upon any preliminary point, the Full Bench clearly considered that section 564 did not stand in the way of this Court in second appeal making a remand for a second decision otherwise than as provided in section 562. It appears to have been considered in various cases that by reason of the words in section 587 making the procedure of chapter XLI applicable to second appeals only "as far as may be," and the fact that section 565 cannot in strictness be applied to a Court of second appeal, limited by the restrictions of sections 584 and 585, section 564 does not preclude a Court of second appeal from remanding a case for re-trial, even where the first Court has not disposed of the suit upon a preliminary point—see the cases reported in I. L. R. 10 Bom. 398; I. L. R. 19 Mad. 157; W. N. 1891, p. 187; W. N. 1891, p. 105; and I. L. R. 17 All. 29—where it was suggested that, although there was no section in the Code strictly authorizing a remand, the Court was warranted *ex debito justitiæ* under the circumstances in setting aside all the proceedings of the Court below, and directing the Court of first instance to re-try the case. That is the distinction which appears to have been drawn between the powers of a Court of first appeal and those of a Court of second appeal with reference to the prohibition contained in section 564. Even as regards Courts of first appeal, however, there are cases in which it has been held that, notwithstanding section 564, a Court of first appeal may sometimes remand a case for re-trial where the Court of first instance has not acted in the manner described in section 562. One of these is the case of *Salima Bibi* v. *Sheikh Muhammad* (2). In that case, which was a first appeal, there had been a misjoinder of causes of action, and the order of this Court was as follows:—"We set aside the decree below, and direct the Court below to perform the duty which that [171] Court ought to have performed under section 53 of Act XIV of

(1) (1889) I. L. R. 12 All. 510.

(2) (1895) I. L. R. 18 All. 131.

37 Bom 289 Diss 199 P R 1908 30 Mad 54=16 M L J 479=1 M L T 268 (F B) Fol 37 Cal 171 11 I C 183=15 C L J C 5 A L J 98 n Appr 2 L B. R 215 Dist 69 P R 1906=118 P L R 1906] 1901 JAN 30

[168] THE facts of this case are fully stated in the judgment of the Chief Justice APPELLATE CIVIL

Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the appellants 23 A 167=21 A W N 39

Mr *D N Banerji* and Pandit *Sunder Lal*, for the respondents

STRACHEY, C J —Apart from an unimportant matter relating to the wording of the decree, the appeal of the defendants is based upon a purely technical ground in reference to an interlocutory order, by which the lower appellate Court on appeal directed the amendment of the plaint, and that the case should be sent back to the Court of first instance for trial on the merits The suit was for possession of certain land claimed as belonging to a temple It was originally brought in the names of the managers of the temple Upon an objection raised by the defendants, the Court of first instance ordered that the plaint should be amended by substituting as plaintiff the name of the idol of the temple With regard to the merits of the case, various issues of fact were framed, and the first Court, after taking evidence and trying all the issues dismissed the suit The plaintiff appealed, and the lower appellate Court held, on the authority of *Thakur Raghunathji Maharaj* v *Shah Lal Chand* (1), that the suit could not be brought in the name of the idol The Court followed the course which was taken by the High Court in that case, directed the amendment of the plaint and remanded the case for re trial So far as the remand is concerned, the words used by the Court in its order were as follows —" and remand the case under section 562 of the Code of " Civil Procedure (by analogy) to the lower Court to be restored to the " file, and proceeded with and decided on the merits in accordance with " law " The amendment of the plaint which the Court directed was by substituting as plaintiffs the names of the managers of the temple in place of the idol No appeal was brought against the order of remand The plaint was amended, the case was re tried by the Court of first instance, fresh evidence was given, a fresh judgment was recorded and ultimately the Court again dismissed the suit on the merits The plaintiffs appealed, and their appeal was successful The lower appellate [169] Court decreed the claim Against that decree the defendants now appeal, and the appeal is practically confined to the order of remand which, it is contended, was *ultra vires* and illegal So far as regards that part of the order which directed the substitution as plaintiffs of the managers of the temple for the idol of the temple, I think there can be no doubt that the order was perfectly right It was justified, I think, by the ruling which the lower appellate Court referred to, and by section 27 of the Code of Civil Procedure which empowers a Court to make a necessary substitution of plaintiffs under certain conditions at any stage of the suit, including the stage of appeal The objection, however, mainly concerns, not the amendment of the plaint, but the following words remanding the case to the first Court for re trial It would be very unfortunate if we were compelled on such a ground as this to set aside the second decision of the suit on the merits, but still, if that is the necessary effect of the provisions of the Code, it must be done The appellants rely on the provisions of section 564 of the Code, which provides

(1) (1877) I L R 19 All 330

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sections of chapter XLI, section 568, no doubt allows an appellate Court in certain cases to take additional evidence. But I doubt whether that section would apply to a case where a new plaintiff was substituted under section 27, or a new party added under section 32 of the Code at the stage of appeal. In such a case the new party so brought on the record could not be affected by the evidence already taken in his absence; he must be allowed to raise further issues, and to support his claim or defence by evidence of his own. I think that section 568 merely contemplates a case where there is on the record evidence to be considered between the parties, but where further or additional evidence is required to be taken into consideration along with that already given. It was indeed admitted by the learned vakil for the appellants that the sections in chapter XLI to which I have referred would not apply to such a case as the lower appellate Court here had before it when making its order [173] of remand. Then what is to be done when a Court of appeal finds it necessary to act under section 27 or section 32 or under section 53 of the Code? Where new issues have to be framed, and evidence taken upon those issues, it must be done either in the appellate Court or in the Court of first instance. If section 568 is not applicable I do not see what other power an appellate Court has to do what is necessary in such a case, or in other words to assume the functions of a Court of original jurisdiction. It follows that what is to be done for the purpose of giving effect to the provisions of the law which I have referred to must be done by the Court of first instance, and, if so, it follows that the appellate Court must have power to direct the Court of first instance to do it. That power is not contained in section 562, but it is implied by the requirements of the section to which the appellate Court is giving effect, and the only question is, how is it to be reconciled with the terms of section 564? The most general rule of the construction of statutes is, that every part of the statute must be read with every other part, and that effect must not be given to one part in such a manner as to defeat the rest. All parts of the statute are of equal authority, and sections 27, 32 and 53, for instance, must be given effect to, at the stage of appeal or otherwise, as much as section 564. It is just as if section 564 were preceded by the words "subject to the requirements of any other provision of this Code." Where a remand was not necessitated by the provisions of section 27, section 32, section 53 or any other provision of the Code, then no doubt section 564 would have full effect and would exclude a remand except as provided in section 562. I prefer this way of looking at the matter to saying that, apart from the specific provisions of the Code, which, after all, purports to contain the whole law of civil procedure, an appellate Court has an inherent power of remand *ex debito justitiæ*. The result is that I think the order of remand was justified in this case, and that the appeal therefore fails.

The only other point has reference, as I have said, to the wording of the decree, which, I think it is now common ground, is ambiguous in its description of the plaintiff's claim which it allows. The decree will be varied in the following way, which [174] removes the ambiguity in question. From the words "the result" down to "erected by the defendants" the following will be substituted. "The result of this will be that the plaintiff's claim for possession of so much of the land forming part of No. $\frac{702}{1490}$ appertaining to the temple called Kuanwala, situate in the village Mau, as is covered by the *Chabutra*

1882, that is to say, we direct the Court below to return the plaint to the plaintiffs for amendment, so that the plaintiffs may elect which of them are or is to continue as plaintiffs or plaintiff in the suit' So that it was there apparently held that, in order to enable the provisions of section 53 to be carried out, the Court of first appeal had power to remand the case and direct the Court of first instance to do its duty under that section Another case is *Ranjit Ram* v *Katesar Nath* (1) That had reference to a defective verification of the plaint, and the Court considered what was to be done if the defect were not discovered until the suit came before an appellate Court At page 399 of the report the following observations occur —" Further, if the amendment is one going to the maintenance of the suit, and the defect in the plaint is not discovered until the suit gets into a superior Court on appeal, the appellate Court, in our opinion, can either order the amendment to be made in that Court, or, for example, in a case where there has been not only misjoinder of parties but misjoinder of causes of action, the appellate Court may order the Court of first instance to do what it ought to have done at the proper stage of the suit, when the suit was before it, and return the plaint to the parties, so that they may make their election as to which of them is to continue the suit, and may make the necessary amendments' There again the view taken by the Court appears to have been that the appellate Court has the power in question by virtue of the requirements of section 53 of the Code The difficulty is that, apart from sections 562 and 566, no express power of remand is given by the Code to an appellate Court In the present case the sections of chapter XLI do not appear to have been applicable Section 562 was not applicable for the reasons which have already been sufficiently given Then could the appellate Court have acted under section 566? I do not think that that would have sufficiently met the requirements of the case Under that section a remand is not made for a further trial and decision by the first Court on the whole case, but only for findings on specified issues to enable the appellate Court itself to pass a proper decision But what the Legislature contemplated [172] was that litigants should have the decisions of two Courts upon the whole suit Upon this point reference may be made to the observations contained in the judgment *Mihin Lal* v *Imtiaz Ali* (2) Except that that case was a second appeal, it has a very close bearing upon the case now before us The head note, which correctly summarises the judgment, is as follows:—" When a Court hearing an appeal is of opinion that a person not a party to the suit, and not entitled to be brought on the record in a representative capacity, should be a party to the record, its proper course is to remand the case to the Court of first instance, and to direct that Court to bring on a particular person as a defendant, or as a plaintiff, if he consents, give him time to file his statement and opportunity to produce his evidence, and try the issues raised between him and the opposite side' These observations were no doubt *obiter dicta*, but they are noteworthy as an instance in which an appellate Court was treated as having a power of remand otherwise than under section 562, in order to give effect to the provisions of another section of the Code, namely, section 32, which was applicable at the stage of appeal, but to which effect could not be given without directing the Court of first instance to take evidence, and in fact re try the suit Proceeding with the

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23 A 167=21 A W N 39.

(1) (1896) I L R 18 All 396 (2) (1896) I L R 18 All 332

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APPELLATE CIVIL.

23 A. 175=21 A. W. N. 44.

THE facts of this case are fully stated in the judgment of the Chief Justice.

Munshi *Jang Bahadur Lal*, for the appellants.

Mr. *W. K. Porter* and Pandit *Moti Lal Nehru* (for whom Maulvi *Ghulam Mujtaba*), for the respondent.

STRACHEY, C. J.—The question raised by this appeal of the defendants Nos. 2 and 3 is whether the Courts below ought not to have dismissed the suit as barred by section 317 of the Code of Civil Procedure. The plaint sets forth that the plaintiff is the owner of a zemindari share, which was advertised for sale in execution of a money decree of Kishan Lal and others. At that time there were other decrees against the plaintiff, and in order to protect the property against those decrees, the plaintiff made an arrangement with the appellants, by which "the said property was [176] purchased with the plaintiff's money fictitiously in the names of the defendants Nos. 2 and 3, in whom the plaintiff had full confidence by reason of their relationship with the defendant No. 1, and after the purchase the proceeding as to the acquisition of the sale certificate and possession, and as to the mutation of names were had in the names of the defendants Nos. 2 and 3, at the expense of the plaintiff, but in fact the plaintiff is the owner of it, and he is in proprietary possession of the said property by making collections and assessment and paying the revenue." That sale took place in September 1893. The plaint goes on to say that recently disputes arose, and in March 1896 a shareholder in the same village applied for partition, and the defendants, appellants, being entered as the owners of the share in question, were made parties to the partition proceedings. The plaintiff then sought to get his name substituted, but the defendants, he says, "dishonestly denied the plaintiff's proprietary title."

Paragraph 7 of the plaint is as follows :—" The defendants are not the owners of the property ; nor are they in possession thereof ; on the contrary, the plaintiff is the owner thereof, and it was with his own money that the property in suit was purchased only fictitiously in the names of the defendants Nos. 2 and 3, and the plaintiff is in possession thereof till now, but owing to the defendants' bad faith the plaintiff apprehends loss of his property. The plaintiff, therefore, prays for the following reliefs :—

" (*a*) By establishment of the fact that the plaintiff is the real purchaser of two-thirds of 6 biswas 8 biswansis 15 kachwansis 3¼ nanwansis share in mauza Paniara Abdullahpur, and is in proprietary possession thereof, it may be declared that the defendants, or any of them are, or is, not the owners, or owner, of that property."

" (*b*) If by reason of entry of names in the revenue papers the plaintiff be considered out of possession by the Courts, then he may be put in proprietary possession of the property.

- The defendant No. 1 was only a *pro forma* defendant. The other defendants pleaded the provisions of section 317 of the Code, and further denied that the plaintiff was the real purchaser at the sale in September 1893, and that they had purchased on his behalf. That being the nature of the suit, the question is [177] whether section 317 applies. " Section 317 provides that. " No suit shall be maintained against the " certified purchaser, on the ground that the purchase was made on

in dispute marked yellow on the plan annexed to the plaint for removal of the thatch erected by the defendants on the said *chabutra* ' With this variation the rest of the decree will stand The appeal is dismissed As the appeal has substantially failed, the respondents will get their costs

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BANERJI, J —The main question which arises in this appeal is by no means free from difficulty The difficulty arises by reason of the provisions of section 564 of the Code, but, as has been pointed out by the learned Chief Justice, that section must be read subject to the other provisions of the Code, for example, those contained in section 27, section 32 or section 53 An appellate Court has the power to make an order under any of those sections, and in order to give effect to the provisions of the section which is applicable, it is necessary that it should, in certain cases for the ends of justice, send back the case to the Court of first instance Section 564 does not seem to preclude an appellate Court from remitting a case to a Court of first instance under the circumstances indicated above This is the view which has been taken by this Court in the several cases to which the learned Chief Justice has referred, and I see no reason why we should depart from that view The rulings in those cases justify the order of remand impugned in this appeal I agree in making the decree proposed

Appeal dismissed

23 A 175 (=21 A W N 44)

[175] APPELLATE CIVIL

Before Sir Arthur Strachey, Kt, Chief Justice and Mr Justice Banerji

BISHAN DIAL AND ANOTHER (*Defendants*) v GHAZI UD DIN (*Plaintiff*)*
[5th February, 1901]

Civil Procedure Code, section 317—Suit by beneficial purchaser against certified purchaser—Suit not taken out of the section by reason of the beneficial purchaser being in possession and claiming only a declaration of his title—Execution of decree

The plaintiff came into Court alleging that certain property of his having [illegible]

property and he asked for a declaration that he was the real purchaser and in proprietary possession of the property in suit

Held that such a suit could not be exempted from the prohibition contained in section 317 of the Code of Civil Procedure, either upon the ground that the plaintiff being in possession claimed only a declaration, or upon the ground that there had been a re transfer to the plaintiff and a new title created in him by the action of the certified purchasers *Sasti Churn Nandi* v *Annopurna* (1) and *Monappa* v *Surappa* (2) distinguished *Aldwell* v *Ilahi Bakhsh* (3) *Mussamat Buhuns Kowur* v *Lalla Buhooree Lall* (4) and *Lokhee Narain Roy Chowdhry* v *Kalypuddo Bandopadhya* (5), referred to

[Disc 27 All 443=1905 A W N 39=2 A L J 111, Appr 36 Mad 564 Fol 28 M L J 251=17 M L T 158=1915 M W N 201=28 I C 205 43 Cal 20 3 L W 86=(1916) 1 M W N 220=32 I C 434, Ref 59 I C 719=24 C W N 1024 62 I C 720 7 L B R 260 1921 Pat 21]

* Second Appeal No 801 of 1898, from a decree of L G Evans, Esq, District Judge of Aligarh, dated the 18th July 1898, modifying a decree of Maulvi Ahmad Ali Khan Additional Subordinate Judge of Aligarh, dated the 30th September 1897

(1) (1896) I L R 23 Cal 699
(2) (1886) I L R 11 Mad 234
(3) (1883) I L R 5 All 478
(4) (1872) 14 Moo I A 496
(5) (1900) 23 W R 358

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not properly applicable" They also say that "the mere permission to hold possession cannot alone give or transfer a title from the *benamidar* to the real owner" In the second of the two Privy Council cases the passage at page 156 of the report implies no approval of the High Court's observations as to waiver Their Lordships only say that in the circumstances of that case "it was material to inquire under what circumstances possession was given by one party to the other, and whether, by reason of the antecedent relations between the parties, it was meant to operate as a transfer to the property" It is to be observed that these decisions were prior to the passing of the Transfer of the Property Act, 1882 In cases arising after the passing of that Act and subject to its provisions, it is more than ever true that "the mere permission to hold possession cannot alone give or transfer a title from the *benamidar* to the real owner,' nor do I see how, in the case of property exceeding Rs 100 in value, such a transfer could legally be effected except by means of a registered instrument Under the circumstances I do not think that we ought to direct the inquiry suggested by the learned counsel I think that the judgment of the lower Appellate Court was wrong, and that the suit was barred by section 317 of the Code I would therefore allow this appeal, set aside the decrees of the Courts below and dismiss the suit with costs throughout It is necessary, under the circumstances, to consider the objections under section 551 of the Code as to costs, and they are dismissed

BANERJI, J —I agree in holding that section 317 of the Code of Civil Procedure is a bar to the maintenance of the present suit The suit is one against certified purchasers, on the ground that the purchase was made by them on behalf of the plaintiff It therefore clearly comes within the purview of the first paragraph of the section The Courts below have relied on the ruling of the Calcutta High Court in *Sasti Churn Nundi* v *Annopurna* (1) [181] in support of thier view that the section is not applicable to a suit like the present If the suit in that case was not framed in the terms of section 317, that case is not analogous to the present But if the learned Judges who decided that case meant to hold that a suit of the nature of the present suit was not open to the objection that it was precluded by the provisions of section 317, I am unable to agree with that view There is nothing in the section which makes it inapplicable to a suit for a declaration of right on the ground that the auction purchaser purchased the property on behalf of the plaintiff or his predecessor in title On the contrary, as has been pointed out by the learned Chief Justice, the inference which arises from the second paragraph of the section is that the first paragraph is not confined to a suit for recovery of possession only As for the ruling of the Madras High Court in *Monappa* v *Surappa* (2), it is difficult to agree with the view expressed by the learned Judges in that case, having regard to the observations of their Lordships of the Privy Council, to which the learned Chief Justice has referred in detail Further, since the passing of the Transfer of Property Act 1882, it is extremely doubtful that ownership can be transferred otherwise than under the provisions of that Act I agree in making the decree proposed by the learned Chief Justice

Appeal decreed

(1) (1896) I L. R. 23 Cal 699 (2) (1886) I L. R. 11 Mad. 234

"behalf of any other person, or on behalf of some one through whom "such other person claims

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23 A 175=21 A W N 44

"Nothing in this section shall bar a suit to obtain a declaration "that the name of the certified purchaser was inserted in the certificate "fraudulently or without the consent of the real purchaser"

There are no allegations of fraud in the plaint which would make the second paragraph of the section apply There can be no doubt that this is a suit against certified purchasers The plaint clearly proceeds throughout upon the ground that the purchase was made by the certified purchasers on behalf of the plaintiff That is the whole basis of the suit as set forth in the plaintiff, and the relief claimed is in express terms a declaration that the plaintiff was the real purchaser, and that the certified purchasers were not the real ones The suit further appears to me to clearly exemplify the mischief against which section 317 is directed It is the case of a judgment debtor trying to evade and defeat his creditors by purchasing the property, which should be available for their debts, secretly in the name of other persons, and afterwards setting up his claim as the real owner The decision of the Full Bench of this Court in *Aldwell* v *Ilahi Bakhsh* (1) supports the view that section 317 would apply to a suit of this description The lower Appellate Court has held that section 317 does not apply, principally on the authority of *Sasti Churn Nandi* v *Annopurna* (2) If the learned Judges in that case meant to lay down that section 317 applies only where the plaintiff, being out of possession, seeks to recover possession from a certified purchaser, and can never apply to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession was not the real purchaser, I cannot agree with them I agree that section 317 must be construed strictly and not extended beyond its express terms But its language is aboslutely general the only conditions are (1) that the suit must be one brought against the certified purchaser, and (2) that the suit must be based on the ground that the purchase was [178] made on behalf of any other person or on behalf of some one through whom such other person claims No doubt that is the only ground of the suit which section 317 prohibits The section would not apply where the suit was based, not on the ground that the purchase was *benami*, but upon some other independent ground In the Calcutta case the alleged ground of fraud was held not to be proved The plaintiff there had been in possession for eight years The terms of the plaint are not set forth in the report, but from the judgment I infer that the Judges regarded the suit as based upon the plaintiff s title by possession, which would be good against any person who could not show a better title, and which the defendant met by setting up a sale certificate in his own name as purchaser I understand the learned Judges to mean that that suit was based, not on the ground mentioned in section 317, but on the title by possession only, and that section 317 does not make a declaratory suit a suit on the ground mentioned in the section, if it is expressly based upon some other ground, and if the question of the certificate is only introduced by the defendant in reply to the claim Whether that view is correct or not, is a question on which I express no opinion All depends upon the nature of the suit as shown by the plaint, and in the present case the plaint proceeds throughout upon the ground

(1) (1883) I L R 5 All 478 (2) (1896) I L R 23 Cal 699

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the decree The principal points in the decree of 1886 are stated in their Lordships' judgment, where all the material facts appear

The questions decided on this appeal were, (1) whether or not, according to the true construction of that decree, interest down to [183] the date of realization of the money was awarded by it, and (2) in connection with this question it was decided whether or not section 88 of the Transfer of Property Act, 1882, was to be construed as precluding an order in the decree for interest to be paid to the decree holder for the period after the date fixed by the decree for the payment of the mortgage money and interest

The judgment debtor having failed to pay the amount by the 20th July, 1886, the date fixed by the decree, the first application for execution was made on the 21st of that month. Another application followed on the 25th April, 1889, another on the 19th March 1894, and the last, out of which this appeal arose, was the above mentioned application of the 17th February, 1896 To this last application the judgment debtor objected for the first time, that the decree of the 17th January, 1886, did not, and could not, legally award interest to accrue after the 20th July, 1886, the date fixed for payment of all that would be due on the mortgage at that date

The Subordinate Judge executing the decree, having considered it as well as the judgment in the suit, was of opinion that they were clear and definite in awarding interest to the decree holder until the 20th July, 1886, the date for payment under the decree in accordance with the provisions of the Act of 1882, section 88, but contained no reference to interest after that The petition was dismissed The execution case was struck off the file upon an office report that the creditor, according to the above view of the claim, had been overpaid to the extent of Rs 66,519

An appeal from this order was preferred to and was dismissed by, a Divisional Bench of the High Court, whose judgment stated that the points to be determined were two They said — "The first is, whether "under the decree the decree holder was granted interest after the 20th "July, 1886, up to the date of payment The second is, whether, if he "was not so entitled, the judgment debtor is, or is not, estopped from "contending that she is not liable to pay any interest after the aforesaid "date"

The Judges found an ambiguity in the terms of the decree of 7th January, 1886, and observed that they, in the face of conflicting expressions, were in the position of the Court which had to put an interpretation upon the decree in *Amolak Ram* v *Lachmi* [184] *Narain* (1) Then followed the judgment of the High Court in that case That judgment was to the effect that in a decree for the sale of mortgaged property the Court has no power under section 88, read with section 86 of the Transfer of Property Act, IV of 1882, to allow interest beyond the date fixed by the decree for payment of the mortgage money The Judges in the present case, therefore decided the first of the above points in favour of the objector and adversely to the decree holder

Upon the first point the High Court, after examining the provisions of sections 86 and 88 of the Transfer of Property Act, and Form 109 in the 4th schedule of the Civil Procedure Code, said "Whatever the

(1) (1896) I L R 19 All 174

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PRESENT:

Lords Hobhouse, Macnaghten and Lindley, Sir Richard Couch and Sir Henry Strong.

MAHARAJA OF BHARTPUR, *Petitioner-Appellant* v. RANI KANNO DEI, *Objector-Respondent.* [17th July and 10th November, 1900.]

On appeal from the High Court for the North-Western Provinces.

Construction of a decree upon a mortgage—Interest to date of realization of a mortgage debt—Act No. IV of 1882 (Transfer of Property Act), section 88.

Section 88 of the Transfer of Property Act, 1882, does not have the effect of limiting interest to the period preceding the date, fixed by a decree upon a mortgage, for payment of the principal and interest of the money secured, nor of precluding interest from extending over the time down to realization of the entire amount due. In a suit upon a mortgage the plaintiff's entire claim was decreed in 1886 with interest during the suit and future interest [182] down to the date of payment. There was a direction in the decree for payment of the principal and interest within six months from the date of the decree, and specified sums were directed to be paid within that period.

Upon the construction of the terms of the decree.

Held, that they were not inconsistent with the mortgagee's obtaining future interest upon the money due, but not paid, at the date fixed in the decree for payment; nor was there any ambiguity in the decree sufficient to prevent, in the execution thereof, interest from being allowed during the interval after that date down to realization.

There being no inconsistency, the duty of the executing Court is only to carry the orders of the decree into effect, as being conclusive between the parties, whether or not the decree may or may not be disputable in point of law.

It was also decided with reference to the provisions of section 88 of the Transfer of Property Act, 1882—which relates to the nature of the decree to be made in a suit by a mortgagee for a sale—that nothing is contained in that section rendering a Court incompetent to award interest beyond the day fixed for payment into Court of the amount declared by the decree necessary to effect redemption, and to set the property free from the otherwise impending sale.

[Fol. 30 Cal. 953; 29 Cal. 43; 31 Cal. 922; 28 All. 223; 35 Cal. 221; Ex. 34 Cal. 150; Ref. 1 S. L. R. 98; 6 C. W. N. 769; 29 Mad. 170; 25 Mad. 214 (F.B.); 9 C. L. J. 288=4 I. C. 56; 14 C. W. N. 125; 13 C. W. N. 744; 37 Bom. 326; (construction of mortgage decree); Ref. 36 I. C. 500; 31 Cal. 922; (duty of executing Court); Dist. 15 I. C. 832.]

APPEAL from an order (28th July, 1898) of the High Court (1) dismissing an appeal against an order (25th September, 1897) of the Subordinate Judge of Agra in the process of executing a decree.

The above orders were made upon an application of the 17th February, 1896, by the appellant for execution of a decree made in his favour on the 7th January, 1886, enforcing his claim upon a mortgage of the 11th December, 1882, securing to him a loan of three lakhs. The balance of the debt for which execution was sought was Rs. 1,44,991 under the decree, including interest.

The order of the Subordinate Judge was made refusing execution upon this application of the decree-holder claiming to be entitled to execution for interest down to the date of the realization of the entire amount decreed. The judgment-debtor objected that the interest after the 20th July, 1886, the date fixed by the original Court in its decree for the payment of the whole amount decreed, was not recoverable under

(1) Weekly notes 1898, p. 164.

In regard to this conflict of authority the High Court of the North West, on their afterwards having to decide the appeal of *Lalit Singh v. Lal Narain Singh*, (1) a judgment debtor's case where the facts were similar to those of the present one, referred the question to a Full Bench. The decree there was for a sale of mortgaged property, and the question was whether the construction that it awarded interest only to the date fixed for payment should prevail, or the construction that it awarded interest down to [156] realisation. The judgment of the Chief Justice, in which his four colleagues concurred, was that the answer depended on the effect of sections 86, 88 and 89 of the Transfer of Property Act, 1882, read with sections 90, 94 and 97 of the same Act, and with section 209, together with the forms 109 and 128 of schedule iv, Civil Procedure Code. He stated that there was an answer given by superior authority, rendering it unnecessary to examine the above decisions of the High Courts. He referred to the judgment of their Lordships in *Rameshwar Koer v. Syed Mahomed Mehdi Hossein Khan* (3) as settling the right decision in agreement with the sense of the Calcutta and Madras rulings. The High Court of the North West having thus overruled the previous decision arrived at in 1890, the present appellant relied upon the proposition thus affirmed, that the true construction of such a decree as that which he held was to the effect for which he contended, and that it was in no way contrary to the enactment of 1882.

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Mr. *J. D. Mayne*, for the respondent, argued that the judgment of the High Court was sound in law. The question really came to what was the true construction of the decree of the 7th January 1880. The contention was that there was no decree for interest accruing after the due date. The Civil Procedure Code in the schedule referred to gave a special form of plaint, expressly asking for interest beyond the due date fixed by the Court, and down to the realisation of the mortgage debt. That form the plaintiff had not employed, and he used no expression directly asking for a decree for such interest. The Judge of the original Court then decreed the claim as made, and the claim involved all the interest that he had asked, down to due date. The decree the Court made did not refer to any interest after it. If the decree was wrong, it might have been corrected by a review, or on appeal, but in execution it was unalterable. There was nothing in the decree to show that the Court which made it considered that interest from and after the date fixed for payment of the mortgage money and until realisation should have been awarded. It was apparent that there was no ground in the decree of 1880 for execution, a reference to the additional interest awarded by ... and the executing Court would have ... warrant of law ... [157] beyond ... [illegible]

[illegible]

[illegible]

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"cause, we should need some stronger authority than is to be derived "from a form which may be varied to suit the circumstances of each "case to overrule what appears to us to be the clear meaning of sec-"tions 86 and 88 of the Transfer of Property Act. Section 209 of the "Code of Civil Procedure applies only to decrees for the payment of "money, and is, in our opinion, inapplicable to decrees for sale of pro-"perty. The decree then, that would have been a legal decree in this "case, would have been one which contained no provisions for interest "after the 21st July, 1886, and we hold that the word 'entire' which "alone renders the meaning doubtful, must be read in the light of the "details which follow, and be governed in its meaning by them."

Upon the second point they held that, although the judgment-creditor had previously obtained orders for execution upon petitions which claimed interest up to date, and no objection had been raised on that score by the judgment-debtor, still there had never before been a decision in which the claim for interest was or need have been disputed, since in all the previous instances a portion of the principal was still due. Consequently, the liability to further interest was not a matter directly and substantially in issue, nor was it a matter heard and finally decided.

For these reasons the High Court dismissed the appeal from the order of the Subordinate Judge, which stood affirmed.

The petitioner for execution having appealed.

Mr. *A. Cohen*, Q. C., and Mr. *G. E. A. Ross*, for the appellant, argued that the decree of the 7th January 1886 should be [185] construed as awarding interest, not merely until the day fixed for payment of the mortgage debt with interest to that date, but with interest for the whole period after that date extending down to the realization of all the money due. Interest on that basis should have been calculated by the Court executing the decree. This would have accorded with the existing practice and with the decisions of the Courts which had recognized the continuance of interest upon the mortgage debt until its satisfaction. There was nothing in section 88 of the Transfer of Property Act, 1882, which required to be construed as precluding interest upon a mortgage after the day fixed by the decree for payment of the amount due into Court, a date which the section required the Court to fix for purposes other than the termination of the period during which interest should run.

In the judgment now appealed from the High Court had followed the decision of another Bench of the same Court in *Amolak Ram* v. *Lachmi Narain* (1). That decision, it was submitted, was erroneous. It was to the effect that in a decree for the sale of mortgaged property, a Court has no power under section 88, read with section 86 of the Transfer of Property Act, 1882, to allow interest beyond the date fixed by the decree for payment of the mortgage money. From the judgment in the case above mentioned a dissentient opinion had been expressed, since it had been given, by the High Courts both of Bengal and of Madras. Reference was made to *Achalabala Bose* v. *Surendra Nath Dey* (2) and to *Subbaraya* v. *Ponnusami* (3). In the latter two cases interest was allowed for the time subsequent to the date fixed by the decree for payment, and was calculated down to the date of realization.

(1) (1896) I. L. R. 19 All. 174.
(2) (1897) I. L. R. 24 Cal. 766.
(3) (1897) I. L. R. 21 Mad. 364.

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"these documents admit of any doubt, and I hold that according to those documents "the decree holder is entitled to interest up to the 20th July 1886, but not after "that

The learned Judge does not further examine the language of the decree, but his decision that it excludes interest after the 20th July 1886, can only be supported by holding that the enumeration of sums specified under head (e) to be paid on that day in order to avoid a sale under head (f) has the effect of cutting down the general terms of heads (a), (b), (c) (d) which, if not so cut down, would give interest to the day of payment

On appeal the High Court affirmed the decision of the Subordinate Judge The learned Judges take a different line of [189] reasoning They do not find the decree so clear against the plaintiff as it appeared to the Subordinate Judge Their difficulties, and with them the precise ground of their decision, will be best stated in their own words —

"Thus we have before us a decree upon which the decree holder places one "interpretation and the judgment debtor another and a totally different interpreta "tion Each claims that the interpretation for which he or she contends is authorised "by the operative words of the decree We have tried to see if those words are capable doubt in the mind of the Court executing which passed the decree The words by In one part they seem to point to an inten "tion of the Court to grant all that the decree holder asked for in his plaint In "another part details are given which cover each portion of the relief asked for "with the exception of interest to date of payment, and thus the two parts are at

"to similar effect In the face of this conflict we are in the same position as the "learned Judges who had to put an interpretation on the decree in *Lachmi Narain* "v *Amolak Ram and another* (see *Amolak Ram* v *Lachmi Narain*, I L R 19 All "174) In that case the learned Judges held 1st that where it is possible to do so "the construction to be placed upon a decree is that construction which would "make the decree one in accordance with the law and secondly, that if a decree "goes beyond what the law allows and leaves no room for doubt as to the construc "tion to be placed upon it, then the Court executing the decree has no option but "to execute it for the sum decreed even though it be a sum beyond what the law "allows

In the case referred to it was laid down that under section 88 of the Transfer of Property Act, which prescribes the nature of the decree to be made in a suit by a mortgagee for sale, it is not competent for the Court to give interest beyond the date fixed for payment into Court of the amount declared necessary to effect redemption and to avoid sale The view of the High Court then is quite clear in its application to the decree in this suit They think that the specifications under head (e) are inconsistent with the results which would otherwise follow upon heads (a), (b), (c) and (d), there is therefore a serious ambiguity in [190] the decree and they are bound to incline to that construction which would make it in accordance with law, rather than to the opposite one

Their Lordships agree that all ambiguous documents should be construed rather to make them accord with law than to make them conflict with it But they are unable to see any such ambiguity in this decree as to call for the application of that principle In their view the foundation of the decree is contained in head (b) That head decrees the

... defendant and is dead. The mortgage was made ... 1882, to secure three lakhs of rupees. The mortgage ... and the mortgagee filed a plaint, which is not in the ... from the Subordinate Judge's recital in his judgment ... been of an ordinary nature, praying for payment of principal ... on a day to be fixed by the Court, and for sale in default ... The frame of the suit however, so far as it explains the ... is most properly taken from the decree itself, on the construction ... the whole case turns.

The decree bears date the 7th January 1886. It will make the ... clearer if the material expressions in it are arranged under separate heads.

"(a) The plaintiff seeks the following reliefs:—That the principal "and interest due up to this time, together with such further interest "as may accrue due from the date of the filing of the plaint up to the "date of payment, and also the costs of this suit with interest thereon up "to the date which may be fixed by the Court, may be ordered to be "paid:

"(b) It is ordered and decreed that the plaintiff's entire claim be "decreed;

"(c) With interest *pendente lite* on the principal at the rate claimed "and costs of the suit;

"(d) The plaintiff will get future interest at eight annas per cent. on "the amount of decree and costs;

"(e) Defendant do pay within six months the sum of Rs. 3,00,000 on "account of principal."

[188] Then follow directions for payment within the six months of specified sums of money under different heads: I. Interest included in the claim, *i.e.*, up to date of suit; II. Interest *pendente lite* at the rate of 9 per cent.; III. Future interest to 20th January 1886, at 6 per cent.; IV. Future interest to 20th July 1886, at 6 per cent.; V. Costs of suit.

"(f) In the event of default in payment of the entire decretal amount, "the hypothecated property be sold by auction in satisfaction of the "decretal amount by enforcement of the lien; and in the event of any "portion of the decretal amount remaining unpaid, the balance of the "decretal amount be recovered from the other property of the debtor "deceased."

The plaintiff has made applications for execution from time to time ...ich he has realised large sums. The last application was made ... 1896, and on that occasion the defendant for the first ... objection that, according to the decree, no interest is ... to the day fixed for payment of the specified sums, ... 86.

... the Subordinate Judge, who was not ... 1886, allowed the objection. His

... ims to recover interest even after the ... by the Court for the payment of the ... 1892. I have read the judgment and ... clear and specific in awarding in... ..., as could be desired. Neither of

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The learned Judge does not further examine the language of the decree, but his decision that it excludes interest after the 20th July 1886, can only be supported by holding that the enumeration of sums specified under head (e) to be paid on that day in order to avoid a sale under head (f) has the effect of cutting down the general terms of heads (a), (b), (c), (d) which, if not so cut down, would give interest to the day of payment

On appeal the High Court affirmed the decision of the Subordinate Judge The learned Judges take a different line of [189] reasoning. They do not find the decree so clear against the plaintiff as it appeared to the Subordinate Judge. Their difficulties, and with them the precise ground of their decision, will be best stated in their own words :—

"Thus we have before us a decree upon which the decree holder places one " interpretation and the judgment-debtor another and a totally different interpreta " tion Each claims that the interpretation for which he or she contends is authorised [illegible] words are capable [illegible] Court executing [illegible] The words by [illegible] point to an inten [illegible] n his plaint. In [illegible] e relief asked for [illegible] two parts are at [illegible] decree the Court [illegible] im as representing what might [illegible] hould expect that a Court which [illegible] decree did would not, if it had [illegible] (20th July 1886), have omitted [illegible] to date of payment,' or words [illegible] same position as the [illegible] ee in *Lachmi Narain* [illegible] *arain*, I L R 10 All " 174). In that case the learned Judges held, 1st that where it is possible to do so " the construction to be placed upon a decree is that construction which would [illegible] with the law, and secondly, that if a decree [illegible] and leaves no room for doubt as to the construc [illegible] a Court executing the decree has no option but [illegible] even though it be a sum beyond what the law " allows "

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the mortgagor, who was defendant and is dead. The mortgage was made on the 11th December 1882, to secure three lakhs of rupees. The mortgagor failed to pay, and the mortgagee filed a plaint, which is not in the record, but which from the Subordinate Judge's recital in his judgment appears to have been of an ordinary nature, praying for payment of principal and interest on a day to be fixed by the Court, and for sale in default of payment. The frame of the suit however, so far as it explains the decree, is most properly taken from the decree itself, on the construction of which the whole case turns.

The decree bears date the 7th January 1886. It will make the discussions on it clearer if the material expressions in it are arranged under separate heads.

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[188] Then follow directions for payment within the six months of specified sums of money under different heads: I. Interest included in the claim, *i.e.*, up to date of suit; II. Interest *pendente lite* at the rate of 9 per cent.; III. Future interest to 20th January 1886, at 6 per cent.; IV. Future interest to 20th July 1886, at 6 per cent.; V. Costs of suit.

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The plaintiff has made applications for execution from time to time under which he has realised large sums. The last application was made on the 14th April 1896, and on that occasion the defendant for the first time raised the objection that, according to the decree, no interest is payable subsequently to the day fixed for payment of the specified sums, *viz.*, the 20th July 1886.

On the 25th September 1897, the Subordinate Judge, who was not the Judge who made the decree of 1886, allowed the objection. His reason is given thus:—

"It is an admitted fact that the plaintiff claims to recover interest even after the "20th of July 1886, which was the date fixed by the Court for the payment of the "mortgage money under section 88 of Act IV of 1882. I have read the judgment and "the decree of the original suit, and they are as clear and specific in awarding in- "terest to the plaintiff up to the 20th of July 1886, as could be desired Neither of

counsel who argued this appeal, it was a new discovery in the year 1896 when the case of *Amolak Ram* (1) was decided, and when the execution now under discussion was applied for It is therefore not surprising that other Courts should have felt difficulty in following the Allahabad decision

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Mr *Mayne* rather flatly refused to argue his case on the ground that the decree of 1886 would be illegal if construed in favour of the plaintiff s view But the authorities cited by Mr Ross show strong judicial reasons against taking such a ground To the report of *Achalabala Bose* v *Surendra Nath Dey*, (2) [192] there is appended a note by the Registrar of the High Court of Calcutta setting forth the rules of that Court and the practice under them, and the effect which the principle of the Allahabad decision would produce on the prevailing views of mortgagees' rights When the last named case came to be decided, which was in July 1897, the Calcutta High Court pointed out, not only a departure from received practice in the Allahabad view of section 88 of the Transfer of Property Act, but its inconsistency with section 97 of that Act and with the form of suit sanctioned by No 109 in the fourth schedule of the Procedure Code of 1882 And on this more extended view of the law they decided that the prevailing practice is a lawful practice, and that section 88 should be construed so as not to interfere with it The same question came before the High Court of Madras in the case of *Subbaraya* v *Ponnusami* (3) in October, 1897, when that Court expressed dissent from the Allahabad decision

In the recent case of *Bakar Sajjad* v *Udit Narain Singh* (4) the High Court of Allahabad itself overruled the decision in *Amolak Ram's* case Perhaps they rested undue weight on a decision of this Board It is true that in the case of *Rameswar Koer* (5), decided in July, 1898, this Board upheld the High Court of Calcutta in awarding interest subsequent to the date fixed for payment by the mortgagor which would have been wrong if the decision in *Amolak Ram* had been right But that point was not raised, and probably never was thought of by anybody until *Amolak Ram's* case came to be known so that the decision of this Board is rather a proof of the prevalence of doctrines contrary to the principle of *Amolak Ram* than a conscious pronouncement against it Nevertheless the Allahabad Judges in giving their decision add a reason of their own for overruling *Amolak Ram*, which seems to their Lordships of importance, to the effect that the object of fixing a day for payment by the mortgagor is for the purpose of assigning a definite time at which the mortgagor s right of redemption is to cease, and the mortgagee's right to foreclose or sell is to attach, and not for the purpose of staying the payment of interest

[193] It must be admitted that the language of section 88 is calculated to cause difficulty, and a sort of difficulty which is a common cause of conflict in judicial interpretations of new statutes It looks as if the draftsman of the Transfer of Property Act had overlooked the difference between a foreclosure and a sale, and had forgotten that in the former case interest stops because the mortgagee gets the property in lieu of his

(1) (1890) I L R 12 All 174
(2) (1897) I L R 24 Cal 766.
(3) (1897) I L R 21 Mad. 364
(4) (1899) I L R 21 All 61
(5) (1898) I L R 26 Cal 39

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entire claim of the plaintiff. The claim so decreed is set forth in head (*a*). It is principal and interest due to the date of the plaint, *plus* interest to accrue due between the date of the plaint and the date of payment, plus the cost of suit with interest thereon up to the date which may be fixed by the Court. The plaintiff seeks that all this shall be ordered to be paid. The sentence is not happily constructed, but such is the reasonably clear outcome of it. Then heads (*c*) and (*d*) mention interest subsequent to date of suit. There is a reason for that, because the sums of interest allowed, first up to date of suit, secondly between that date and the decree (*pendente lite* as it is called), and thirdly after decree, differ in point of rate. All the same, these two heads are included in the plaintiff's entire claim. Then comes head (*e*). In it the Court calculates beforehand, instead of leaving for subsequent account, the amounts which the mortgagor must pay on the 20th July in order to redeem his property and avoid a sale. If he does not pay, the further part of the decree head (*f*) is to be executed. But there is nothing to say that if the mortgagee is kept out of his money beyond the 20th July he is not to have interest upon it; nor any intimation that the Court considered the relief given by the first four heads to be restricted by head (*e*). As then there is no inconsistency, the duty of the executing Court is, as the High Court rightly points out, to carry the orders of the decree into effect, as being conclusive between the parties, whether it may or may not be disputable in point of law.

Apart from the question whether the Court could lawfully give interest to the day of payment, the only difficulty of construction suggested by the learned Judges is the omission of words equivalent to "with future interest to the day of payment." But it is not clear what difficulty this omission creates, nor at what [191] point those words should be expected to come in. They could not come into head (*e*), because that relates only to the period terminated by the 20th July. Head (*f*) does not specify any particulars, but uses the term "decretal amount." It is true that the term is used rather loosely, and has to be applied to subsequent changes of event. On its first appearance it does mean the sums specified under head (*e*), because it is then referring to the 20th July, the critical moment which is to determine whether there shall be redemption or sale. On its subsequent appearance the Court might with propriety have used the words the omission of which has struck the High Court as strange. But there is no inconsistency, or indeed difficulty, in supposing that the term "decretal amount" means the amount due whenever the decree is speaking or being called into action under heads (*a*), (*b*), (*d*). It is far more difficult to suppose that the Court, though contemplating a sale, and more than one sale, with the inevitable delays, before the debt could be got in, should at each successive time have considered the "decretal amount" to be the amount required on the 20th July in order to avoid any sale at all.

This view of the decree is sufficient to decide the present appeal. But a question of such great and general importance has been raised by the judgment of the High Court that their Lordships cannot with due regard to public convenience avoid passing an opinion on it. If the effect of the Transfer of Property Act be as alleged, it works a startling abridgment of the remedies of mortgagees as previously understood. So far as appears from reported cases, or from anything known to the

"pray that when my name is substituted in place of the deceased Raja, "the name of Babu Sheo Narain Singh may, in the terms of this appli- "cation, be substituted and entered in the records in place of my name "in respect of the zamindari haqiyat and lambardari of the entire "village Sikandarpur, tahsil and district Lucknow, as its proprietor in "perpetuity"

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The application as regards Samnapur was in the same terms, except that the words "in perpetuity" were inserted after the words "for his maintenance" and that the words "as its proprietor in perpetuity" were omitted at the end

After the death of Sheo Narain his widow obtained mutation of names in the revenue record in her favour as to both the villages on the 27th September, 1874 She remained in possession of the villages till her death in December 1886 Arjun Singh and Shankar Singh both survived her

In 1889 Arjun brought this suit His plaint alleged that the grant of 1879 by Bisheshar to Sheo Narain conveyed absolutely a permanent and heritable estate, and that thus the title to the two villages, on the death of the grantee and his widow, had passed to him, the plaintiff, as next heir to his brother

The defendant's written answer was, mainly, that the grant to Sheo Narain by Bisheshar was only for his maintenance, and that the estate granted to him in the villages came to an end at his death Reliance was placed on Arjun's having obtained the decree of 1869, which, it was contended, operated in satisfaction [198] of all his claim upon any part of the family estate It was also contended that a will of Jai Ratan was evidence of the nature of Sheo Narain s possession, stating that it had been regarded as only for his life

On issues relating to these points the District Judge dismissed the suit As to the documents relating to Bisheshar s grants to Sheo Narain, he was of opinion that "Sheo Narain did not possess heritable and "transferable rights in the villages in suit and that the plaintiff Arjun was "not entitled to succeed as his heir to the possession of those villages"

In the Court of the Judicial Commissioner this decision was reversed The Commissioners concurred in a judgment in favour of the plaintiff, and the proprietary possession was decreed to him with costs in both Courts

The only point on which the appellate Court was asked to decide was whether 'Sheo Narain had an heritable or only a life interest in the villages Upon this point the Court decided that he had a heritable interest which had passed to Arjun Singh on the death of the widow The Commissioners were of opinion, first, that the grants made by Daljit Singh to his three younger sons must be assumed to have been all of the same nature, secondly, *that the absolute character of the grants to Arjun* Singh and Shankar Singh was shown by an award of the British Indian Association of the 20th August 1868, and by the subsequent litigation and settlement decree in 1869, thirdly, that the character of the grant to Sheo Narain by Bisheshar in 1879 was shown from the presumption that as the village of Nidhan Kuar Khera was held on an absolute tenure, so also, from the words used by the grantor in his application for mutation of names, it appeared that the villages given in exchange for that property would have been given by similar grant for the same absolute estate The continued possession of Jai Ratan Kuar, as a matter of right on her part

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In 1879, after the death of Jagmohan, his son and successor Bisheshar Bakhsh Singh, made an oral agreement with Sheo Narain which resulted in the relinquishment of Nidhan Kuar Khera by the latter, and in exchange for it his acceptance of the two villages now in suit. The transaction is set forth in a baz-dawa, or deed of relinquishment, dated the 2nd May, 1879. On the same date Bisheshar signed petitions for the recording of Sheo Narain's [196] name in the revenue registers, and on the 9th March, 1880, orders were made for the recording of his name accordingly. The baz-dawa was the following :—

"I am Babu Sheo Narain Singh, son of Raja Daljit Singh, caste "Amethia, resident of Sheogarh, pargana Kambrawan, tahsil Drigbijai-"ganj, district Rai Bareli.

"On the death of my full brother, Raja Jagmohan Singh, taluqdar "of Kamhrawan, district Rai Bareli, Raja Bisheshar Bakhsh Singh, the "eldest son of the late Raja, became the owner and possessor of the "moveable and immoveable property of every description left by the "late Raja. I, the declarant, am the late Raja's younger brother of full "blood. My father, Raja Daljit Singh, had, during his life-time, given "me the muafi village of Nidhan Kuar Khera, pargana Kambrawan, "district Rai Bareli, valued at Rs. 2,000 for my maintenance: I, how-"ever, lived jointly with him, the said Raja Sahib, and did not therefore "take possession of the Guzara: on Raja Daljit Singh's demise, the "village continued under possession and enjoyment of Raja Jagmohan "Singh: it is a small village, and it is not possible for me to maintain "myself from the profits thereof. For this reason Raja Bisheshar "Bakhsh Singh, the proprietor in possession of the estate, granted to "me, out of his own pleasure, village Sikandarpur, rental Rs. 1,050, "valued at Rs. 13,500, and village Samnapur, rental Rs. 420, valued at "Rs. 4,400, pargana and tahsil Mohanlalganj, district Lucknow, as an "exchange for the Guzara village Nidhan Kuar Khera under an oral "agreement; and made an application for dakhil-kharij, and had them "duly registered. Therefore, I have now, or shall have in future, no "claim whatever to village Nidhan Kuar Khera, pargana Kambrawan, "district Rai Bareli, and to any property left by the late Raja; and, if "I make any, it shall be void and not entertainable. Wherefore I have "written these few words in the form of withdrawal of claim, so that it "may attest the transaction."

The applications for dakhil-kharij of the villages were as follows :—

"Whereas agreeably to my verbal promise I have after the execution "of the deed of relinquishment regarding the village [197] Nidhan Kuar "Khera, pargana Kamhrawan, district Rai Bareli, and other properties "left by the late Raja Jagmohan Singh, Taluqdar of Kamhrawan, given "the entire village Sikandarpur, valued at Rs. 13,500, and Samnapur, "valued at Rs. 4,400, both situated in the pargana and tahsil of Mohan-"lalganj, district Lucknow, and owned and possessed by me, to my own "uncle (paternal) Sheo Narain Singh, for his maintenance, and placed "him in possession and occupation of both the said villages; and where-"as owing to the demise of my father, the said Raja Jagmohan Singh, a "case for mutation of names respecting the haqiyat (proprietorship) and "lambardari of village Sikandarpur, pargana and tahsil Mohanlalganj, "district Lucknow, is pending, therefore submitting this application, I

the decrees of the Revenue Courts, in the Courts of the regular settlement of 1869 were made to Arjun and Shankar as grantees from their father, Daljit, and expressly to them and their heirs The grants to the two brothers were treated as the basis of claims to estates of inheritance, and there was no reason to suppose that Daljit s gift to Sheo Narain of village Nidhan Kuar Khera was not of the same permanent character The combined effect of the grant in May 1879 with that of the previous transactions in favour of the younger members of the family was to effect an absolute assignment of all the right which the grantor possessed in the villages so disposed of, he having purported to convey that right The estates were obtained not merely in discharge of recognized obligations upon a taluqdar to maintain his younger brothers, but were made upon compromise of claims that would have been litigated Accordingly, under these circumstances the burden was on the appellant to show that Sheo Narain's interest in the particular villages, the subject of this controversy, was restricted to an estate for life The evidence, as it stood, was to the contrary, and indicated estates of inheritance

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The document of the 2nd May, 1879, stating the exchange of Nidhan Kuar Khera for the other villages should receive a benignant construction, according to the extent of the estate which the law allows, see *Juttendromohun Tagore* v *Ganendromohun Tagore* (1)

[201] Whatever might be said as to the usual construction placed on the words "proprietor" and "for ever" in grants for maintenance, they might in this case well be considered as words of description and not necessarily to limit the quantity of estate granted The duration of the estate depended upon the intention with which the grant was made, and in this case that intention had been found with reasonable and sufficient certainty to have been gathered from the circumstances surrounding the parties and their acts Reference was made to the following —*Rajah Nursing Deb* v *Ray Koylasnath* (2), *Bhaiya Ardawan Singh* v *Raja Pratab Singh* (3), *Lalit Mohun Singh Roy* v *Chakkun Lal Roy* (4), *Braja Kissora Deva Garu* v. *Sri Kundana Devi* (5), and to the two cases cited in the argument for the appellant from 12 Indian Appeals and Indian Law Reports, 12 Calcutta

Mr *L DeGruyther* replied

Afterwards, on the 8th December 1900, their Lordships' judgment was delivered by SIR RICHARD COUCH —

Raja Daljit Singh, a taluqdar of Oudh, who died in 1857, had four sons, Jagmohan, Arjun, Shankar and Sheo Narain Jagmohan died in 1879, leaving a son Bisheshar Bakhsh, who died in December 1887, leaving a son Rameshar Bakhsh Shankar died in 1888, leaving two sons, and Sheo Narain died on the 23rd July, 1884, leaving a widow, Jai Ratan Kuar, and a daughter, Mangal Kuar The widow died on the 9th December, 1886 At the time of the annexation of Oudh in 1856 Daljit Singh was the taluqdar of taluka Bansinghpur in the district of Rai Bareli After the death of Daljit, Arjun and Shankar made a claim against Jagmohan for half of the taluqa to be settled with them, the whole having

(1) (1872) L R I A Sup. Vol 47, 55
(2) (1862) 9 Moo I A 55, 64
(3) (1896) L R 23 I A 64, I L R. 23 Cal 838
(4) (1897) L R 24 I A 76 I L R 23 Cal 834
(5) (1899) L R 26 I A 66, I L R. 22 Mad. 431

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after her husband's death, led to the same inference, that Sheo Narain's interest in the villages granted was intended by Bisheshar to be absolute.

On this appeal.

Mr. *L. De Gruyther*, for the appellant, argued that the decree of the appellate Court below was erroneous, and that the District [199] Judge's judgment should be restored. The question being one of the terms of the grant there was no direct evidence of them, but the evidence as to them included the words "proprietor" and "for ever." Those words had in former decisions been construed, in manner well ascertained, to the effect that they would not of themselves denote the grant of a heritable estate in a conveyance for the purpose of maintenance, such as this case presented. To control the *prima facie* construction of this grant, the judgment of the Judicial Commissioners had drawn inferences which had not in reality a sufficient basis in the circumstances of the grant which they had to consider. That Court had acted on insufficient evidence in finding that Raja Daljit in 1856 had by grant conferred on the plaintiff and Shankar Singh absolute estates in the villages of Bankagarh and Davindgarh. Even if that grant conferred hereditary estates on those brothers, still no presumption would thence arise that the grant by Raja Daljit of Nidhan Kuar Khera to Sheo Narain conveyed to him an absolute and heritable estate in that village. Again, even if it were to be assumed that Raja Daljit had granted an estate of inheritance in Nidhan Kuar Khera, still no legitimate presumption thence arose that the grant to Sheo Narain by Bisheshar was for an estate of inheritance. If references to the deed of withdrawal of the 2nd May 1879 and to the petitions for the mutation of names were permissible, for the purpose of ascertaining the terms of the oral grant which was distinctly a grant for maintenance, still it was apparent that those documents contained no words sufficient to indicate the transfer of an estate of inheritance in the two villages granted by Bisheshar to Sheo Narain. Reference was made to *Maulvi Muhammad Abdul Majid* v. *Fatima Bibi* (1), *Toolshi Pershad Singh* v. *Raja Ramnarain Singh* (2), *Anund Lal Singh Deo* v. *Maharaja Dheraj Gurrood Narayun Deo* (3), *Baboo Lekhraj Roy* v. *Kunhya Singh* (4), *Roshan Singh* v. *Balwant Singh* (5).

Mr. *J. D. Mayne*, for the respondent, argued that the Judicial Commissioners were right. Daljit Singh, the father of the [200] brothers, in 1856 made grants, by way of absolute division of part of his property, to the two younger brothers, Arjun and Shankar, and made a grant to the youngest Sheo Narain; and this disposition was calculated to secure the succession of his eldest son, Jagmohan, to an undivided taluqdari estate. The gift of villa… Nidhan Kuar Khera was one of a series of thr… ts to the you… hers. The two, Arjun and Shankar, afte… claim a ri… in the family estate, alleging that the… ates were… e. But the above view of the impa… e arran… commended itself to the associated… made a… 8 on the occasion of the claim mad… er me… ily. Moreover

(1) (1885) L. R. 1… 8 All. 39.
(1885) L. R. 12 … 17.
…50) 5 Moo. I.
(4) … 3 Cal.
(5) … All.
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Bisheshar Bakhsh having died, the suit in this appeal was brought by Arjun on the 10th October, 1889, against his son, Rameshar, a minor, and Rani Sukraj Kunwar, his guardian, the present appellants, for proprietary possession of the two villages of which they were alleged to be in possession, and being heard by the Additional Civil Judge of Lucknow on the 13th December, 1893, it was dismissed Arjun thereupon appealed to the Court of the Judicial Commissioner of Oudh, which reversed the decree of the Lower Court and decreed to the plaintiff possession of the villages

The case of Arjun was that according to the custom prevailing in the family a daughter is excluded from inheritance, and that he was the heir to Sheo Narain The defendants denied the alleged custom and asserted that Bisheshar granted to Sheo Narain a maintenance right only in the villages The material issues of those laid down were whether daughters were excluded from inheritance by the family custom and whether the right of maintenance was heritable It may here be noticed that Shankar as well as Arjun having survived Sheo Narain, Arjun, if right in his contention, would be entitled to only a half share of the property The First Court found that the custom to exclude daughters was proved, and with reference to an argument for the plaintiff that Nidhan Kuar Khera was held by Sheo Narain as absolute owner, and it must therefore be presumed that he obtained similar rights in the two villages, held that there was nothing to prove that it was given to him by Daljit Singh absolutely, and it was unlikely that two villages of large value were given to him [204] absolutely in lieu of an insignificant village like Nidhan Kuar Khera On the evidence in the petitions the Court held that there was nothing in them from which it could be gathered that it was the intention of Bisheshar Bakhsh to create an estate of inheritance, and referred to the case of *Abdul Majid* v *Fatima Bibi* (1) and to three cases in the Judicial Commissioner's Court similar to the present, in which it had been held that heritable estates had not been created and dismissed the suit On appeal to the Judicial Commissioner's Court that Court referred to the decision or award of the British Indian Association in a dispute between Arjun and Shankar and Jagmohan in which the former two claimed that the ancestral property was held in common and was divisible and each claimed one quarter of it The opinion or award was against their claim But the Court quotes from the award, which is a lengthy document occupying ten pages of the printed record, two passages One of them is — "It is clear that Raja Daljit Singh himself "during his lifetime separated the plaintiffs, after giving them a suitable "maintenance" And the other is — "that it has been proved by trustworthy witnesses that Raja Daljit Singh by this action," namely the gift by him of a village to each of his three younger sons, "intended to avoid future disputes" It is then said by the Court — "It is clear "from the award that the taluqdars who made it regarded the grants to "the plaintiff and Shankar Bakhsh Singh as absolute" Their Lordships cannot agree to this conclusion from the award Apparently the question whether the grants were absolute was not the matter in dispute The question referred to was whether the ancestral property though styled a Raj was held in common and was divisible That appears in the statement in the so called award of the points in issue and the opinion There is no finding that the grants were absolute The Court then says

(1) (1885) L R. 12 I A. 159, I L R 8 All 39

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been forfeited under Lord Canning's Proclamation. In the proceedings of the Financial Commissioner's Court at Lucknow on the 9th February 1869, with reference to the settlement of the forfeited estate it is stated by the Commissioner that these two brothers refused to accept anything but a complete share of the estate, and had been several times on the point of creating disturbances; that he had had the parties before him several times; the plaintiffs [202] then appeared more reasonable and were willing to withdraw their claim if the Raja (Jagmohan) would make them some further allowance; that Jagmohan Singh was unwilling to alienate any of the property to the detriment of his own son and maintained that the plaintiff's share was settled as younger sons by their father; that the taluqdar defendant (Jagmohan) after some discussion in which Maharaja Man Singh took part and advised him consented to give up lands paying Rs. 1,000 more in perpetuity to the two plaintiffs and had signed an agreement to this effect. Thereupon Colonel Barrow, the Financial Commissioner, ordered the settlement to be recorded. This was done by the Assistant Settlement Officer who, on the 22nd June 1869, decreed the proprietary right in the village Bankagarh to Arjun and his heirs. On the 28th June 1869, the same officer decreed the proprietary right in the village Davingarh to Shankar and *his heirs*.

The facts as regards Sheo Narain are these. On the 2nd May 1879, Jagmohan having died on the 15th February previously, he executed a deed by which, after stating that his father Daljit had during his lifetime given him the village of Nidhan Kuar Khera, pargana Kambrawan, district Rai Bareli, valued at Rs. 2,000 for his maintenance, that he lived jointly with the Raja and did not take possession of the village, and, on Daljit Singh's death, the village continued under the possession and enjoyment of Jagmohan, and it was not possible for him to maintain himself from the profits thereof, that for his reason Bisheshar Bakhsh had granted to him "out of his own pleasure" village Sikandarpur, rental Rs. 1,050, "valued at Rs. 13,500, and village Samnapur, rental Rs. 420, valued at Rs. 4,400," as an exchange for the village Nidhan Kuar Khera under an oral agreement and made applications for dakhil-kharij and had them duly registered, he relinquished all claim to that village and to any property left by the late Raja. Accordingly, on the 2nd May 1879, Bisheshar petitioned the Assistant Commissioner of Lucknow that when his name was substituted in place of Jagmohan's the name of Sheo Narain might be substituted and entered in records in place of his name in respect of the zamindari haqiyat and lambardari of the entire village Sikandarpur. On the same day he made a similar application for the village Samnapur. There is a difference in the words of these applications [203] as stated in the record in this appeal. In the first it is said that Jagmohan had given the villages to Sheo Narain for his maintenance, and at the end, after the description of the villages as in the district of Lucknow, are the words "as its proprietor in perpetuity." In the second these words are omitted after "Lucknow," but in the middle of the document after the words "Sheo Narain for his maintenance" are the words "in perpetuity." The difference is not material; the meaning is the same. On the death of Sheo Narain the tahsildar having reported it and that his widow was the proprietress and was in possession, mutation of names as to both villages was made in her favour, and she was in possession of them until her death on the 9th December, 1886.

23 A 206 (=21 A W N 34)

APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Aikman

1901 FEB 5. APPELLATE CIVIL 23 A 206=21 A W N 34

NARSINGH MISRA AND ANOTHER (*Defendants*) v LALJI MISRA (*Plaintiff*) * [5th February 1901]

Hindu Law—Joint Hindu family—Liability of sons to pay their father s debts—Limitation—Act No. XV of 1877 (Indian Limitation Act) schedule II article 120

The father of a joint Hindu family executed, on the 23rd June 1893, a simple money bond, payable on the 18th June 1894 The money not being paid on the due date the creditor sued the father alone and obtained a decree against him on the 17th June, 1897 The father died in 1899, and after his death the creditor attached certain joint family property in the hands of the sons The sons objected to the attachment, and their objection was allowed Thereupon the creditor, on the 22nd January, 1900 filed a suit against the sons claiming payment from them of the father s debt *Held* (1) that the liability of the sons to pay their father s debt accrued on the 18th June, 1894, the date when the bond became payable and (2) that the suit was one to which article 120 of the second schedule to the Indian Limitation Act, 1877 applied and was therefore not barred by limitation *Badri Prasad* v *Madan Lal* (1) followed *Mallesan Naidu* v *Jugala Panda* (2) and *Natesayyan* v *Ponnusami* (3) referred to The latter case dissented from as regards the *terminus a quo* of the period of limitation

[Dist 25 All 67=1902 A W N 199 Ref 9 O C 351 31 All 176=6 A L J 263, Fol 28 All 508=1906 A W N 117=3 A L J 274 Appr 27 Mad 243=14 M L J 84 6 A L J 378=1 I C 759

THE facts of this case sufficiently appear from the judgment of the Court

[207] Munshi *Gobind Prasad*, for the appellants

Babu *Jiwan Chandar Mukerji* (for whom Babu *Beni Madhab Ghosh*), for the respondent

BLAIR and AIKMAN, JJ —This is an appeal against an order of remand under section 562 of the Code of Civil Procedure, based upon a finding that the Munsif, as Court of first instance, had wrongly dismissed the suit of the plaintiff as barred by limitation

The facts are —One Kauleshar, father of the present defendants executed a bond upon the 23rd June 1893, for a sum of money borrowed from the plaintiff, which, under the said bond, became payable on the 18th June, 1894 The bond was a simple unregistered money bond It was not paid on the due date, and upon the 17th June, 1897, the present plaintiff sued Kauleshar alone upon the bond, and obtained a decree against him on the 12th July, 1897 Kauleshar and his sons, the present defendants, constituted a joint Hindu family Kauleshar died in 1899, and after his death the plaintiff attached certain property which was the property of the joint Hindu family The present defendants objected to the attachment on the ground that it was ancestral property which had devolved on them by right of survivorship, and was not an asset of the deceased father in their hands This objection was sustained The property was released from attachment on the 20th January, 1900 On the 22nd January the plaintiff brought the suit, out of which this

* First Appeal No 72 of 1900 from an order of Rai Anant Ram, Additional Subordinate Judge of Ghazipur dated the 1st May 1900

(1) (1893) I L R 15 All 75

(2) (1898) I L R 23 Mad 292

(3) (1892) I L R 16 Mad 99

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23 A. 194= 28 I. A. 1= 7 Sar. 804.

that the grants to Arjun and Shankar (which were made upon a compromise of the claim of $\frac{1}{4}$ share) being absolute, it seems to follow that the grant to Narain was one of the same nature; that the circumstance that Nidhan Kuar Khera, although granted to Sheo Narain for maintenance, was granted to him absolutely (which is erroneously taken as proved) goes to show that Sheo Narain, when he stated in the bazdawa that that [205] village had been granted to him as maintenance, was referring not to a grant for life but an absolute grant; that there was therefore a strong presumption when he stated in the same document that the disputed villages were granted to him in lieu of Nidhan Kuar Khera that he referred to an absolute grant of those villages, and that Bisheshar Bakhsh when he stated in the application for mutation of names that he had granted those villages to Sheo Narain for maintenance was referring to an absolute grant of them; that this presumption is strengthened by "proprietor" and "for ever" and was not weakened by the fact that the disputed villages were of considerably greater value than Nidhan Kuar Khera which was accounted for by Sheo Narain relinquishing all claims on the taluqa property moveable and immoveable, and that there was no reason to suppose that Bisheshar Bakhsh would grant to his uncle, who had lived jointly with his father up to the latter's death, the least he could well do. The construction is thus made by the Court to depend upon a fact as to Nidhan Kuar Khera which was not proved and the supposition by the Court of what Bisheshar Bakhsh would do. It does not seem to have been in the mind of the Court that a statement of Sheo Narain in his own favour was not admissible evidence. But the Court had just before said :—"There seems to be no doubt that where "the purpose of the grant is the 'guzara,' or maintenance of the gran- "tee, such purpose goes to show that the grant is intended to be for the "life of the grantee. This was so held in Select Case No. 291 on the "authority of *Woodoyaditto Deb* v. *Mukoond Narainaditto* (22 W. R. "225). There seems also to be no doubt that in the case of a grant for "maintenance the words 'proprietor' and 'for ever' will not *per se* "create an inheritable estate." Their Lordships may observe that in the case in L. R. 12 I. A. 159, where this was held, the gift by a will was of the management of property, but it is also applicable in the construction of the gift in this case. The Court should have stopped here and dismissed the appeal and not proceeded to give so insufficient a reason as followed for allowing it and reversing the decree of the First Court. This Court had found on the issue whether daughters were excluded from inheritance by the family custom in favour of the plaintiff Arjun. The Judicial Commissioner's Court has taken no [206] notice of this issue, and in the view which their Lordships take of the case it is not necessary to decide it. That Court also seems not to have been aware that Shankar survived Sheo Narain and left a son, and consequently Arjun could only inherit a half share of the property. Their Lordships being thus of opinion that the decree of the First Court ought not to have been reversed will humbly advise Her Majesty to affirm it and reverse the decree now appealed from with the costs of the appeal in which it was made. The respondent will bear the costs of this appeal.

Appeal allowed.

Solicitors for the appellant :—Messrs. *Watkins* and *Lempriere.*

Solicitors for the respondent :—Messrs. *T. L. Wilson & Co.*

er of selling or
Imdad Khatun

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APPELLATE CIVIL.

23 A 211=
21 A W N
52.

[Disc 1906 A W N 204 Ref 28 I C 852=13 A L J 833 63 I C 437 Rel 4 N L R 104 Dist 14 A L J 244=33 I C 707]

THE facts of this case were as follows One Ram Bakhsh, an occupancy tenant, planted certain trees on his occupancy holding He mortgaged those trees in 1885 to Sheo Ratan Subsequently to the mortgage Ram Baksh relinquished his tenancy, and the holding was taken possession of by the Zemindars Then under a [212] decree on Ram Bakhsh s mortgage the trees were put up to auction and purchased by Sheoadhar After this the land upon which the trees stood was taken up for public purposes, and a sum of Rs 76 8 0 was paid as compensation in respect of the trees This sum was realized by the Zemindars, and thereupon the auction purchaser Sheoadhar sued the Zemindars for the recovery of the said sum The Court of first instance (Munsif of Cawnpore) dismissed the suit The plaintiff appealed, and the lower appellate Court (Small Cause Court with powers of a Subordinate Judge) decreed the appeal and the plaintiff s suit The defendants accordingly appealed to the High Court

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the appellants

The Hon'ble Mr *Conlan* (for whom Mr *W Wallach*) for the respondent

KNOX AND BURKITT, JJ —The decision of the lower appellate Court is clearly wrong, and shows a remarkable ignorance of the common law applicable to cases of this kind in these Provinces When a tenant, either occupancy or tenant at will, plants trees on his holding, the property in those trees, in the absence of custom or contract to the contrary, attaches to the land, and the tenant has no power of selling or otherwise transferring those trees This is the law which has been laid down in *Ajudhia Nath* v *Sital* (1), *Imdad Khatun* v *Bhagirath* (2) and *Kausalia* v *Gulab Kunwar* (3) In this case when the respondent Sheoadhar took a mortgage of the trees and in execution of the decree on that mortgage purchased those trees, he acquired in them no interest either by his mortgage or by the sale resulting from it There is nothing to show that the Zemindars, who were not made parties to his suit or any of the proceedings, were in any way cognizant of them The appeal is decreed, the judgment and decree of the lower appellate Court set aside, and that of the Court of first instance restored with costs

The plaintiff's suit will stand dismissed with costs in all Courts

Appeal decreed

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(1) (1881) I L R 3 All 567
(2) (1888) I L R 10 All 159
(3) (1899) I L R 21 All 297

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defendant alone. From this decree the plaintiff appealed to the High Court.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the apppellant.

Mr. S. *Amir-ud-din* and Munshi *Gobind Prasad*, for the respondents.

STRACHEY, C. J., and BANERJI, J.—The attention of the lower Appellate Court was not called to the decision of the Full Bench in *Heera Ram* v. *The Hon'ble Sir Raja Deo Narain Singh* (1).

That was a case in which the Zemindar sued the purchaser and the vendor for recovery of the customary due known as *haq-i-chaharum*, and the question was directly raised as to whether it was a good defence on the part of the purchaser that he had paid the whole of the purchase-money to the vendor. We construe the judgment of the Full Bench as deciding that in the case of a customary right to receive *haq-i-chaharum*, where it does not appear that the Zemindar's right to a share of the purchase-money is limited to a right to claim it from the vendor, the right can be enforced against the vendee also. In the present case the lower Appellate Court has referred to the terms of the wajib-ul-arz. The only passage bearing on the point occurs in Chapter [211] IV, "On general rights of the tenants," and it is as follows:—"If the tenants of a higher class sell their houses they should deduct therefrom the *haq-i-chaharum* (one-fourth) due." That may either mean that the vendor is to leave with the purchaser the one-fourth due to the Zemindar or it may mean that out of the purchase-money received by him he is himself to make over one-fourth to the Zemindar. As to the obligation on the purchaser, as distinguished from the vendor, the passage is inconclusive. With regard to the rest of the evidence the learned Judge expressly says, "it shows that there is no fixed rule." By this we can only understand the learned Judge to mean that the *haq-i-chaharum* is sometimes paid by the vendor and sometimes by the vendee. In other words, it is a case where the vendee does not show that the Zemindar's customary right is limited to a right against the vendor only. The result is that we must allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

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23 A. 211 (=21 A. W. N. 52.)

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

JANKI AND ANOTHER (*Defendants*) *v.* SHEOADHAR (*Plaintiff*).*
[6th February, 1901.]

Landholder and tenant—Trees—Property in trees planted by a tenant on his holding.

When a tenant, either occupancy or tenant-at-will, plants trees on his holding, the property in those trees, in the absence of custom or contract to

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* Second appeal No. 15 of 1899 from a decree of Babu Nilmadhab Rai, Judge of Small Cause Court, with powers of the Subordinate Judge of Cawnpore, dated the 28th September 1898, reversing a decree of Pandit Kanhia Lal, Munsif of Cawnpore, dated the 18th July 1898.

(1) N. W. P. H. C. Rep. 1867 F. B. 63.

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APPELLATE CIVIL

23 A 216= 21 A W N 50

Lachmi Narain has acquired the interests of all the other members of Nain Sukh Rai's branch

The present suit is a suit for partition of the property in question, in which the plaintiff claims a one half share against Lachmi Narain, who is the owner of the other half It was objected in the Courts below, and the objection was repeated in this appeal by the defendant, that the suit ought to have been dismissed on the ground that it is a suit for partition of a portion only of the joint family property That plea is based on the fact that there is other property belonging jointly to the two branches, Din Dayal's and Nain Sukh Rai's, which was not divided in the partition of 1864, in which other persons besides the plaintiff and Lachmi Narain are jointly interested, but which is not included in the suit Two of those other persons belong to Din Dayal's branch and two to Nain Sukh Rai's branch In that other property the plaintiff and the defendant appellant would each be entitled to one sixth and the rest to the remaining five sixths Now it will be observed that as regards the property in suit the only persons interested are the plaintiff and the defendant appellant What is suggested is that the claim for partition of this property is bad, because it does not include a claim for partition of other property against not only the defendant appellant but other persons who have no interest in the property in suit at all

The cases in which it has been held that a suit will not lie for partition of a portion only of joint family property are different No case has been cited to us in which the principle of those cases has been applied where partition is sought of property belonging exclusively to the plaintiff and the defendant We see no reason why that principle shoud be extended to such a case In Mr Mayne's Treatise on Hindu Law, 6th Ed , pp 647, 648, one of the exceptions to the general rule that every suit for partition should embrace all the joint family property is stated to be where a portion "is held jointly with strangers who have no interest in the family partition, and therefore cannot be made parties to the general suit for partition" The authority for this exception is *Purushottam* v *Atmaram* (1) [218] In that case there were two properties—one owned jointly by the families of the Parashares and the Khandves the other owned jointly by the family of the Parashares The plaintiffs, who were members of their family Parashares, brought a suit against the members of their family for partition of the first mentioned property only, and that property was divided among the Parashares The same plaintiffs afterwards brought another suit against the members of both families for partition of the second property It was held that the claim was not barred by section 43 of the Code of Civil Procedure, as the cause of action out of which it arose was different from the cause of action in the former suit, and that it could not have been joined in the former suit The only substantial difference between the point considered in that case and the point before us is that the Parashares and the Khandves were distinct families, whereas here the plaintiff and the defendant are members of a joint Hindu family whose property has been partly divided Still, so far as the property now in suit is concerned, the members of the family, other than the plaintiff and the defendant, are, to all intents and purposes, "strangers" to both, they have "no interest" in the partition claimed,

(1) (1899) I L R 23 Bom 596.

1901 FEB. 9. — FULL BENCH. — 23 A. 213= 21 A. W. N. 54.

chargeable with duty under the Stamp Act. Compare the definition of "postage stamp" in section 2 (*g*) of the Indian Post Office Act, 1898. It follows that a postage stamp is not a stamp of the nature contemplated by the Act and Rules. Further, it follows with reference to the words "improper description" both in Rule 16 and section 37 of the Act; and the same considerations would apply to Telegraph or Court-fee stamps, except as authorized by Rule 15 (*e*) that it is not a stamp of "improper description," but, within the meaning [216] of the Act and Rules, not a stamp at all, and in a case where any such stamp is used the Collector is not competent to take action under Rule 16. We agree with the view of the Board of Revenue and this is our answer to the reference.

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23 A. 216(=21 A. W. N. 50.)

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

LACHMI NARAIN (*Defendant*) *v.* JANKI DAS (*Plaintiff*).*
[14*th February*, 1901.]

Hindu Law—Joint Hindu family—Suit for partition—Partition of the whole joint family property not claimed.

The plaintiff, a member of a joint Hindu family, sued the defendant, another member of the same family, for partition of certain property, which had once been the property of the joint family as a whole, but which at the time of the suit had come to be the joint property of the plaintiff and the defendant only. *Held*, that it was not necessary for the plaintiff to include in the suit other property, which belonged jointly to the plaintiff, the defendant and other members of the joint family. *Purushottam* v. *Atmaram* (1) referred to.

[Fol. 28 All. 50=1905 A. W. N. 174; Ref. 7 O. C. 369.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) for respondent.

STRACHEY, C. J., and BANERJI, J.—The plaintiff belongs to one branch of a joint Hindu family and the defendant-appellant to another branch. Din Dayal and Nain Sukh Rai were two brothers. The plaintiff is the grandson of Din Dayal, and the defendant is one of the sons of Nain Sukh Rai. In 1864 there was a partition of some of the joint family property between Din Dayal's branch and Nain Sukh Rai's branch. Certain other parts of the joint family property, however, were not divided in that partition. Among the joint properties which were left undivided was the property now in suit, which consists of a gateway, certain bullock sheds, rooms and the like. As regards this property, it appears that the plaintiff has acquired the interest of all the other persons in his, that is, Din Dayal's, branch of [217] the family. Similarly in the property in suit the defendant-appellant

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* Second appeal No. 40 of 1899 from a decree of Babu Baijnath, Rai Bahadur, Additional District Judge of Saharanpur, dated the 1st October 1898, confirming a decree of Pandit Kunwar Bahadur, Munsif of Muzaffarnagar, district Saharanpur, dated the 10th September, 1897.

(1) (1899) I. L. R. 23 Bom. 596.

1901 FEB 21.

APPELLATE CIVIL

23 A 219= 21 A W N. 66

KNOX and BURKITT, JJ —On the 27th July, 1889, the plaintiff respondent to this second appeal sued the present appellants and others, and prayed for the same relief in respect of what was virtually the same subject matter as he now sues for in this suit the only difference as regards the subject matter is that in the present suit a certain portion of the property, for the partition of which he originally sued, has been omitted from the plaint In other respects the suit of 1889 and the present suit are precisely the same Before the suit of 1889 was determined, the parties [220] came to Court and represented that the matter in dispute between them had been adjusted The Court set forth in its order that both the parties before it expressed a wish that the suit should be struck off (kharij), and proceeded to strike off the case in accordance with this wish The Court in passing such an order acted wrongly It should have acted in accordance with section 375 of the Code of Civil Procedure It did not do so, and it is probably due to this mistake that the present plaintiff litigation has taken place Still it was the duty of the present plaintiff to have got a proper order recorded Instead of seeing to this he remained satisfied with action which practically amounted to withdrawal of his suit without permission asked to sue again We can easily understand that under the circumstances the parties never contemplated that such permission would be needed After some ineffectual efforts made to enforce the compromise, the plaintiff has brought the present suit, the nature of which has been explained above We are compelled reluctantly to hold the suit is barred by the second clause of section 373 of the Code of Civil Procedure

The result is that this appeal must be and is decreed The judgment and decree of the lower appellate Court is set aside, and the plaintiff's suit is dismissed with costs in all Courts *Appeal decreed*

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23 A 220 (=28 I A 28=5 C W N 153=3 Bom L R 78=11 M L J 65)

PRIVY COUNCIL

PRESENT

Lords Hobhouse, Davey and Robertson, and Sir Richard Couch

RADHA KISHAN (*Plaintiff, Appellant*) v THE COLLECTOR OF JAUNPUR (*Defendant, Respondent*) [14th November and 8th December, 1900]

[*On appeal from the High Court for the North Western Provinces*]

Ex parte decree against an absent defendant—Civil Procedure Code, section 108—Remand under section 562—Such order not appealable—Civil Procedure Code, section 595 (a)

A defendant not present in person at the hearing on evidence, had appointed a pleader who had acted in the suit until that occasion, when he stated to the Court that he was not instructed for the defence The Court proceeded without him to a decree for the plaintiff

An application by the defendant under section 108, Civil Procedure Code, for an order setting that decree aside, was disallowed without the Court's being [221] satisfied by any investigation as to whether or not the defendant had been prevented by any sufficient cause from appearing when the suit was called on for hearing

The High Court on an appeal reversed that order, holding that the decre

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and most of the reasoning of the learned Bombay Judges seems fully applicable. Thus Mr. Justice Parsons says (p. 598) :—"It cannot be said that the claim of the plaintiffs to obtain their share of property owned jointly by them and B is founded on the same cause of action as their claim to obtain the share of property owned jointly by them and B and C. If the cause of action is founded on a refusal on the part of the defendants to divide, then the refusal in each case is that of different persons owning different rights. If it is founded on the right to claim a partition of what is joint, then the subject-matter is different, for the joint property of A and B is not the joint property of A, B and C." Mr. Justice Ranade says (p. 600) :—"This claim against the Khandves could not have been joined in the old suit for a family partition without infringing the provisions of sections 28, 29 and 44 of the Code about the misjoinder of parties and of subject-matters." All this seems to apply equally to a case where the property not included in the suit belongs jointly to the plaintiff and the defendant, and persons who though not "strangers" in the sense of members of another family, have no more interest than "strangers" in the property [219] in suit, and, if so, it seems that Mr. Mayne's third exception should be enlarged so as to cover such a case.

We think that the Court below was right, and dismiss this appeal with costs.

Appeal dismissed.

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23 A. 219 (=21 A. W. N. 66.)

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

GULKANDI LAL AND OTHERS (*Defendants*) *v.* MANNILAL (*Plaintiff*).*
[21st February, 1901.]

Civil Procedure Code, section 373—Suit for partition—Withdrawal of suit—Joint petition by parties praying that the suit might be struck off—Subsequent suit for partition barred.

The plaintiff and the defendants in a suit for partition having arrived at a compromise, presented to the Court a joint petition asking that the suit might be struck off (*kharij hardiya jawel*). The Court passed orders accordingly in the terms of the petition, striking off the suit. The terms of the compromise were not however inserted in the decree, and were never carried out. Subsequently the plaintiff brought a second suit for partition of the same property.

Held, that it was incumbent on the plaintiff to see that the Court did its duty and recorded a proper order in the suit with reference to section 375 of the Code of Civil Procedure, and that, as he had not done so, he must be taken to have withdrawn his suit without permission to sue again, and his second suit was barred by section 373 of the Code.

[Ref. 37 A. 155=13 A. L. J. 98=27 I. C. 694.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) for the appellants.

Mr. *W. K. Porter* and Munshi *Gobind Prasad* for the respondent

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* Second Appeal No. 840 of 1898 from a decree of Rai Pandit Indar Narian, Subordinate Judge of Farrukhabad, dated the 28th July, 1898, confirming a decree of Babu Prithi Nath, Munsif of Kaimganj, dated the 16th March 1898.

his being busy elsewhere, or by reason of the record of the suit not having come back from Jaunpur, where it had been sent on requisition The postponement took place on the 1st January, 1896, on which an order was passed that the case should come on for decision on the 19th March, 1896, and that the parties with their witnesses should appear on that date Due notice thereof was admittedly given to pleaders That day having arrived the pleader for the applicant stated that he could not conduct the case, and he had received no instructions from his client Thereupon the Court proceeded to try the case, and tried and decided the issues on the evidence adduced on plaintiff s behalf and decreed the suit against the applicant "

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The Subordinate Judge added that the defendant's pleader was not without instructions, and that his appearance in Court, therefore, was an appearance of his client

The High Court (EDGE, C J and BLAIR, J) set aside that order holding that the decree was *ex parte* They remanded " the case,' as their order stated, under section 562 " to be disposed of on the merits Their judgment, in which they referred to *Bhagwan Dai* v. *Hira* (1), *Jonardan Dobey* v *Ramdhone Singh* (2), and *Sahibzada Zein ul abdin Khan* v *Sahibzada Ahmed* [223] *Raza Khan* (3), distinguished the last case as having no bearing on the present They decided that this was a decree passed *ex parte* against a defendant within the meaning of section 108 For although the pleader was physically present in Court, he was not there representing the defendant The judgment is reported in I L R 20 All 195 *Shankar Dat Dube* v *Radha Krishna*

Mr. *W H Apjohn* and Mr *G E A Ross*, for the appellant, argued that there was error in the judgment of the High Court The decision on the 19th March, 1896, was not *ex parte* Referring to the fact that the pleader, whose vakalatnamah had been filed and was not cancelled, was in Court, a postponement having been obtained on his application, and the date fixed for the hearing, the presence of the pleader was in his representative character What took place was that the defendant ceased to appear in the course of the hearing of the case when the pleader said that he had no instructions The procedure that was applicable was the procedure under section 157, Civil Procedure Code, which referred to Chapter VII

The parties had appeared more than once, there was a non appearance of the defendant at an adjourned hearing The question was as to the meaning of section 157 in authorizing the Court to proceed to dispose of the suit in one of the modes directed by Chapter VII, or make such other order as it might think fit The main contention was that the presence of the pleader, who had appeared for the defence, rendered section 108 inapplicable, although it was in Chapter VII The case was not heard *ex parte*; and there was no need for enquiry as to sufficiency of cause (as expressed in that section) preventing the non appearance of the defendant, for he had appeared by his pleader The decree itself had not been appealed from It was submitted that it could not be set aside under section 108

Mr *A. Phillips*, for the respondent, argued that the order of the High Court was right That order was that " the case," meaning the

(1) (1897) I L R 19 All 355
(2) (1896) I L R 23 Cal 738
(3) (1878) L R 5 I A 233 I L R 1 All 67

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23 A. 220= 28 I. A. 28= 5 C. W. N. 153=3 Bom. L. R. 78= 11 M. L. J. 65.

was an *ex parte* one within the meaning of section 108, and by an order of remand under section 562 remanded the case to be disposed of on the merits.

Held, that the intent and effect of the High Court's order was not to set aside the decree made against the defendant, but to direct an inquiry under section 108 as to the cause of the defendant's absence, the decree having been *ex parte*.

Held, also, that the High Court's order of remand was not appealable, being interlocutory and not being final within section 595 (*a*), and that the present appeal ought not to have been admitted.

[Diss. 1 S. L. R. 115; 31 Cal. 403=11 C. W. N. 329=5 C. L. J. 217 (F. B.); Dist. 17 C. P. L. R. 1; 8 C. W. N. 621; 2 Pat. L. T. 155; Ref. 1914 M. W. N. 64=26 M. L. J. 96=14 M. L. T. 560=21 I. C. 842=38 Mad. 509; 21 C. L. J. 279=26 I. C 567; 8 A. L. J. 192=33 All. 391; 3 Pat. L. J. 339; 15 C. W. N. 818=13 C. L. J. 90=9 I. C. 183; 60 I. C. 479=6 Pat. L. J. 116; 60 I. C. 522=1 Lah. 106; 62 I. C. 57.]

APPEAL from an order (23rd December, 1897) (1) of the High Court, setting aside an order (25th November 1896) of the Subordinate Judge of Benares, and remanding the case under section 562 of the Code of Civil Procedure, to be disposed of on the merits.

This suit was brought by the plaintiff, appellant, on two hypothecation bonds for Rs. 65,426, principal and interest, executed by Raja Harihar Dat Dube, deceased, against Shankar Dat Dube, his legal representative. The latter having died pending this appeal, the respondent now was the Collector of Jaunpur as agent of the Court of Wards managing the estate of the late Rani Gumani Kuar.

There were the principal facts—that the pleader, who had appeared in the case on previous occasions as representing the defendant stated to the Court when the case was called on for hearing on evidence on the day appointed, the 19th March, 1896, that he had not been instructed, and that the proceedings were continued without him and in the absence of the defendant, Shankar Dat Dube, to their conclusion.

The main question on this appeal was whether the decree which followed was an *ex parte* one within the meaning of section 108 of the Code of Civil Procedure so as to afford ground for the application of that section.

On the 9th April, 1896, the defendant applied to the Subordinate Judge (who had succeeded the Judge who made the decree above mentioned) to set aside the decree under section 108 of [222] the Code of Civil Procedure. The petition stated that the pleader had given no notice to the defendant of the date fixed for the hearing. The petition was disallowed on the ground that the decree was not *ex parte*, and that therefore section 108 was inapplicable. The view taken was that the defendant had in fact appeared. The case was thus stated by the Subordinate Judge:—

"The 19th March, 1896, on which the decree in question was passed, was fixed to the knowledge of the pleaders for both parties for the purpose of the production of evidence on the issues framed. These issues had been framed with reference to the plaint and the written statement filed on defendant's behalf on the 17th May, 1895 and 19th March, 1896; but the case was postponed before the 19th March from time to time, either by reason of the application of defendant's pleader praying for the postponement on account of

(1) (1897) I. L. R. 20 All. 195, *Shankar Dat Dube* v. *Radha Krishna*.

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cation came before a different Judge from Nil Madhab Roy, who had presided on the 19th March, 1896 The new Judge, notwithstanding that his predecessor had recorded that the defendant in question was absent, that no one appeared for him, and that his pleader informed the Court that he had no instructions to proceed with the case, forthwith disallowed the application with costs No opportunity was given to the applicant to satisfy the Court in terms of section 108 that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the theory of the decision being that the applicant had in fact appeared and that the decree was therefore not *ex parte*

Against this order an appeal was taken to the High Court at Allahabad, who allowed the appeal and pronounced the order now appealed against The terms of the order are as follows —"It is ordered that "this appeal be allowed, that the order of the Subordinate Judge of "Benares be set aside, and that the case be, and it hereby is, remanded "under section 562 of the Code of Civil Procedure to the Court of the "said Subordinate Judge to be disposed of on the merits

The appellant represents that by this order the High Court have set aside the decree of the 19th March, 1896, and have remanded the original suit to be disposed of on the merits The [226] respondents disclaim for the order any such sweeping effect and hold that what is remanded is merely the application immediately before the Court, to wit the application to set aside the decree, and that it is this application which the Subordinate Judge will under the remand proceed to dispose of, by allowing the respondent to endeavour to satisfy him of the conditions specified in section 108, and then if this be done by setting aside the decree

Their Lordships are clearly of opinion that the respondent's is the *just construction of the order of the High Court The application by the* respondent to set aside the decree might be described as "the case" with at least as much accuracy as the original suit in which there was a standing decree, and unless and until that decree had been set aside, there was no means of remanding that suit The form of the records is inconsistent with the appellant's view The judgment of the High Court is headed "Case 2 of 1897 First appeal from the order of the "Subordinate Judge of Benares dated 8th October, 1896," which is the dismissal of the petition under section 108 And the decree is headed in similar fashion That then was the "case" with which the High Court was dealing * But further, if there be any ambiguity, it is to be presumed that that was done which the law required; and it is allowed by both parties and is clear to their Lordships that, assuming the 108th section to apply at all, the proper course was to remand the application to the Subordinate Judge to dispose of that application with due regard to the conditions of the section There is, however, a further consideration which is conclusive as to the true intendment of the order, for the learned Judges in their written judgment point out as the error of the Subordinate Judge that he had disposed of the case without considering whether the defendant was prevented by sufficient cause from appearing and maintaining his defence at the hearing on the 19th of March, 1896 Their Lordships would require very clear language in the order which was intended to effectuate this opinion to induce them to construe it in a sense which would stultify the Court pronouncing it

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65.

application to set aside the decree, was to be heard on the merits. This involved inquiry as to whether the defendant had for sufficient cause or excuse failed to appear to the summons. The latter would have been the merits referred to. But no appeal [224] could be heard in this case, for there was no final order or decision of an ultimate Court of appeal in India within the requirements of section 595 (*a*), Civil Procedure Code.

Consequently the order of the High Court now appealed from must remain. There was, however, the additional reason that the application to have the judgment of the 19th March, 1896, set aside ought to have been heard on the merits, and ought not to have been disallowed. The order of remand, however, under S. 562 was an order that was not appealable.

Mr. *G. E. A. Ross* replied.

Afterwards on the 8th December, 1890, their Lordships' judgment was delivered by LORD ROBERTSON.

To this appeal from the High Court of Judicature for the North-Western Provinces, Allahabad, it is objected by the respondent that no appeal to Her Majesty in Council lies against the order complained of. For the due understanding of the question thus raised it is necessary briefly to trace the procedure in the suit.

The suit was brought on the 10th March, 1892, before the Subordinate Judge of Benares, for the recovery of money alleged to be due under two bonds executed by a person of whom the defendant, Shankar Dat Dube, was the legal representative. That defendant is now deceased and is represented by the respondent. He appeared in the suit, and on the 17th May, 1895, filed a written statement with a list of documents. Into the nature of the questions raised by the plaint and the written statement it is unnecessary to enter, as the questions before their Lordships arise solely out of the part taken by the defendant at a certain stage of the procedure. It is sufficient to note that the issues settled between the appellant and Shankar Dat Dube were—1. Has the plaint been amended according to law? 2. Is defendant No. 1 (Shankar Dat Dube) the heir of Raja Harihar Dat? 3. Is the deed of mortgage legally valid? Could Harihar Dat Dube legally hypothecate the property? 4. Is the deed of mortgage genuine? A fifth issue was settled, but it did not affect Shankar Dat Dube but only certain other defendants.

Prior to the 19th March, 1896, the case had repeatedly been before the Court, but had from time to time been postponed; [225] and on the 31st January, 1896, an order was passed that the case should come on for decision on the 19th March, 1896. On each of these occasions the defendant, Shankar Dat Dube, was represented by a pleader. On the 19th March, 1896, it is recorded by the presiding Judge that "defendant No. 1 is to-day absent. No one appears for him. His "pleader informs the Court that he has no instructions to proceed with the "case." The Court proceeded, as in absence, heard evidence for the plaintiff and decided the issues, giving a decree for the claim with costs.

On the 9th April, 1896, Shankar Dat Dube applied to the Court under section 108 of the Code of Civil Procedure to set aside this decree on the ground that neither the defendant applicant, nor his general attorney, had notice of the date fixed, and that for this reason he could not conduct the suit. The appellant filed a reply denying that the 108th section applied and asserting that the defendant had notice. The appli-

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23 A 227=28 I A 11=5 C W N 193=11 M L J 56=3 Bom L R 154.

APPEAL from a decree (16th December, 1895) of the High Court (1), varying a decree (6th February, 1894) of the Subordinate Judge of Bareilly

The question which the plaintiff appellant sought to raise was whether the law in sections 43 and 44 of the Code of Civil Procedure which had been applied to his claim for mesne profits by the High *Court, was applicable under the following circumstances It was con* tended on his behalf that the judgment below had erroneously decided that part of the time during which, according to his claim, mesne profits had accrued, to which he was entitled, was a period in respect of which his present claim might have been, and ought to have been, if it was to succeed, included in a prior suit brought by him against the defendant on the same cause of action in 1899 However, it appearing that the appeal involved a value less than that for which a right of appeal was given by the Code of Civil Procedure in ordinary course of procedure, and that the appeal had not been certified as otherwise a fit one, the case was disposed of on this ground

This suit was brought on the 30th June 1892 by Banarsi Prasad, the appellant, *son of Gobind Prosad, deceased in that year, for mesne* profits of two villages with interest The defendant Musammat Mewa Kunwar representative in estate of Jaichand Ray, who died on the 17th January, 1888, also died pending this appeal, and was succeeded on this record by Kashi Krishna Narain and Gobind Krishna Narain, as representing her

On the 5th February, 1883, by deed of usufructuary mortgage, Jaichand Rai had mortgaged the two villages to the said Gobind Prasad for a term of seven years, agreeing that the mortgagor should pay to the mortgagee in every year Rs 2,182 for interest and that if any should fall into arrear for two years, the mortgagee should be entitled to possession Jaichand Rai remained in possession till he died in January 1888, leaving his son Aftab Kuar his heir, who, in respect of these two villages, [229] caused the name of Mewa Kunwar, his wife, to be entered in the Collectorate record The two years arrears then became due, and on the forfeiture under the contract of 1883, Gobind Prasad obtained against Mewa Kunwar, on the 1st December, 1890, in a suit commenced on the 23rd December, 1889, a decree for possession, and payment of Rs 5,625, the interest due for 1887 and 1888, with a further sum of Rs 1,675, in all Rs 7,300

Mewa Kunwar, however, continued to hold possession of the two villages, receiving the profits to which the appellant Banarsi Prasad was entitled

Hence the present suit by the latter, claiming Rs 12,053 on account of the profits received by her from the instalment of February, 1889, till the end of June, 1892, at 1 per cent a month, total Rs 14,333 This part of the period for which profits were claimed was from 31st January 1889 to 23rd December 1889, the latter date being that of the institution of the prior suit for possession

On the answer of the defendant an issue was framed as to whether there was a bar to the claim under section 43 of the Code of Civil Procedure on the ground that the prior claim filed on the 23rd December, 1889, should have included what was due in respect of the period from 31st January, 1889, to 23rd December, 1889, if it was to be recoverable

(1) (1895) I L R 17 All 533 *Mewa Kuar v Banarsi Prasad.*

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Their Lordships having thus ascertained the true meaning of the order appealed against, the question is whether an appeal lies to Her Majesty in Council, and this depends on whether the order [227] is a final order in the sense of section 595 (*a*) as modified by section 594 of the Code of Civil Procedure. The mere fact that the High Court, apparently on the assumption that it was such an order, have certified the sufficiency of the amount and value of the suit cannot make appealable an order which does not fulfil the statutory conditions. Now it does not in their Lordships' judgment admit of doubt that, assuming the order to have the meaning which they ascribe to it, it is in no sense of the term a final order. It is a purely interlocutory order, directing procedure. Accordingly their duty is to advise Her Majesty to dismiss the appeal. Precluded as they would therefore be from proceeding to examine the merits of the order, their Lordships do not regret that in the course of ascertaining its true construction they have necessarily had to consider the law applicable to the case and to pronounce that no other order would have been appropriate save that which they find to have been made. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant :—Messrs. *Barrow*, *Rogers* and *Nevill.*

Solicitors for the respondent :—The *Solicitor*, *India Office.*

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23 A. 227 (=28 I. A. 11=5 C. W. N. 193=11 M. L. J. 56=3 Bom. L. R. 154.)

PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Davey, and Robertson, and Sir Richard Couch.

BANARSI PROSAD *v.* KASHI KRISHNA NARAIN AND ANOTHER.
[21st November and 8th December, 1900.]

[*On Appeal from the High Court for the North-Western Provinces.*]

Civil Procedure Code, sections 596, 600—*Appeal to Her Majesty in Council—Procedure*

In order that an appeal may lie according to section 596, of the Code of Civil Procedure, besides involving directly or indirectly the value of at least Rs. 10,000, the appeal must raise a substantial question of law in those cases where the decree of the final appellate Court affirms the decree of the Court below it.

The assent of the respondent to the issue of a certificate under section 600 cannot give effect to it in the absence of the conditions required to give the right of appeal. Nor does the existence of a question of law of itself give rise to a right of appeal in the ordinary course of procedure under section 596, being in such a case a necessary condition when the higher Court affirms the the decision of the lower.

[228] But, should a question of law be raised in a case where the value is less than the above sum, it is within the judicial discretion, to be exercised by the Court under sections 595 and 600, to specially certify the case as "otherwise" "fit for appeal."

[Fol. 21 Cal. 783=15 Bom. L. R. 1021; 22 I. C. 259; Ref. 31 Cal. 405=8 C. W. N. 225; 23 All. 415 (P. C.); 24 All. 236=1902 A. W. N. 46; 13 C. L. J. 681=10 I. C. 444; 44 Mad. 293=23 Bom. L. R. 718=19 A. L. J. 161=40 M. L. J. 229=1921 M. W. N. 119=33 C. L. J. 277=25 C. W. N. 630; 62 I. C. 71; 21 C. L. J. 281=28 I. C. 569; 26 C. W. N. 819; Appr. 5 O. C. 168.]

it could be understood to have been in the exercise of the High Court s power within sections 595 and 600 of the Code of Civil Procedure

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The irregularity in the certificate could be remedied by special leave being granted here The admission of the appeal having ensued, such admission being within the discretion of the Court to grant or with hold on the ground of the existence of a point of law, it was now too late for the appeal to be stayed as if no such proceedings had taken place

The respondent did not appear On the 8th December their Lord ships judgment was delivered by Lord HOBHOUSE

It will be remembered that the argument on the merits of the case was broken off because the property at stake is not such as to give a right of appeal The amount in question is little more than Rs 4,000 When this was called to Mr *Ross's* attention, he relied on the allega tion that a substantial point of law is involved Their Lordships have found on previous occasions that the existence of a point of law has been supposed to give a right of appeal in the ordinary course of pro cedure under the Code That is a mistake Section 596 of the Code required that in order to give such a right there must be in dispute either directly or indirectly an amount of Rs 10,000 If the decree affirms the Court below, another condition is affixed, *viz*, that the ap peal must involve some substantial question of law The presence of such a question does not give a right when the value is below the mark, the requirement of it restricts the right when the higher decree affirms the lower

It is true that by sections 595 and 600 an appeal may be granted if the High Court certifies that the case is fit for appeal ' otherwise, *i e*, when not meeting the conditions of section 596 That is clearly intend ed to meet special cases, such, for example as those in which the point in dispute is not measurable by money, though it may be of great public or private importance To certify that a case is of that kind, though it is left entirely in the [232] discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certificate

No such certificate has been given in this case The certificate runs, " That as regards the nature of the case it fulfils the requirements of section 596 of the Act No XIV of 1882 But it does not fulfil them on account of its small value

Mr *Ross* says that the defendant was served with notice, and, not appearing, must be taken to have assented It is quite possible that owing to the defendant s non appearance the defect in value was overlooked, but even if non appearance could be taken to signfy assent, it cannot give to the plaintiff a right of appeal which the Code does not allow, or sustain a certificate which from some oversight or other is obviously erroneous Whether, if the learned Judges had been asked to say that notwithstand ing its small value the case was a fit one for appeal to the Queen in Council, they would have said so, may well be doubted seeing that Mr *Ross*, whose argument had advanced to some length before the point of value was observed, had not succeeded in impressing their Lordships with the importance of his legal objection to the decree What is certain is that the learned Judges were not asked by the plaintiff to do, and have not done, anything of the kind And as it is of great importance not to

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The Subordinate Judge decided this point in favour of the plaintiff, decreeing Rs. 13,975 against Mewa Kunwar.

The judgment of High Court (EDGE, C. J. and BANERJI, J.) is reported in I. L. R., 17 All., 533. They referred to *Lalessor Babui* v. *Janki Bibi* (1), *Lalji Mal* v. *Hulasi* (2), *Venkoba* v. *Subbanna* (3). They held that by the operation of section 43 of the Code of Civil Procedure, and the effect of the previous suit, the plaintiff was disentitled to claim mesne profits for the period between the 31st January, 1889, and the 23rd December, 1889, in the suit before them. They, therefore, remanded the case to the Court below to find what were the mesne profits to which the plaintiff was entitled after excluding those in respect of the above period.

[230] After the return of the findings, after this order of remand, the High Court decided and decreed on the 16th December, 1895, that the decree of the lower Court, so far as it awarded to the plaintiff mesne profits for the period above specified, should be reversed. They held that the claim in respect of that period was barred by section 43 of the Code of Civil Procedure. By this decision the amount awarded was reduced to Rs. 10,066. The amount that remained in dispute as being calculated in reference to the time so withdrawn was Rs. 3,929. On the 14th July, 1896, the High Court certified that the case fulfilled the requirements of section 596 of the Code of Civil Procedure, and on the 12th November following this appeal was admitted.

Mr. *G. E. A. Ross* for the appellant, argued that he was entitled in this suit to claim mesne profits for the period between 31st January, 1889, and 23rd December, 1889. The judgment of the first Court was right. The appellant had not been obliged to include them in the suit of the latter date, which was not brought upon a cause of suit identical with that which was the ground of the present claim; for the right to sue for mesne profits was separate from the right to claim proprietary possession. The latter was the ground of the suit decreed on the 1st December, 1890, and although it was true that in suits for land the Court might decree payment of mesne profits, with interest, by section 211 of the Code of Civil Procedure, and might determine the amount thereof prior to suit, or might reserve inquiry by section 212 still, that power was consistent with power to decree in a separate suit mesne profits and interest. Section 43 contemplates identical causes of action, and no such identity was found in the two suits that presented the question now raised. The expression "cause of action" included every material fact which the plaintiff had to prove in order to obtain a decree. In a suit for mesne profits he had to prove more propositions than that he had a right to possess the property in question. A decree for the land did not involve the right for the recovery of mesne profits. He referred to the judgment in *Jibunti Nath Khan* v. *Shib Nath Chakerbati* (4).

[SIR R. COUCH referred to the certificate of the High Court under which this appeal had been admitted, adding that the case [231] did not appear to have been certified for appeal except as one preferred in the ordinary course under section 596, of the Code of Civil Procedure.] It was no doubt the certificate in the ordinary course that had been issued. However, the admission of the appeal having taken place,

(1) (1891) I. L. R. 19 Cal. 615.
(2) (1881) I. L. R. 3 All. 660.
(3) (1887) I. L. R. 11 Mad. 151.
(4) (1882) I. L. R. 8 Cal. 819.

un nissa, the defendant, who survived her sister Sharif un nissa These two sisters survived their brother Syed Mehrban Ali, and both were now dead, the latter having died before, and the former after, this appeal

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23 A. 233=5 C W N 177=28 I. A 15=11 M L J 58=3 Bom L R 114=7 Sar 829.

The questions decided on this appeal were as to the effect of the circumstances under which a deed disposing of immoveable property and executed by Syed Mehrban Ali was put upon the register by the Registrar, and the validity of the deed to [234] constitute a waqf or dedication to religious or charitable purposes was also in dispute

The plaint alleged that Mehrban Ali being the owner of property valued at four lakhs executed on the 16th October, 1889, a deed of waqf dedicating the property to charitable and religious uses Sent to be registered the document was rejected by the Registrar for the reason that the property was not sufficiently described according to the requirements of section 21 of Act No III of 1877, the Indian Registration Act A list was then added The Syed died on the 26th of the same month The document was taken on the 4th November following to be presented for registration by Syed Habib ullah, a person described as the general attorney and trustee of the deceased On this occasion the Registrar accepted it for registration and registered it

The plaint prayed that this document might be declared to be a valid and enforcible deed of waqf, and that the property might be declared not to be divisible among the sharers

The two sisters defended the suit on the ground, among other defences not before the Committee on this appeal, that the deed was "illegally registered" and could not be called a registered deed or affect the property Also that in regard to its terms there was no waqf created "All that was meant was a settlement" for the preservation of the property and the benefit of the family

Syed Mehrban Ali stated in the deed his purpose, and that he had made a "waqf khandani The terms of the deed, which gave a detail of the property subject to the "family endowment and the conditions attached thereto, are at length stated in their Lordships' judgment

The proceedings when the deed was presented on both occasions for registration are also stated in that judgment

Among several issues framed to raise all the question in dispute were the two that related to two principal points, now the only issues presented on this appeal They were (1) as to the registration of the deed, and (2) as to the validity of the attempt to establish a waqf or dedication for religious or charitable purposes

Upon the construction of the deed the Subordinate Judge held that a settlement made by a deed such as the present, wherein a [235] man settled property on himself or for the benefit of his descendants, was a charitable act, that this deed of settlement was valid as constituting a waqf, that this waqf was not open to any objection according to Muhammadan or any other law

The sisters, defendants, appealed to the High Court, their counsel relying only on the defect in procedure under the Indian Registration Act, 1877, and on the invalidity of the alleged waqf namah or deed to constitute a waqf as not being a dedication to a religious or charitable purpose

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allow litigants who have succeeded in the High Courts to be harassed by the further appeals, when there is nothing at stake but amounts of money which the Indian Legislature has decided to be too small to give a right of appeal, their Lordships will humbly advise Her Majesty to dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow, Rogers* and *Nevill.*

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23 A. 227=28 I. A. 11=5 C. W. N. 193=11 M. L. J. 56=3 Bom. L. R. 154.

23 A. 233 (=5 C. W. N. 177=28 I. A. 15=11 M. L. J. 58=3 Bom. L. R. 114=7 Sar. 829.)

[233] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Davey, Robertson and *Lindley, Sir Richard Couch* and *Sir Ford North.*

MUJIB-UN-NISSA AND OTHERS (*Plaintiffs*) *v.* ABDUR RAHIM AND ANOTHER (*Defendants*). [21st and 23rd November, and 8th December 1900.]

[*On appeal from the High Court for the North-Western Provinces.*]

Act No. III of 1877 (*Indian Registration Act*), *sections* 32, 34, 35, 87—*Presentation of document by a person without due authority—Waqf—Family endowment ineffective as a waqf.*

A person, who had executed a document disposing of immoveable property made his power-of-attorney to his agent to present it for registration, but died before the presentation. The Registrar was aware of his death, but accepted and registered the document.

Held, that this was not a mere defect in procedure falling under section 87 of Act No. III of 1877, the Indian Registratron Act. The registration was illegal and invalid. The power and jurisdiction of the Registrar only arises when he is invoked by a person in direct relation to the document, and the relation of the person authorized by the maker in his life had ceased on his death.

The document, describing itself as a deed of family endowment, declared that the income and the profits of the property, after defraying the necessary expenses according to the provisions in the deed, should be applied to charitable purposes. But this liberality was by the conditions in the deed only to an uncertain and discretionary amount and as an incident to an endowment for the family. The dedication was in substance only for the maintenance and increase of the family property and not for charitable purposes. Therefore no waqf was established.

[**Appr.** 37 All. 49; **Dist.** 30 Cal. 265; 34 All. 253; 35 All. 72; **Fol.** 28 All. 707; 35 All. 34; 26 I. C. 52=12 A. L. J. 913; 24 I. C. 451=12 A. L. J. 918; **Ref.** 26 All. 57; 5 C. L. J. 188; 13 C. W. N. 722; 11 I. C. 925; 34 All. 331; 35 All. 134; 18 I. C. 126; 24 M. L. J. 664=14 M. L. T. 237=1913 M. W. N. 525=20 I. C. 385; 19 I. C. 896=17 C. W. N. 1018; 30 Cal. 666; 53 I. C. 773=30 C. L. J. 241=24 C. W. N. 306; (**Presentation by person without authority**) **Fol.** 4 C. L. J. 442; 3 O. C. 666; (**Mahomedan Law—Waqf**). **Ref.** 8 O. C. 379; 14 I. C. 988=14 Bom. L. R. 295; 53 I. C. 597=30 C. L. J. 67; 53 I. C. 764=30 C. L. J. 102=24 C. W. N. 18.]

APPEAL from a decree (9th June, 1895) of the High Court, reversing a decree (23rd December, 1892) of the Subordinate Judge of Meerut.

The appellants, the plaintiffs in this suit, were the minor daughters, under the guardianship of their mother Farid-un-nissa, the widow of Syed Mehrban Ali, who died on the 26th October, 1889. The respondents, Abdur Rahim and Abdul Aziz, were the representatives of Ulfat-

23 A 233=5 C W N 177=28 I. A 15=11 M L J 58=3 Bom L R 114=7 Sar 829

[237] Mr *J D Mayne* and Mr *W A Raikes*, for the appellants, were directed by their Lordships to take first the point as to the registration They argued that this should be held valid In registering this document the Registrar was acting within his jurisdiction, and the act was done in good faith The registration holds good notwithstanding the irregularity Act No III of 1877, section 87, was referred to There may be an irregularity which will not invalidate [Sir R Couch — *Merely putting the deed on the register is not enough It must be* registered according to the requirements of the Act] But reference should be made to *Sah Mukhun Lall Panday* v *Sah Koondun Lall* (1) If the Registrar did not proceed according to the Act in registering the document on the application of a person not formally [238] empowered, such a registration was not declared by any words in the Act to be a nullity *Mohammed Ewaz* v *Birj Lall* (2) was also referred to Here the defect was one of procedure Reference was also made to *In re Shaik Abdul Aziz* (3) As soon as application is made the Registrar's jurisdiction comes into existence Here the application was made by a person who had already shown his authority to represent to the

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and on admission of execution by a volunteer not authorised under section 32 of the Act Most careful provision is made in section 33 for the registration of instruments executed by living persons who are unable to appear But I cannot find any provision for the registration of an instrument executed by a person who is dead at the time of presentation for registration, excepting in section 35, where it is provided that if the person executing the document is dead and his representative or assign appear before the registering officer and admits the execution, the document shall be registered, and perhaps in the case of a person who claims under the instrument presented for registration That, however, is not the case here Habib-ullah *does not claim under the waqf namah, and was not the representative* or assign of the person who executed the document nor the representative, assign or agent of any person claiming under it Under these circumstances it seems to me that it is impossible to say that this instrument has been registered 'in accordance with the provisions of the Registration Act' It is provided by section 49 of that Act that no document of which the registration is compulsory (as is the case here) shall *inter alia* be admitted in evidence 'unless it has been registered in accordance with the provisions of this Act This document, no doubt, has been registered in so far that the *certificate* provided for by section 60 of the Act has been endorsed on it The second clause of section 60 provides that that certificate shall be admissible 'for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the *facts mentioned in the endorsement referred to in section 59 have occurred as therein* mentioned' But that clause does not provide that the certificate shall be conclusive incontrovertible proof that the document has been registered in manner provided by the Registration Act And if, as I have no doubt, the rules in *sections* 32, 33, 34 and 35 of the Registration Act are included 'in the provisions of this Act' within the meaning of the last clause of section 49 of the Act, then in the present case the certificate given under section 60 which is admissible in evidence to prove due registration would by its very terms show that the registration had not been made 'in accordance with the provisions of the Registration Act,' execution of the

. . . . . . entative nor
. . . . . istrained to
. . . in accord
. . . prevents us
. . . of *Hardei* v

Ram Lal (4), in which a Full Bench of this Court held that a registration made under very similar circumstances was valid for the purpose of section 49 of the Act In deference to the opinion of the learned Judges who decided that case, my learned brother, who heard this appeal with me, and I thought it better not to exclude the waqf namah under section 49"

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(1) (1875) L R 2 I A 210, 215
(2) (1877) L R 4 I A 165, 175
(3) (1887) I L R 11 Bom 691
(4) (1889) I L R 11 All 319

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23 A. 233= 5 C. W. N. 177=28 I. A. 15= 11 M. L. J. 58=3 Bom. L. R. 114= 7 Sar. 829.

As to the registration, the Judges (BLAIR and BURKITT, JJ.), feeling bound by a Full Bench decision in *Hardei* v. *Ram Lal* (1) admitted the document in evidence and considered its value and effect.* They held that the words used in the deed, translated [236] "family endowment," aptly and fully described the settlor's intention. The object which he had in view was spiritual benefit to himself by making a family endowment of his property in favour of his descendants. They expressed their opinion that in executing the so-called waqf-namah, the Syed had nothing in view but to make a permanent provision for his descendants as long as any one descended from him survived, and to provide for his increase of the estate by investment of the surplus income. They declined to give effect to a clause which was not to have operation till after the extinction of the settlor's descendants at some indefinite time in the future, pointing out that a similar dedication in *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (2) was decided to be illusory on account of its remoteness. Under the deed now in question there was no immediate dedication of any portion of the settlor's property to charitable or relgious uses, and the settlor never intended to make any such dedication, his object being to make a perpetual settlement for the support of his descendants.

The judgment of the Subordinate Judge was for these reasons reversed.

On this appeal.

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* As to the question of the registration of the waqf-namah, the High Court found as follows :—

BURKITT, J.—"Now as to the registration of this instrument the facts are (as we are informed by both sides) that the Waqf-namah was, on October 15th 1889, written on a stamp paper of Rs. 5, which being insufficient, it was on the following day written out on a stamp paper of Rs. 2,000 and executed by Syed Mehrban Ali. Even then it was not complete, as it did not contain any detail of the property. It was therefore not registered, but was taken back to Mehrban's residence at Gulaoti, where a schedule (signed by Mehrban) of the property intended to be endowed was added to it on October 24th. For some reason unknown it was not then sent to be registered, and Mehrban Ali died on the 26th October before any attempt had been made to have the deed registered. It was subsequently presented for registration at the office of the Sub-Registrar on the 4th November, 1889, by one Syed Habib-ullah, who is brother of Mussammat Farid-un-nissa, one of the plaintiffs-respondents, and who at the time of Mehrban Ali's death held a general power-of-attorney from the latter, empowering him *inter alia* to present documents for registration. In the registration endorsement Habib-ullah is described as the person who had been "given charge of" (*muhawwil, ali*) the deed. The registration was effected on the acknowledgment of Habib-ullah, as to whom the registering officer recorded that he had a 'right to appear and make admission, as he was the *muhawwil, ali, i.e.*, the custodian of, or the person who had been given charge of, the document.'

"Now section 32 of the Registration Act (III of 1877) tells us who the persons are by whom documents shall be presented for registration. Habib-ullah, the person by whom this instrument was presented for registration, is not one of those persons. He was not the person who executed it. He does not claim under it. He was not the representative nor the assignee of the person who executed it or of any person claiming under it. Nor was he the agent of such person (*i e.*, executant or claimant), representative or assign duly authorized by a power-of-attorney executed and authenticated in a particular manner. The general power-of-attorney which Habib-ullah held from Mehrban ceased to be operative on Mehrban's death, and it is not contended that under the power conferred by it, Habib-ullah could have presented this document for registration. The registration was in fact made on presentation

(1) (1889) I. L. R. 11 All. 319. (2) (1894) L. R. 22 I. A. 76.

It was besides a fact that the list was still incomplete, and thus the deed could not be accepted for registration with reference to the requirements of section 21

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Mr *J D Mayne* replied

Afterwards, on 8th December, their Lordships' judgment was delivered by Lord ROBERTSON —

The appellants were the plaintiffs in a suit before the Subordinate Judge of Meerut, and by their plaint they prayed that it should be declared that a deed executed in October 1889 by Munshi Syed Mehrban Ali, deceased, is a valid deed of waqf The property affected by this instrument is said to be worth [240] Rs 4,00,000 The plaintiffs are, respectively, wives and daughters of the deceased, for whom certain provisions are made in the deed The defendants were two of his sisters, for whom no provision was made in the deed Both sisters are now dead, and only one of them, Ulfat un nissa, is now represented on the record in pursuance of an order in Council of the 7th August, 1900, which struck off the representatives of the other sister, Sharif un nisa, under circumstances set out in that order

Of the several issues settled by the Subordinate Judge two only have been argued in this appeal The first question is raised by the defendants plea that the deed founded on not having been legally registered cannot be admitted in evidence and cannot affect the property The second question is raised by the defendants' contention that having regard to the terms of the deed itself, the property did not become a waqf property Both questions have been considered by their Lordships

The question about registration turns on the Act No III of 1877 The deed in dispute being an instrument of gift of immoveable property, it came under section 17 of the Act, and registration under the Act was accordingly, by section 49, indispensable in order to render it receivable as evidence of the transaction which it purported to record, and to enable it to affect the immoveable property comprised therein The question is, was it lawfully registered? It was *de facto* registered, but the history of that registration requires to be examined

The deed as ultimately presented for registration and registered consists of two parts, of which the former part is dated the 16th October, 1889, and contains the deed of endowment and conditions, while the latter part is headed "Supplement of Detail of the Endowed Property,' and consists of these particulars It appears that at first the Munshi who executed the deed, or his advisers, had not adverted to the requirements of section 21 of the Registration Act, and as the deed as at first presented for registration did not contain "a description of the property sufficient to identify the same,' the Registrar, on the 16th October, 1889, declined to register, but returned the deed "for correction and compliance with ' those statutory provisions The deed had been presented on behalf of the Munshi by Syed Habib ullah, [241] who held his power of attorney On the 24th October, 1889, the supplement or detail of the endowed property was added, so as to render the deed registrable, and on that day the deed so completed was executd by the Munshi On 4th November, 1889, that deed of endowment (i e, the completed deed) was presented for registration by the same Syed Habib ullah In the interval between the execution of the completed deed and its presentation to the Registrar the Munshi died The legal

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Registrar the wish of the maker of the document that it should be registered. The presence of that person was sufficient to satisfy the Registrar that the registration was desired by the executant; and if he was, *bonâ fide*, under a mistake in registering, the error could not deprive him of the authority that had already attached. His mistake would not have any such retrospective effect, being only a departure from the proper procedure which did not interfere with the result that the parties in good faith requested. Here the first presentation of the deed was by an agent absolutely authorized. True it was that the authority had ceased at the time of actual registration; but even then the person to whom authority had originally been given was present, tendering the deed that had been executed with the intent that it should be registered in accordance with directions given by the maker of it. It was contended that a mere error in procedure would not invalidate the registration.

As to the validity of the waqf which the deed was executed to establish, there was in the waqf-namah a substantial gift to charitable purposes. It was not necessary that the amount should be defined if, as was the case here, it was intimated that the amount was to be substantially liberal. No doubt an illusory gift to the poor would not suffice to save a perpetual family settlement from being void. But where an appropriation is made to charitable purposes it will not fail merely because sufficient particulars and a working scheme are wanting. They can be supplied or Courts can direct them. It was contended that on a general construction of all the clauses in the deed the use of the word "waqf" was justified and appropriate. It was not a mere attempt to make pass a family settlement under colour of a gift for charity. The donees under the deed were to devote [239] money for charitable objects as the donor had spent it himself. If the whole had been a pretence the powers given to the mutawalli would hardly have been inserted. The case was not governed by the law declared in *Sheik Mahomed Ashan-ul-la Chowdhry* v. *Amarchand Kundu* (1); *Abdul Gafur* v. *Nizamudin* (2) and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3). Reference was also made to *Runchordas Vandrawandas* v. *Parvatibhai* (4) and *Chotalal Lukhmiram* v. *Manohar Ganesh Tambekar* (5). For English cases showing that under English law expressions no more distinct would sufficiently show intention *In re Sutton* (6) and *Lewis* v. *Allenby* (7) were referred to.

The Hedaya, Volume II, Book XV, page 334, Hamilton's translation was cited.

Mr. *J. H. A. Branson*, for the respondents, was called upon only as to the registration. His argument was that the error on the part of the Registrar was not a mere defect in the procedure, but amounted to an entire absence of authority to present for registration under the Act No. III of 1877. The basis of the Registrar's power to register was wanting, and the registration was null and void. According to the Act, section 34, the only person who could present a deed after the death of the person who had executed it was his personal representative or assign.

(1) (1889) L. R. 17 I. A. 28 I. L. R. 17 Cal. 498.
(2) (1892) L. R. 19 I. A. 170; I. L. R. 17 Bom. 1.
(3) (1899) L. R. 27 I. A. 69, 76; I. L. R. 23 Mad. 271.
(4) (1899) L. R. 26 I. A. 71; I. L. R. 23 Bom. 725.
(5) (1899) 24 Bom. 50.
(6) (1885) 28 Ch. D. 464.
(7) (1870) L. R. 10 Eq. 668.

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In both those cases the Registrar was throughout moved by a person having title and was exercising his jurisdiction The difference is in their Lordships' judgment vital They therefore hold the registration of this deed to have been illegal

Their Lordships have, however, considered the question whether, *even assuming it to have been registered, the deed is, according to its* terms, a valid deed of waqf It will be so if the effect of the deed is to give the property in substance to charitable uses It will not be so if the effect is to give the property in substance to the testator s family

[243] The deed begins with a statement that the grantor has always devoted a portion of his income to religious and charitable purposes as seemed proper and expedient to him at the time He goes on to say that, as he has *no male issue* and it is *incumbent on every one not to* neglect to secure benefit of his soul in the next world, he wishes to establish a *perpetual, lasting and continuing charity*, so that the charitable expenses may in future be defrayed without any difficulty or obstacle *in his lifetime and also after his death* Hence "in order to "secure benefit and honour in the next world I have of my free will "and accord, without coercion or compulsion and while in a sound state "of body and mind, made a family endowment (waqf khandani) to seek "nearness to God"

He goes on to say that he has withdrawn his proprietary possession from the property, the subject of endowment, and has brought it into his possession as mutawalli, "which I can hold during my life under "the terms of this document Its income and profit shall, after defray "ing its necessary expenses according to the provisions hereafter made "in this document, be applied to charitable purposes No one was by reason of his getting any maintenance to have right to exercise propri tary acts, nor should the endowed property be liable to be attached or sold in satisfaction of personal debts of any mutawalli or recipient of allowance, because it being an endowed property all the rights of the mutawalli and those for whom maintenance allowances have been fixed are to exist only for their personal maintenance A detail of the pro perty (*waqf khandani*) which was "*the subject of the family endow* "ment under this deed and the conditions attached thereto' was then given

The conditions follow the detail of the property and are ten in number

The 1st appoints the donor himself to act as mutawalli and he is to use the income of the endowed property "in the way I shall think "proper, according to the provisions of the Muhammadan law and the "conditions of this document"

No 2 provides *for one of* his wives and thereafter *one of* his daughters, and after their deaths some direct descendant, being succes sively mutawalli

[244] No 3 fixes Rs 300 a month as the allowance of the mutawalli *for his or her own expenses and those of his or her children*

No 4 gives maintenance allowances to the wives and daughters of the donor

"The 5th and 6th purposes are as follows —"Whatever are the "necessary expenses, such as the salaries of the servants for the

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question now to be considered turns on this last fact. The narrative, however, may be completed by mentioning that the Registrar accepted the deed and registered it, recording in writing that the man who had executed it and whose attorney presented it for registration was dead. The minute of this proceeding is on the record.

It was not attempted on the part of the appellant to justify the registration of the deed, as regularly done in accordance with the Act. The departure from the Act is indeed palpable, and the only question is whether it invalidates the registration. The Act by section 32 enacts that every document to be registered under it, whether such registration be compulsory (as in the present case) or optional (as in the case of other classes of instruments), shall be presented by some person executing or claiming under the same, or by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorized by power-of-attorney. Now the case in hand is that of a person who when he presented the deed for registration (as he says he did) on 4th November, 1889, stood in no other relation to the deed than that, before the death of the person executing it he had held his power-of-attorney. It is prefectly plain, not merely from the general law but from the terms of the section 32 itself, that, after the man's death, the only attorney who would have had any *locus standi* would have been the attorney of the representative or assign of the deceased. It has been suggested, however, that the error of the Registrar was a defect in his procedure only, and accordingly under section 87 does not invalidate the act of registration. To their Lordships the error appears to be of a more radical nature. When the terms of section 32 are considered with due regard to the nature of registration of deeds, it is clear that the power and jurisdiction of the Registrar only come into [242] play when he is invoked by some person having a direct relation to the deed. It is for those persons to consider whether they will or will not give to the deed the efficacy conferred by registration. The Registrar could not be held to exercise the jurisdiction conferred on him if, hearing of the execution of a deed, he got possession of it and registered it ; and the same objection applies to his proceeding at the instigation of a third party, who might be a busybody. Now it seems to their Lordships that when the deed was presented on the 4th November, 1889, it was presented by a volunteer, and the Registrar's minute shows that he proceeded to register at the request of one whom he knew to derive his power-of-attorney from a dead man. Nor is it possible to treat this action of the Registrar as compliance with the request made on the 16th October, 1889, when the principal was alive. Not only had the deed in fact been executed afresh on the 24th October, but it was presented afresh on the 4th November, as the minute itself bears ; and even assuming the continuity of the proceeding, the death of the applicant brought it to an end. The Registrar indeed did not merely disregard section 32, for he proceeded to accept the admission of the alleged attorney as a good admission of the execution of the deed, although section 34 requires in the case of a decease the admission of the representative or assign.

Their Lordships were referred to two decisions of this Committee in support of the appellants' contention. Neither case gives any countenance to the view that the absence of any party legally entitled to present a deed for registration is a defect in procedure falling under section 87.

at the time when this suit was instituted there was in the plaintiff pre emptor a subsisting cause of action, and I fail to see how a cause of action, which existed on the date the suit was instituted, can be vitiated or destroyed by any subsequent action taken by a defendant to that suit during the pendency of the proceedings under it On this matter the judgment of this Court in the case of *Janki Prasad* v *Ishar Das* (1) is relevant In my opinion the lower appellate Court decided the case properly The appeal is dismissed with costs

Appeal dismissed

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23 A 249 (=21 A. W N 59)

[249] REVISIONAL CRIMINAL

Before Sir Arthur Strachey, Knight, Chief Justice

IN THE MATTER OF THE PETITION OF ALAMDAR HUSAIN *

[9th March, 1901]

Criminal Procedure Code, sections 439 476—Revision—Power of High Court to revise an order under section 476—Circumstances under which such power should or should not be exercised

The High Court has power in revision to set aside an order passed by a Civil, Criminal or Revenue Court under section 476 of the Code of Criminal Procedure, but such power should not be exercised where the Court below has arrived at a judicial opinion on evidence that there is ground for inquiring into an offence referred to in section 195, merely because the High Court disagree with that opinion

[Fol 26 All 514=1904 A W N 90 35 Cal 909=8 Cr L J 435 3 Cr L J 73=163 P L R 1905 Rel 15 Cr L J 33=23 Ind Cas 177=9 N L R 181 Ref 26 All 249=1904 A W N 15 4 A L J 701=1907 A W N 277=6 Cr L J 350 1901 A W N 177 78 P L R 1902=18 P R 1902 Fol 9 N L R 181]

THE facts of this case sufficiently appear from the order of the Court

Mr *W Wallach* and Babu *Satya Chandra Mukerji* for the applicant

The Assistant Government Advocate (Mr *W K Porter*) in support of the order

STRACHEY, C J —This is an application for revision of an order made under section 476 of the Code of Criminal Procedure An appeal was being heard by the Collector as a Revenue Court from the Court of a Tahsildar The Tahsildar had dismissed the suit for default of appear ance by the plaintiff, and the appeal to the Collector was from that dismissal of the suit At the hearing of the appeal before the Collector there was present a mukhtar of the appellant who had represented him in the Court of first instance It was contended in appeal before the Collector that the Court of first instance ought not to have dismissed the suit for default, because there was no default of appearance, inasmuch as this mukhtar had actually appeared for the appellant at the hearing before the Tahsildar on the date of the dismissal, and had on that occa sion presented to the Tahsildar a certain receipt In support of that con tention the Collector took the evidence on oath of the mukhtar, who swore that he was present in the Tahsildar's Court with his client when the suit was dismissed, that he produced the receipt, and that the Tahsildar dismissed the suit after argument about the receipt That

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* Criminal Revision No 90 of 1901

(1) Weekly Notes, 1899, p 126

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this Court that the High Court has power in revision to set aside an order passed by a Civil, Criminal or Revenue Court under section 476 of the Code, and I assume that this view is correct Still, one must have regard to the nature of the revisional jurisdiction, and must not, in a case arising under section 476, any more than in any other case, allow what would virtually be an appeal from the order of the Court below It is necessary, as in all other cases, to see whether there has been any error of law, any irregularity, any abuse of, or failure to exercise judicial discretion, such as would justify interference in revision Now let us see whether there is any fault of that kind to be found in the Collector's proceedings The condition of his acting under section 476 is his forming the opinion that there was ground for inquiring into any offence referred to in section 195 The test is his opinion, and not the opinion of any superior Court, and if he has formed a real opinion to the effect stated, he has power to act under the section, and he commits no error or irregularity in doing so, even though another Court may think the opinion erroneous I say, if he forms a real opinion, because, no doubt, if a case arose in which the Court acted on [252] merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then this Court would probably hold in revision that there had been no such action as section 476 contemplates The opinion spoken of by section 476 no doubt is a judicial opinion founded on evidence If such an opinion has been formed, this Court ought not in revision to interfere merely on the ground that it disagrees with it the case must go on In the present case I see no reason whatever to doubt that the Collector formed a serious, deliberate judicial opinion that there was ground for inquiry I think myself that there was ground for inquiry, although I guard myself against expressing any strong opinion as to that Here is a man who swore to certain events taking place in his presence at a certain time and on a certain occasion before the Tahsildar and upon inquiry being made, the Tahsildar contradicts the whole of what he says, and declares it to be absolutely untrue The Collector had before him the statement of this man, who was examined as a witness before him, and of whose veracity he had an opportunity of judging, and also had the Tahsildar's contradiction I think that there is no cause for interfering in revision The application is dismissed

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23 A 252 (=21 A W N 80)

APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji

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ABDUL GAFUR (*Judgment debtor*) v RAJA RAM (*Decree holder*) *
[11th March, 1901]

Civil Procedure Code section 211—Execution of decree—Mesne profits—Allowance of collection expenses to a trespasser against whom a decree for mesne profits has been passed.

Ordinarily in the case of a decree for mesne profits against a trespasser in possession of immoveable property the collection expenses incurred by him during the period of his possession will be allowed it is only when the

*Appeal No 21 of 1900 under section 10 of the Letters Patent.

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was a plain circumstantial story told by [250] the mukhtar as to what occurred in the Tahsildar's Court at the time of the dismissal of the suit, and this story was supported by an endorsement upon the receipt bearing the date of the dismissal and purporting to be made by the Tahsildar himself. I am informed by the learned counsel for the petitioner that the date in this endorsement appears to have been tampered with. Now the Collector after taking this evidence called for a report from the Tahsildar as to what had occurred at the time of the dismissal of the suit, and in due course the Tahsildar made a report, the substance of which was that there was no such appearance as sworn to by the mukhtar, no production of the receipt at the time of the dismissal and no argument about the receipt, but that there had been an actual default of appearance, in consequence of which the suit was dismissed. After the determination of the appeal the Collector made an order directing the trial of the mukhtar for the offence of giving false evidence, punishable under section 193 of the Indian Penal Code. He made that order, not upon any application for sanction to prosecute, but of his own motion. He signed that order "G. A. Tweedy, Magistrate." An application was made to the Sessions Judge for revision of that order, and the Sessions Judge held that, although the order was signed by Mr. Tweedy as "Magistrate," still, as all the preceding orders in the case had been signed by the Revenue officers as such, and the Collector as a Revenue Court was alone seised of the case, the order must be treated as one made by the Collector of the district. He held that he had no jurisdiction under section 435 of the Code. An application for revision is now made to this Court on behalf of the mukhtar, and I am asked to set aside the order under section 476. The first ground on which I am asked to do so is that it was made without jurisdiction because it was made by the District Magistrate, and the District Magistrate had as such no power under section 476 to take action in regard to any offence not committed before him as District Magistrate, or brought under his notice as District Magistrate in the course of judicial proceedings, but committed before him in his capacity as Collector and Court of Revenue. Now there can be no doubt that Mr. Tweedy had power, under the circumstances, to make the order under section 476. He had that power as the Collector before whom the alleged offence was committed [251] in the course of a judicial proceeding. Therefore as a matter of substance his power was undoubted. But it is suggested that because in signing the order he described himself as Magistrate, and possibly thought that he was acting as District Magistrate, the order was one made without jurisdiction. In my opinion the true way of looking at the matter is, that the order was made by one who had jurisdiction to make it, but who in making it misdescribed, or possibly misconceived, the authority which he had to make it. On a ground like that I would not interfere in revision. I should look in revision at the substance of the thing, and if the Collector had power to make the order which he did, he did not lose that power because he signed the order as "Magistrate" instead of as "Collector."

The other ground on which I am asked to interfere in revision is this. It is, shortly that the Collector was mistaken in his opinion that there was sufficient ground for inquiring into the offence which, in his opinion, this mukhtar had committed. That is the only other ground which has been suggested for my interference. Now it has been held by

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23 A. 252= 21 A. W. N. 80.

justice of this case requires that the respondent should recover mesne profits without deducting the necessary expenses of collection which, if he had been in possession as purchaser from the date of confirmation of sale he would himself have been obliged to pay. I can see no justice in giving him [256] that additional benefit. We have been pressed with certain rulings. The first is the decision of the Full Bench in *Altaf Ali* v. *Lalji Mal* (1). All that the majority of the Court there held was that when the trespass is "altogether tortious and malicious" without any *bona fide* belief of the trespasser in the rightfulness of his possession, and in defiance of the rights of another, it is not imperative on the Court in estimating the damages to allow him even such charges as would ordinarily, but voluntarily, be incurred by the owner. That only shows that the Court has a discretion in the matter, and that discretion must depend on circumstances and in particular on the Court's view of the trespasser's conduct. In the present case I do not take the same view of the trespasser's conduct as Mr. Justice Knox, and I do not think that it requires to depart from the ordinary rule. In *Sharf-ud-din Khan* v. *Fatehyab Khan* (2) the point before us was not discussed or decided, but there are expressions in the judgment which indicate that some allowance on account of expenses, though not on account of decrees for rent, may properly be made to a wrong-doer in possession. In *Shitab Dei* v. *Ajudhia Prasad* (3) at page 15 it is said—" The defendants cannot claim, being tort-feasors, to deduct the costs of the collection of money they have wrongfully collected." That is all that is said on the point, and if it means that a tort-feasor ought not in any case to be allowed to deduct the costs of collection, the proposition is, I think, much too widely stated. That is clearly shown by the decision of the Privy Council in *McArthur & Co.* v. *Cornwall* (4), which is of course of superior authority to all the other cases cited. That was a suit for recovery of land and damages for conversion of its produce. The defendants were in a possession which was found to be illegal. Up to the time when a decree was passed in 1886 the illegality of their possession was disputed, and the Privy Council thought that their conduct up to that decree, or at least up to their failure to get leave to appeal from it, was in some degree excusable. After that date their Lordships say that it was less excusable; that "the illegality of their possession, though disputed before was then made manifest," and that their retention of the land [257] was not justified. Nevertheless their Lordships held that the measure of damages was the value of the produce which the lands were capable of yielding at the time they were taken possession of after allowing the defendants a proper sum for expenses. The effect of their decision is thus stated in the headnote—" However wilful and long continued the trespass may have been, there is no law which authorizes the disallowance of such expenses or the infliction of a penalty on the defendants beyond the loss sustained by the plaintiffs." With reference to that decision, Mr. Justice Knox says that the case is a peculiar one, and that " the trespassers therein mentioned had hardly passed the line of trespass in exercise of a *bona fide* claim." At all events the Privy Council say that after 1886 the trespass was " unauthorized and wilful in its inception and persistent and definite in its continuance;" that the illegality was manifest; that the defendant's conduct was a piece of disobedience

(1) (1877) I. L. R. 1 All. 518.
(2) (1897) I. L. R. 20 All. 208.
(3) (1887) I. L. R. 10 All. 13.
(4) L. R. 1892, A. C. 75

the lease was "purposely taken either to delay or abet the delaying of the just claims of the decree holder,' and that consequently the case was not one of a trespasser entering on an estate in the exercise of a *bona fide* claim of right, but of one who, "in defiance of the rights of another, thrust himself into an estate I cannot agree with the view of the learned Judge So far as regards the taking of the lease and the original possession of the appellant his motives appear to me to be immaterial, because in my view there was nothing wrongful about his action he was not a trespasser, and his possession was lawful When the lease was executed, that is, after the decree for sale, but five years before actual sale, the judgment debtor Sahib Jan was still owner of the property subject to the decree, and had a perfect right to make a lease of it subject to the rights which the decree created She exercised that right, and the lessee remained in possession for five years without question That during the whole of this period the appellant s possession was not wrongful, but lawful, is not denied by the respondent for he makes no claim for mesne profits during that period, which, had he thought the possession wrongful, he certainly would have done His decree only entitles him to mesne profits after the confirmation of the sale There is, therefore, no ground for treating the original taking of possession by the appellant, or the continuance of his possession up to the confirmation of sale on the 20th September, 1895, as wrongful, and this destroys the whole foundation of the learned Judge s decision [255] in regard to the collection expenses Now let us consider the period after the confirmation of sale No doubt, as soon as the sale was confirmed, the lease which was always subject to the rights created by the decree for sale, had no effect as against the respondent, who had purchased under the decree Therefore, after the confirmation of sale, the appellant ought to have given up possession when required to do so, instead of which he resisted the respondent s application for mutation of names and attempted to get possession It was his continuance in possession after the confirmation of the sale and his resistance to the purchaser that was wrongful, not his original entering into possession So that the sum and substance of his wrong doing is that his possession after the 20th September, 1895, was illegal, and, it may be assumed, illegal to his knowledge Is that a sufficient reason for disallowing his collection expenses when allowing the respondent mesne profits? The objection of a suit for mesne profits is to compensate the owner of land for being kept out of possession and deprived of the profits of the land The measure of the compensation is ordinarily the loss which he has suffered If he is placed in the same possession as if he had all along been in possession that is all he is ordinarily entitled to, and it is not reasonable that he should receive any additional benefit, or that the person in wrongful possession should not only make compensation but be fined as well The ordinary meaning of the profits of land, as observed by the Privy Council in *Hurro Doorga Choudhrani* v *Maharani Surut Soondari Debi* (1), is the amount which might have been received from the land deducting the collection charges I do not mean that in all cases the Court would be compelled to allow such deductions As the Privy Council said in *Girish Chunder Lahiri* v *Shoshi Shikhareswar Roy* (2), "mesne profits are in the nature of damages which the Court may mould according to the justice of the case" The question is, whether the

(1) (1881) L R 9 I A 1 at p 5 (2) (1900) L R 27 I A 110, at p 121

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the Privy Council in that case applies, in my opinion, with equal if not greater, force to this case. That was a case in which the trespass was "unauthorized and wilful in its inception and [259] persistent and definite in its continuance." In the present case the possession of the appellant was in its inception lawful. The mere fact that a decree for sale had been passed against Sahib Jan did not preclude her from dealing with her property until it was sold in execution of the decree. She was therefore competent to grant a lease of it to the appellant, and by virtue of the lease the appellant lawfully entered into possession. It is his continuance in possession after the confirmation of the subsequent auction sale which was unlawful and rendered him liable to pay mesne profits. His case is not in any way different from that of an ordinary trespasser; and having regard to the rulings of the Privy Council to which the learned Chief Justice has referred, such a trespasser is entitled to charges of collection. The Full Bench case of *Altaf Ali* v. *Lalji Mal* (1) appears to have been a case of "tortious and malicious" trespass, which this is not. That case is, therefore, distinguishable from the present. I see no reason to hold that the justice of this case requires that the appellant should be deprived of the expenses of collection which the respondent himself would have had to incur had he been in possession, and that the mesne profits in this case should include anything more than the actual profits received from the land after deducting collection charges.

As for the sir lands, assuming that Din Muhammad was a man of straw, and the lease in his favour is in reality a lease in favour of the appellant, the possession of the appellant in respect of the sir is possession as the sub-tenant of Sahib Jan, who, after the auction sale, became the ex-proprietary tenant of the respondent. It has not been suggested that she has, by contract or otherwise, lost her ex-proprietary rights. The respondent cannot therefore have any claim against the appellant for mesne profits in respect of the sir.

I agree in the order proposed.

Issues remitted.

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23 All. 260=21 A. W. N. 63.

[260] APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

ABDUL SHAKUR (*Plaintiff*) *v.* MENDAI (*Defendant*).* [12th March, 1901].

Pre-emption—Wajib-ul-arz—Construction of document—Meaning of the term "hissadaran shikmi."

Held that the expression "*hissadaran shikmi*" as used in the clauses of a wajib-ul-arz dealing with various classes of persons who were entitled to pre-emption in preference to strangers, did not necessarily imply any idea of subordination, but was rightly considered applicable to persons who were co-sharers in the particular *khata* of the *patti* in which the land sold was situated.

[**Ref.** 29 All. 575; **Dist.** 30 All. 77=1908 A. W. N. 16=5 A. L. J. 52.]

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* Appeal No 41 of 1900 under section 10 of the Letters Patent.

(1) (1877) I. L. R. 1 All. 518.

to the law, that they had been more than imprudent, and had been wrong headed and obstinate No more than this—if so much—can in my opinion, reasonably be said of the conduct of the appellant in this case in retaining possession after the period of five years during which his possession under the lease was lawful and never questioned On the main point in this appeal, therefore, I think that the appellant is entitled to succeed, and that he ought to be allowed a proper sum for his expenses of collection It will be necessary to remit an issue to the Court of first instance to determine what that proper sum is under the circumstances of the case There is one other question which is raised by the appeal The appellant objected in the first Court that the decree holder was not entitled in the assessment of mesne profits to any sum on account of certain sir lands which, with the rest of the property, was included in the appellant s lease Now the effect of the sale, which was confirmed on the 20th September, 1895, by virtue of the provisions of the North Western Provinces Rent Act, No XII of 1881, was that Sahib Jan became an ex proprietary tenant of the purchaser in respect of the sir lands From the date of the confirmation of the sale the purchaser would, as regards the sir lands, possess proprietary right as owner, Sahib Jan would be the ex proprietary tenant liable to pay [258] rent to the purchaser, and the appellant would be the sub tenant of Sahib Jan and liable to pay rent to her There is nothing whatever to show that at any time after the date of the sale Sahib Jan lost any of her rights as ex proprietary tenant which she acquired by virtue of the sale So long as the ex proprietary tenancy subsisted the appellant as Sahib Jan s sub tenant would be entitled to possession of the sir lands, and would be liable to pay rent not to the purchaser but to Sahib Jan, the ex proprietary tenant, his own landlord His possession of the sir lands would not be wrongful but a rightful possession in these circumstances The purchaser would not be entitled to recover rent from him, but would only be entitled to recover such rent from Sahib Jan as might be determined by the Rent Court or by agreement between himself and Sahib Jan That being so, it appears to me that the objection raised by the appellant with reference to the sir lands was sound, and that no mesne profits ought to be allowed to the respondent in respect of the sir lands Before deciding this case it is necessary to obtain findings on the following issues under section 566 of the Code —

1901 MARCH 11 — APPELLATE CIVIL — 23 A 252= 21 A W N 80

(1) What is the proper sum to allow the appellant for the expenses of collection incurred by him during his possession of the property in dispute from the 20th September, 1895 ?

(2) To what amount of mesne profits is the respondent entitled after deducting the sum found to be a reasonable sum for the expenses of collection under the first issue, and excluding all sums claimed by the respondent on account of the sir lands, and also all sums claimed by the respondent as interest on the mesne profits which have been disallowed by Mr Justice Knox ?

We remit these issues to the Court of first instance, which will take such additional evidence as may be necessary, and on return of the findings, ten days will be allowed for objections

BANERJI, J —I entirely concur, and have little to add I am unable to distinguish this case from that of *McArthur & Co* v *Cornwall* (1) The principle of the ruling of their Lordships of

(1) L R. 1892 A. C 75

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APPELLATE CIVIL

23 A 260
21 A W N 63

THE facts of this case sufficiently appear from the judgment of the Court

Maulvi *Muhammad Ishaq* for the appellant

Pandit *Sundar Lal* and Babu *Jiwan Chandra Mukerji* for the respondent

BANERJI, J —This appeal arises in a suit for pre-emption brought on the basis of the wajib ul arz The wajib ul arz confers the right of pre emption on seven classes of persons, each class having a preferential right over the class next following The first two classes are composed of persons who are related to the vendor The remaining classes are co sharers of the vendor The third class of pre emptors is described as *hissadaran shikmi* The fourth is the lambardar of the *behri* or *patti* The fifth is a co sharer in the *patti* The sixth and seventh are respectively the lambardars and co sharers in the village The plaintiff claim as a pre emptor of the third class He is a co sharer of the vendor in the same *khata*, and he says that he comes within the third category of pre emptors mentioned in the wajib ul arz The Courts below were of opinion that by the words *hissadaran shikmi* were meant co sharers in the same *khata*, and, as the plaintiff is admittedly a co sharer of the vendor in the same *khata*, those Courts held that he had a preferential right of pre emption to that of the vendee who is a co sharer in the *patti* On appeal to this Court the decrees of the Courts below were set aside, the learned Judge of this Court being of opinion that the word *shikmi* implies "subordination of some kind," and that a co-sharer *shikmi* must mean some co sharer who holds in subordination to the co sharer whose property is sold I am unable to [261] agree with this view The word *shikmi* is derived from the word *shikam*, which means the belly, and its primary meaning is "inclusion" So that the word *shikmi* does not necessarily imply subordination This was in a way conceded by Mr *Sundar Lal* on behalf of the respondent The illustrations which Mr *Sundar Lal* put before us as showing what was meant by *hissadaran shikmi* do not imply any kind of subordination to the co sharer whose share is sold He put the case of a person buying an isolated piece of land from a co sharer in the same *khatta* Such a purchaser certainly is in no sense subordinate to his vendor When the co sharers who caused recitals as to the custom of pre emption to be recorded in the wajib ul arz, declared that *hissadaran shikmi* would have a right of pre emption, they must have meant some co sharers who were not necessarily in the relation of subordination to the co sharers who might sell his share There can be no doubt that at the time when the wajib ul arz was prepared, the co sharers in the village were referring to the state of things which existed in the village at that time The intention was to exclude from each group of co sharers persons who were strangers to that group Thus we have co sharers in the *patti* as persons who would exclude co sharers in the village There can be no doubt that co sharers *shikmi* were intended to mean some co sharers who were nearer to the vendor than the co-sharers in the *patti* In the village in question it appears that each *patti* or *behri* is sub divided into *khatas*, each *khata* representing a separate unit for the payment of Government revenue as between the co sharers in the *patti* There is no other class of co sharers in the village who could have been meant as being co sharers *shikmi* than co sharers in the *khata*, and although any doubt in the matter would have been impossible had the

1901 MARCH 13. — APPELLATE CIVIL. — 23 A. 263= 21 A. W. N. 75.

property of the judgment-debtor, Abdul Wahab. The lower appellate Court has decreed the claim upon the authority of *Muttyjan* v. *Ahmed Ally* (1). The decision in that case was dissented from by a Full Bench of this Court in *Jafri Begam* v. *Amir Muhammad Khan* (2). In this Court it is settled that a decree passed against only the heir or heirs in possession of the estate of a deceased Muhammadan debtor does not bind the other heirs who are not parties to the suit so as to enable their rights and interests to be sold in execution, and that they may, subject to certain conditions, recover their shares from the auction-purchaser. Having regard to the decision of the Full Bench, it was not contended on behalf of the plaintiff that under the decree he was strictly entitled to sell more than the rights and interests in the property of the judgment-debtor, Abdul Wahab. The main question discussed was whether the defendants, who claim under Abdul Wahab by a transaction prior to the attachment, can resist the suit upon such a ground. It was contended that they could not, as they stood in no better position than Abdul Wahab [265] and that he could not have resisted the attachment and sale of the whole property upon such a ground. I do not think that contention is correct. If the execution of the decree had been sought against this property in the hands of Abdul Wahab, I see no reason why he should not have objected to the attachment and sale of the rights and interests of the other heirs who were not parties to the suit, upon the ground that, as regards those other heirs and their interests, he was in possession of the property as trustee. That a judgment-debtor could make such an objection is shown by the case of *Nathmal Das* v. *Tajammul Husain* (3), and is recognised by the Full Bench in the case of *Seth Chand Mal* v. *Durga Dei* (4). I think that the judgment-debtor could certainly have asked that execution of the decree should be limited to his own rights and interests in accordance with the decision of the Full Bench in the case of *Jafri Begam* v. *Amir Muhammad Khan* (2). The defendants, in my opinion, can do the same They rely on their possession and they dispute the plaintiff's right to disturb their possession, except in so far as he can establish a superior title. So far as the interest in the property of Abdul Wahab is concerned the plaintiff's superior title is established. So far as the rights and interests of the other heirs are concerned, it may be that Abdul Wahab have no right to put the defendants into possession: but so far as regards those rights and interests, the plaintiff is no more entitled under his decree to bring them to sale than the defendants are to retain possession. That being so, I think that this appeal ought to be allowed, the decree of the lower appellate Court set aside, and the decree of the Court of first instance restored with costs.

BANERJI, J.—I concur. The main contention on behalf of the respondent was, that the defendant could not set up a plea which Abdul Wahab, through whom they derived their title, could not have set up. For the reasons stated by the learned Chief Justice, I am of opinion that that contention is unsound. It was open to Abdul Wahab to contend that the decree-holder plaintiff was not entitled to proceed against any property other than the interests of Abdul Wahab himself in the estate of the deceased debtor. He could have urged that as regards the shares of his

(1) (1882) I. L. R. 8 Cal. 370.
(2) (1885) I. L. R. 7 All. 822.
(3) (1884) I. L. R. 7 All. 36.
(4) (1889) I. L. R. 12 All. 313.

23 A 263 (=21 A W N 75)

APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji

1901
MARCH 13

APPELLATE CIVIL

23 A 263=
21 A W N
75

DALLU MAL AND ANOTHER (*Defendants*) v HARI DAS (*Plaintiff*) *
[13th March, 1901]

Execution of a decree—Civil Procedure Code section 283—Decree against one only of several co-heirs of deceased debtor—Transfer by judgment debtor of property belonging to himself and co-heirs—Plea of jus tertii raised by transferees

The plaintiff obtained a money decree for a debt due by a deceased Muhammadan against one only of several heirs of the deceased In execution of this decree an attachment was made of certain immoveable property formerly of the original debtor but prior to such attachment the judgment debtor had by an oral agreement transferred such property to other persons and put them in possession

Held that it was open to the transferees in possession to raise the defence which their transferor could have raised namely, that only the rights and interests of the judgment debtor himself were liable to attachment and sale in execution of the decree and not the rights and interests of the co heirs of the judgment debtor *Jafri Begam* v *Amir Muhammad Khan* (1), *Nathmal Das* v *Tajammul Husain* (2) and *Seth Chand Mal* v *Durga Dei* (3) referred to

[Ref 2 S L R 76 12 O C 146=2 Ind Cas 922 62 I C 428]

THE facts of this case sufficiently appear from the judgment of the Chief Justice

Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandra Mukerji* for the appellants

Pandit *Sundar Lal*, Munshi *Jang Bahadur Lal* and Munshi *Gokul Prasad*, for the respondent

STRACHEY, C J —This is a suit under section 283 of the Code of Civil Procedure to establish the right of the plaintiff to attach and bring to sale certain immoveable property in [264] execution of a decree held by him The decree was a money decree for a debt due to the plaintiff by the ex Nawab of Tonk It was obtained against one Abdul Wahab, who was one of the heirs of the debtor, and was in possession of the deceased's estate The decree was against Abdul Wahab alone as representative of the deceased debtor There were other heirs of the deceased entitled under the Muhammadan law to share in the estate They were not parties to the suit or decree The plaintiff now seeks to execute the decree against certain immoveable property formerly of the debtor, which, prior to the attachment, was made over by the judgment debtor Abdul Wahab, not by any registered instrument, but by means of an oral transfer to the defendants in this case It is found that at the time of that transfer, Abdul Wahab was in possession of the property It is also found upon remand that at the date of the attachment in execution of the plaintiff's decree the present defendants were in possession derived from Abdul Wahab The plaintiff seeks to execute his decree against all the deceased's rights and interests in the property in the defendants' hands and not merely the rights and interests in the

*Second Appeal No 619 of 1898 from a decree of R Greeven, Esq , District Judge of Benares, dated the 10th October 1898, modifying the decree of Babu Mohanlal, Subordinate Judge of Benares dated the 18th May 1898

(1) (1885) I L R 7 All 822
(2) (1884) I L R 7 All 36
(3) (1890) I L R 12 All. 313.

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APPELLATE CRIMINAL.

23 A. 266= 21 A. W. N. 77.

The Local Government have appealed on the ground that the complainant was justified in arresting the accused, and that the subsequent detention being legal, the accused had escaped from lawful custody. It is admitted that the offence of theft was not committed in view either of Mata Bhikh or of the chaukidar. If, therefore, this appeal is to be supported at all, it must be on the ground that Johri was either receiving or retaining the stolen property in view of the person arresting him. In this case there is no suggestion of receipt, so the offence therefore could be nothing but a retaining of stolen property within the meaning of section 411 of the Indian Penal Code. Now in our opinion the retention by the thief of the stolen property is not an offence within the meaning of section 411. It is merely a continuation of that appropriation to himself of another man's goods which constitutes the gist of what was always called in England the principal felony or theft. Until the receipt of stolen goods was made a statutory felony, it was only an abetment of the principal felony of stealing, so that it would have been impossible to convict a man at once of the principal felony and of the abetment of such felony. Indeed, it is still possible in England to convict a man of abetment at common law, and it is not necessary that he should be prosecuted for the statutory felony. The framers of the Indian Act were, no doubt, cognizant of the fact that it was settled law in England that the receipt of stolen goods to be guilty must be a receipt with knowledge at the time of the receipt that they were stolen. No subsequent knowledge would make that guilty which was originally innocent. Therefore, in my opinion, the framers [268] of the Indian Act added the word "retain" to the word "receive." The class of persons against whom section 411 is directed is a class to whom these alternative words apply—"knowing or having reason to believe the same to be stolen property." It seems to me that the application of these words to the thief himself would be wholly inappropriate, and that therefore the person who is himself the thief does not fall within the purview of section 411. The question raised by the Government appeal as to whether a qualified person having made an arrest, and having then handed over the person arrested to the custody of an agent, such custody continues to be, what it was originally, a lawful custody is one which I should be disposed to answer in the affirmative in accordance with the ruling in *Queen-Empress* v. *Potadu* (1) if it were necessary to do so. I would dismiss this appeal.

AIKMAN, J.—I am of the same opinion. The facts of the case are proved, and are admitted by the accused. On the 18th of August last a bullock belonging to one Mata Bhikh was stolen. Mata Bhikh traced it that same evening to the house of the accused, Johri, who was present in his house at the time. Mata Bhikh arrested Johri, and made him and the bullock over to the village chaukidar to be taken to the police-station. Johri made his escape from the custody of the chaukidar, but was arrested four days afterwards. He was put upon his trial for the theft of the bullock, was convicted under section 379 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment. He was then put upon his trial for an offence punishable under section 224 of the Indian Penal Code, that is, for escaping from the custody of the village watchman. The Magistrate who tried the case, and who has written a very good judgment, came to the conclusion that as neither Mata Bhikh nor the chaukidar had seen the accused committing the offence of theft, he

(1) (1888) I. L. R. 11 Mad. 480.

[266] brothers and the other heirs of the deceased, he was in the position of a trustee That being so, the defendants were entitled to set up the *jus tertii* of the heirs of the deceased debtor other than Abdul Wahab, and under the decree which the plaintiff got he could proceed against the interests of Abdul Wahab alone in the estate of the deceased I also would therefore restore the decree of the Court of first instance

Appeal decreed

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23 A 266 (=21 A W N 77)

APPELLATE CRIMINAL

Before Mr Justice Blair and Mr Justice Aikman

KING EMPEROR v JOHRI *
[14th March, 1901]

Act No XLV of 1860 (*Indian Penal Code*) *sections* 224, 411—*Escape from lawful custody—Actual thief arrested by private person whilst in possession of stolen property—Section* 411 *of the Indian Penal Code not applicable to the thief himself.*

Section 411 of the Indian Penal Code does not apply to the person who is the actual thief Where therefore, a person whose bullock had been stolen in his absence traced it to the house of the thief, and there and then arrested him, and made him over to a chaukidar, from whose custody he escaped, it was *held* that this was not an escape from lawful custody within the meaning of section 224 of the Code

Semble that if the owner of the bullock had himself been entitled to make the arrest, the subsequent custody of the prisoner by the chaukidar would have been a lawful custody *Queen Empress* v *Potadu* (1) referred to

[Fol 29 All 575=4 A L J 483=1907 A W N 179=6 Cr L J 10 Ref 29 All 377=1907 A W N 94=5 Cr L J 277 (Penal Code, S 224—' Lawful custody ') Dist 28 All 372=3 A L J 146=1906 A W N 522=3 Cr L J 247 (S 411 not applicable to thief himself)

THE facts of this case sufficiently appear from either of the judgments

The Government Advocate (Mr *E Chamier*), in support of the appeal

BLAIR, J —This is an appeal from an order of acquittal by a Magistrate under the following circumstances One Johri had been convicted of stealing a bullock, the property of one Mata Bhikh Mata Bhikh lost his bullock, apparently got wind of Johri, followed him into his house, and there found him in possession of the stolen bullock Mata Bhikh then arrested him and made him over to the police chaukidar, from whose custody he shortly afterwards escaped Johri was tried for and convicted [267] of theft, and sentenced to six months' rigorous imprisonment He was then put upon his trial for an offence under section 224 of the Indian Penal Code for escaping from the custody in which he was lawfully detained for the offence with which he was charged The Magistrate acquitted him of that charge, holding that the offence of theft was not committed either in the presence of Mata Bhikh, complainant, or of the chaukidar to whom Mata Bhikh handed him over, and, as the law gives neither of those persons a right to arrest except for an offence committed in their view, the custody was an illegal custody, and that escape from such custody did not fall within the purview of section 224

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* Criminal Appeal No 93 of 1901

(1) (1888) I L R 11 Mad 480

1901 MARCH 21.

APPELLATE CIVIL.

23 A. 270= 21 A. W. N. 69.

reduction or revision of rent for a particular year only and having no effect beyond that year on the rent payable for the holding.

In a suit for arrears of rent under section 93 (*a*) of the North-Western Provinces Rent Act, 1881, the defendant proved a local custom, whereby a tenant was entitled to a proportionate deduction from the rent for any year for such lands as were in that year, owing to fluvial action, unculturable by being submerged by water or covered by sand. *No application for abatement* of rent had been made under Chapter II of the Act.

Held that inasmuch as the defendant did not by his plea seek for an abatement of rent in the sense of Chapter II, namely, a reduction permanently or for an indeterminate period of the rent payable for his holding, but only a remission or deduction from such rent for a particular year and in respect of such portions of the holding as were unculturable in that year, and inasmuch as no such remission could have been obtained in proceedings under Chapter II, the custom did not over-ride any of the provisions of the Act, and must be given effect to by the Court trying the suit.

Radha Prasad Singh v. *Baldeo Misr* (1) distinguished.

[Ref. 33 All. 738; Fol. 23. All 277.]

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid* and Babu *Bishnu Chandar Moitra*, for the respondent.

[271] STRACHEY, C. J. and BANERJI, J.—This is one of a large group of second appeals arising out of suits under section 93 (*a*) of the North-Western Provinces Rent Act, No. XII of 1881, for arrears of rent, which have been brought by the Maharani of Dumraon against certain occupancy tenants and tenants at fixed rates. The defence of the tenants raises a question which is common to many of these appeals, and our judgment in this case will govern the decision of the other cases in which the same point arises. The Dumraon estate is situate in the Ballia district. It is well known that the holdings in that district are often of a shifting character owing to changes in the course of the river Ganges. During one year a particular holding, or part of it, may be submerged by water or covered by sand, and therefore not capable of cultivation; and in the next year it may be wholly free from water and sand, while other holdings, or parts of holdings, are, in their turn temporarily covered. Such changes occur frequently and rapidly, and it cannot be foreseen how any particular holding may, in the near future, be affected in the manner described. The defence to the suit is that, by a custom prevailing in the district and recognised by the predecessor of the plaintiff, a tenant is entitled, when sued for rent, to a deduction from the rent payable for the holding proportionate to those lands which, during the period of claim, were unculturable, either because they were submerged by water or because they were covered by sand. It is contended by the defendants that in these suits the rent claimed should only be decreed subject to such a deduction of a proportionate part of the rent. In some of the cases it is said that the entire holding for which rent is claimed has been submerged or covered, in others, that part only has been in that condition. In this particular case the nature of the defence is clearly shown by paragraph 2 of the written statement, which is as follows:—"It is a custom in the village in question to allow a deduction of rent for *bal*, *panchat*, and *bijmar* land (a kind of sandy land and land in which seeds do not germinate). In the years in question more than two bighas and 5 biswas of land were not

(1) Weekly Notes, 1893, p. 29.

could not be said to have been lawfully detained and on this ground he acquitted him of the offence punishable under section 224 Against this order of acquittal the present appeal has been filed by the learned Government Advocate under the direction of the Local Government The learned Government Advocate admitted that the theft [269] had not been committed in the presence of Mata Bhikh or of the chaukidar ' He endeavoured to support the appeal on the ground that when Mata Bhikh arrested Johri, the latter was then committing an offence punishable under section 411 of the Indian Penal Code, and that offence being cognizable and non bailable, the complainant, Mata Bhikh, it was argued, was justified in making the arrest under section 59, sub section (1) of the Code of Criminal Procedure This argument, I may note in passing, could not apply to the chaukidar, as the offence under section 411 of the Indian Penal Code is not one of the offences mentioned in section 8 of the North Western Provinces Police Act, 1873, for which the chaukidar has authority to arrest It is true that it is sometimes doubtful whether an offender is himself the thief or only a receiver In such a case there is no objection to the conviction being in the alter native But where, as in this case, the facts clearly point to Johri being himself the thief, in my opinion he cannot be said, when arrested by Mata Bhikh, to have been committing an offence under section 411 The language of that section, I hold, is clearly directed against some person other than one who is proved to be the actual thief I have arrived at the conclusion, therefore, that the arrest by Mata Bhikh was not jus tified by section 59, sub section (1) of the Code of Criminal Procedure The custody, therefore, in which the chaukidar detained Johri was not a lawful custody, and his escape therefrom did not amount to an offence under section 224 of the Indian Penal Code Had the arrest by Mata Bhikh been lawful, I should have had little difficulty in holding, in con currence with the Madras High Court (see the case cited by my learned colleague) that the escape from the chaukidar s custody was an offence under section 224 But it is unnecessary to decide this point I agree in the order proposed

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23 A 270 (=21 A W N 69)

[270] APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji

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BENI PRASAD KUARI (*Plaintiff*) v DUKKHI RAI (*Defendant*) *
[21st March, 1901]

Act No XII of 1881 (*North Western Provinces Rent Act*), *Chapter II, section* 93 (*a*)—*Landholder and tenant—Suit for rent—Plea of custom allowing deductions on account of land rendered unculturable by action of river—Such deduction not an ' abatement of rent within the meaning of the Act*

An abatement of rent in the sense of Chapter II of the North Western Provinces Rent Act, No XII of 1881, implies the reduction of the rent payable for the holding, r minate period, the rent as d continuing to be the rent y further order A tenant car a

* Second Appeal No 587 of 1899 from a decree of Kunwar Bharat Singh District Judge of Ghazipur, dated the 28th June 1899, confirming a decree of Munshi Kashi Prasad, Assistant Collector of Ballia, dated the 22nd November 1898

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reduction or revision of rent for a particular year only and having no eff beyond that year on the rent payable for the holding.

In a suit for arrears of rent under section 93 (a) of the North-We Provinces Rent Act, 1881, the defendant proved a local custom, wher tenant was entitled to a proportionate deduction from the rent for an for such lands as were in that year, owing to fluvial action, uncul by being submerged by water or covered by sand. No application f ment of rent had been made under Chapter II of the Act.

Held that inasmuch as the defendant did not by his plea seek for ment of rent in the sense of Chapter II, namely, a reduction perm for an indeterminate period of the rent payable for his holding, b mission or deduction from such rent for a particular year and in re portions of the holding as were unculturable in that year, and no such remission could have been obtained in proce Chapter II, the custom did not over-ride any of the provisio and must be given effect to by the Court trying the suit.

Radha Prasad Singh v. *Baldeo Misr* (1) distinguished.

[Ref. 33 All. 738; Fol. 23. All 277.]

THE facts of this case sufficiently appear from the j Court.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*,

Mr. *Abdul Majid* and Babu *Bishnu Chandr* respondent.

[271] STRACHEY, C. J. and BANERJI, J.—This of second appeals arising out of suits under sectio Western Provinces Rent Act, No. XII of 1881, fo have been brought by the Maharani of Dumraon a tenants and tenants at fixed rates. The defenc question which is common to many of these a in this case will govern the decision of the othe point arises. The Dumraon estate is situate i well known that the holdings in that dist character owing to changes in the course of t year a particular holding, or part of it, m covered by sand, and therefore not capable year it may be wholly free from water and parts of holdings, are, in their turn temp occur frequently and rapidly, and it ca cular holding may, in the near future, b The defence to the suit is that, by a cu recognised by the predecessor of the sued for rent, to a deduction from th portionate to those lands which, dur turable, either because they were were covered by sand. It is conte suits the rent claimed should onl of a proportionate part of the ren entire holding for which rent is in others, that part only has b case the nature of the defenc written statement, which is in question to allow a deduc (a kind of sandy land and l years in question more th

(1)

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cultivated, and the remaining land was sandy, under water, and *bijmar* land Therefore the claim for rent of the land out of cultivation should be dismissed with [272] costs It is admitted by the plaintiff, and it has been found as a fact by the Courts below, that this custom does prevail in the district and in the villages in question It has also been found that the defendants have proved that portions of their holdings were for part of the period to which the claim relates unculturable for one or the other of the reasons stated The Courts below have given effect to this plea of the defendants, and have given the plaintiff a decree for rent subject to deduction accordingly From that decision the plaintiff now appeals It is necessary, in the first place, to see what is the exact nature of the custom that is pleaded For that purpose it is sufficient to refer to three documents The first is an application made to the Collector by the late Maharaja, which is printed at page 3 of the respondent's book in second appeal No 692 of 1899 This begins by saying that "the custom of allowing deduction on account of *bal* and *panchat* (sandy and sub merged) lands prevails in the undermentioned villages It goes on to give a history of the measures adopted in this estate for giving effect to that custom It shows at considerable length that in the time of the late Maharaja all disputes as to the submergence of holdings were settled by the Maharaja's agents and by the tenants themselves, sometimes by a sort of *panchayat* by arbitrators appointed in each village, sometimes with the help of investigations and measurements made by the amins and munsarims attached to the Collector s office In this way disputes of this kind were usually settled amicably by the parties themselves So that the procedure for giving effect to the custom varied from time to time, but the custom itself was apparently always recognised There was no question as to the existence or the nature of the custom, but only as to its application to particular cases The second document to which we refer is the wajib ul arz of the village Kawaspur, which is printed at page 26 of the same book Clause 10 is as follows —" In this mahal there is a custom of allowing deduction on account of the sandy, submerged, and sterile lands The estate makes inquiry every year and collects rent after allowing such deduction ' The third document is that which gives the fullest description of the custom It is the Settlement Report of the Ballia district for the years 1882 85 [273] At page 91, paragraph 6, it is stated as follows —" A local custom also provides for the remission of rent in cases of *bal*, *panchat* and *bijmar* (sand, water logged soil, and blighted seed) Rent is only paid on the productive area in the villages exposed to fluvial action, and the area which is spoilt by a deposit of sand, or on which the fertile deposit is too thin to bear a crop, is deducted The same custom obtains in the *diara* lands of pargana Ballia The area to be deducted under this custom is a fruitful source of dispute in suits for arrears of rent, because it can only be accurately determined when the crops are on the ground before harvest time, and there is therefore no means of ascertaining whether the tenant s claim is true or false except the utterly untrustworthy evidence of the witnesses of the parties There has lately, however, been introduced a system on the Maharaja s estate of annual measure ment at the proper time by amins nominated by the Collector The tenants are made acquainted with the areas allowed by this survey, and objections not made then cannot be usefully brought forward at a later date ' In the judgment under appeal in this case the lower appellate

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by the ambiguity of the word abatement: as used in Chapter II of the Act it has the special technical sense which we have explained; but what the tenants claim in this suit would be more correctly described as a remission or deduction than abatement, or at all events is abatement in a different sense altogether. The test is whether by his plea in the suit the tenant is indirectly trying to get, not merely a particular remission or deduction for a particular year, and for the portion for the holding which he proves to have been unculturable in that year, but a permanent or indeterminate diminution of the rent of his holding which can only be effected by the procedure which Chapter II prescribes. If he is, then the plea of custom is bad : if he is not, and if he proves the facts which make the custom applicable, it must be given effect. For these reasons it appears to us that the custom pleaded by the defendants in these cases does not override any of the provisions of the Rent Act of 1881. No other reason has been suggested why the custom should not be given effect to, and we think that effect ought to be given to it. In all these cases it [277] will, of course, be for the tenant to prove that in the particular year in question the portions of his holding, in respect of which he claims a deduction of rent were in the condition to which the custom is applicable, and if he does not prove this, he will have to pay the full rent of the holding. For these reasons we think that the decision of the Courts below were right, and we dismiss this appeal with costs.

Appeal dismissed.

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23 A. 277 (=21 A. W. N. 72.)

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

BENI PRASAD KUARI (*Plaintiff*) *v.* DHARAKA RAI AND ANOTHER (*Defendants*).* [21st March, 1901.]

Act No. XII of 1881 (*North-Western Provinces Rent Act*), *Section* 93 (*a*)—*Suit for rent —Limitation Act No. XV of* 1877 (*Indian Limitation Act*), *section* 5.

Section 5 of the Indian Limitation Act, 1877, applies to a suit under section 93 (*a*) of the North-Western Provinces Rent Act, 1881. *Muhammad Husen* v. *Muzaffar Husen* (1) dissented from.

[Ref. 14 I. C. 154=54 All. 375 ; 8 A. L. J. 833 ; Fol. 28 All. 48=1905 A. W. N. 175=2 A. L. J. 714 ; 22 A. W. N. 34 ; 12 I. C. 810=34 All. 496 (F.B) ; 12 I. C. 810].

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Conlan*, Mr. *A. E. Ryves*, and Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

STRACHEY, C. J. and BANERJI, J.—This is an appeal in a suit for arrears of rent under section 93 (*a*) of the North-Western Provinces Rent Act, No. XII of 1881, brought by the Maharani of Dumraon against certain tenants. The main defence was that by a local custom

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* Second Appeal No. 692 of 1899, from a decree of Kunwar Bharat Singh, District Judge of Ghazipur, dated the 28th June 1899, modifying a decree of Munshi Kashi Prasad, Assistant Collector of Ballia, dated the 22nd November 1898.

(1) (1898) I. L. R. 21 All. 22.

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[275] question, and that according to the village custom the suit ought to be instituted after deducting rent of the diluviated lands That was really a claim that, by reason of the custom, the rent for the holding was proportionately and permanently abated because a portion of the holding had disappeared by diluvion Undoubtedly the tenant could have applied for such abatement under section 18 of the Act So that in the present case the question is, whether the defendant is by his plea asking for an abatement of the rent of his holding within the meaning of the sections to which we have referred Could he have obtained what he now seeks to obtain by his plea, by an application made under section 19? To answer this question it is necessary to see what is the nature of the abatement of rent to which those sections refer Where an order for abatement is made, the rent as abated becomes substituted as the rent of the holding for the original rent as fixed by contract or by order of the Court The rent as abated continues to be the rent of the holding until altered either by contract or by some further order for enhancement or abatement That is the effect of several sections, and in particular of sections 16 and 31 of the Act The essence of the order of abatement is that it diminishes, if not permanently, at all events for an indeterminate period, the rent of the holding as defined in section 3 (2) of the Act,—that which is to be paid by the tenant on account of his holding, use or occupation of the land There can be no doubt that a Court dealing with a suit for arrears of rent cannot by its decree on the ground of local custom or otherwise give the tenant an abatement of the rent of his holding in that sense, and that is what the decision in *Radha Prasad Singh* v *Baldeo Misr* (1) establishes Therefore if in any of these appeals the custom is set up with a view to obtaining an abatement of the rent of the holding in the sense explained, a permanent deduction, or a reduction for an indeterminate period of the rent of the holding as fixed by contract or by order of the Court, we shall undoubtedly follow that authority To any other class of cases it does not, in our opinion, apply To take the present case, what the defendant seeks by virtue of the custom is not an abatement of the rent of the holding in the sense of the sections relating to abatement at all and he could not have obtained what he [276] now seeks by means of any application made under section 19 He does not contend that by virtue of custom the rent of the holding as fixed by contract or order is diminished by a single rupee The rent of the holding remains exactly the same as before, and he admits that in any year he may have to pay the full amount at the same rate at which he has always been liable to pay rent for the holding What he asks for is not an abatement of the rent of the holding permanently or for an indefinite period but remission from the payment of the rent for a particular year only for such part of the holding as in that year is proved to have been unculturable That seems to us to be no more abatement in the sense of Chapter II of the Act than a release or remission by the landlord of part of his claim for rent in any particular year under section 63 of the Contract Act would be an abatement of rent in the sense of the Chapter It would affect only the particular year in which the land was submerged, and would have no effect beyond that year on the rent payable for the holding A tenant cannot obtain on such a ground or on any ground whatever a remission for a particular year only by an application under section 19 of the Act One must not be misled

(1) Weekly Notes, 1893, p 2J

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collected in the note to section 6 in Mr. Starling's edition of the Limitation Act. The general effect of those cases is, that the provisions of the Limitation Act are applicable to proceedings under special or local laws, except so far as they affect or alter the periods prescribed by those special or local laws, unless the special or local law is a complete code by itself to which the general provisions of the Limitation Act cannot be applied without incongruity. This is very clearly explained by the judgment of Mr. Justice Muttusami Ayyar in *Veeramma* v. *Abbiah* (1). That, subject to these exceptions, the Limitation Act is applicable to suits and other proceedings under special laws, such as the Rent Act of 1881, clearly appears, we think, from the Act itself, which is a general law of limitation, and in particular from section 1, which expressly provides that certian portions of the Act are not applicable to suits under two special Acts named, the Indian Divorce Act and Madras Regulation, VI of 1831. That, we think, greatly strengthens the inference that in regard to suits under other special or local Acts the provisions of the Limitation Act apply, subject, of course, to the qualifications already pointed out. It is, we think, impossible to hold that the Rent Act of 1881 constitutes by itself a complete code, to which, under the authorities already referred to, the provisions of the Limitation Act generally would not be applicable. It is clearly not complete as to procedure in general, for it has in a great variety of ways to be supplemented by the Code of Civil Procedure. It is particularly incomplete as regards provisions relating to limitation. So far, therefore, we can see nothing which would exclude the application of section 5, paragraph 1, of the Limitation Act to suits under the **[280]** Rent Act. But in answer to this, section 203 of the Rent Act has been relied on. Section 203 provides that "whenever a Court is closed on the last day of any period provided in this Act for the presentation of any memorandum of appeal, or for the deposit or payment of any money in or into Court, the day on which the Court re-opens shall be deemed to be such last day." The contention is that, inasmuch as this section expressly embodies section 5, paragraph 1, of the Limitation Act, so far as that section relates to the presentation of an appeal, it impliedly excludes by its silence the application of section 5, paragraph 1, to the institution of suits. We do not think that this contention is correct. When sections 202 and 203 are carefully read, it is clear that they have reference exclusively to the computation of the periods of limitation prescribed by the Rent Act. In that respect they are of the same character as the provisions for computation of periods of limitation contained in Part III of the Limitation Act. The effect of section 203 is to make the day on which the Court re-opens part of the period prescribed by the Act for the appeal. Section 203 has nothing to do with the presentation of an appeal or the institution of any proceeding after the period prescribed has expired. On the other hand, section 5 of the Limitation Act has nothing to do with the computation of any period of limitation, but, as we have already pointed out, assumes, that the period has expired. It is really an exception to, or qualification of, section 4, which requires, subject to the provisions contained in sections 5 to 25 inclusive, the dismissal of a suit, appeal or application brought after the period of limitation has expired. Reliance has been placed on the judgment of Mr. Justice Aikman in *Muhammad Husen* v. *Muzaffar Husen* (2). The learned Judge there held that a suit under section 93 (*b*) of the North-Western Provinces Rent

(1) (1894) I. L. R. 18 Mad. 99. (2) (1898) I. L. R. 21 All. 22.

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called *bal panchat* the tenants were entitled to a proportionate reduction of the rent for any year on account of any part of their holdings which was unculturable by reason of being submerged by water or covered by sand The plaintiff contended that this plea was one which could not be given effect to in such a suit as this without contravention of the provisions of the Rent Act, and relied on the decision in *Radha Prasad Singh v Baldeo Misr* (1) Upon this point the Courts below decided in favour of the defendants For the reasons given (2) in our [278] judgment just delivered in second appeal No 587 of 1899, we think that, as regards this point, the decisions of the Courts below were right, and that so far as this question is concerned this appeal must fail

The only other question is whether a portion of the claim is barred by limitation The suit for rent relates to the following years —(1) to the last two instalments of rent payable for 1302F, (2) for 1303F, (3) for 1304 F, (4) for the first two instalments of 1305 F It is uncertain from the terms of the judgment and decree of the lower appellate Court whether that Court meant to hold that the suit was barred in respect of the fourth instalment for 1302 F If it did mean that, it was clearly mistaken, and that is admitted on behalf of the respondents The question relates to the first instalment claimed in this suit, that is the third instalment for 1302F That instalment fell due on the 10th April 1895 Section 94, paragraph 1, of the Rent Act provides that "suits for arrears of rent or revenue, or for a share of the profits of a mahal, or of village expenses or other dues, shall not be brought after three years from the day on which the arrears, share, expenses or dues became due" This suit was brought on the 11th of April, 1898, that is, one day after the period of three years had expired The last day of the three years, the 10th of April 1898, was a Sunday The 11th of April 1898, the day when the suit was instituted, was the day when the Court re opened The plaintiff appellant relies on the first paragraph of section 5 of the Limitation Act, 1877, which provides that "if the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted presented or made on the day that the Court re opens" On this ground it is contended by the plaintiff that the suit is not barred by limitation On behalf of the defendants, respondents, it is contended that section 5 of the Limitation Act is not applicable to a suit for rent under the Rent Act, 1881, and reliance is placed on section 6 of the Limitation Act, which provides that "when by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed" That section only shows that [279] nothing in the Limitation Act is to effect or alter any period specially prescribed by a special or local law But section 5 does not affect or alter the period of three years prescribed by the first paragraph of section 94 of the North Western Provinces Rent Act Section 5 does not extend any period of limitation It assumes that the period prescribed for a suit has expired, and provides that nevertheless the suit may be instituted if the period expired on a day when the Court was closed This construction of section 6 is in accordance with the cases which are

(1) Weekly Notes, 1893, p 23

(2) See p 270, supra

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23 A. 282= 21 A. W. N. 74.

Of two agricultural holdings situated in the Ballia district of the North-Western Provinces, each separately assessed to rent, one became submerged by the river Ganges, and subsequently re-appeared on the other side of the river in the Shahabad district of Bengal.

Held that the Rent Courts of the Ballia district had no jurisdiction to entertain a suit for the rent of this holding. *Parmeshar Dat* v. *Sri Newas* (1) distinguished.

Section 104 of the North-Western Provinces Rent Act, 1881, only refers to cases in which the entire property for which rent is claimed, though a part of it may be in a different district from another part, is situate within the North-Western Provinces.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the appellant.

The respondents were not represented.

STRACHEY, C. J., and BANERJI, J.—This is a suit for arrears of rent for two holdings, each separately assessed to rent. Originally both the holdings were within the Ballia district. The river Ganges forms the boundary between the Ballia district of the North-Western Provinces and the Shahabad district of Lower Bengal. It appears that some 6 or 7 years before the suit was brought, one of these two holdings was submerged by the river Ganges, and subsequently re-appeared on the Shahabad side of the river, so that it now is included in the Shahabad district of Lower Bengal. The Courts below have dismissed the suit, so far as regards that holding, on the ground that they had no jurisdiction under the North-Western Provinces Rent Act of 1881 to entertain a suit for rent for a holding situate in Lower Bengal. Section 1 of the Act shows that the local extent of the Act is limited to the territories for the time being under the [283] Government of the Lieutenant-Governor of the North-Western Provinces. Section 104 of the Act has been referred to. It provides that "suits under this Act shall be instituted in the district in which the subject of the suit, or some part thereof, is situate." When this is read with section 1 and with the preamble, we think it is clear that it only refers to cases in which the entire property for which rent is claimed, though a part of it may be in a different district from another part, is situate within the North-Western Provinces. The case of *Parmeshar Dat* v. *Sri Newas* (1) is, we think, rightly distinguished by the lower Appellate Court. The decision in that case was based on the circumstance that the property to which the suit related, part of which was in Oudh, was leased by the plaintiff to the defendant at one lump amount for the whole. It was held that in such a case the effect of section 4-A and section 43 of the Code of Civil Procedure, read with section 104 of the North-Western Provinces Rent Act, No. XII of 1881, was that the plaintiff was entitled to have his whole claim heard and determined in the Court of the Assistant Collector of Basti, in which he brought it. That decision would not apply to a case like the present in which there was a separate rent payable for each of the two holdings in question, and not one single sum payable as rent for the whole of the land. We agree with the judgment of the lower Appellate Court, and we dismiss this appeal with costs.

Appeal dismissed.

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(1) Weekly Notes, 1891, p. 47.

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23 A 277=21 A W N 72

Act, the period of limitation for filing which expired on a Sunday, could not be instituted on the day when the Court re opened, but was time barred At page 24 of the report the learned Judge says " the provisions of Act No XV of 1877 do not affect special or local laws which specially prescribe periods of limitation consequently the plaintiffs are not entitled to take advantage of the general provisions contained in section 5 of that [281] Act We cannot agree with that view Section 6 of the Act to which the learned Judge appears to refer does not say that "the provisions of the Act do not affect special or local laws which specially prescribe periods of limitation It says that they do not affect or alter the period so prescribed The learned Judge, we think, overlooks the difference in wording between section 6 of the present Limitation Act and section 6 of the Limitation Act of 1871 As pointed out in several of the cases to which we have referred, under section 6 of the Act of 1871 *where any other law specially prescribed a period of limitation differing* from that prescribed by the Act ' nothing herein contained shall affect such law ' In altering by section 6 of the present Act these words to ' nothing herein contained shall affect or alter the period so prescribed, we must presume that the Legislature intended to alter the rule contained in the Act of 1871 The learned Judge also we think, overlooks the difference which we have pointed out between affecting or altering a prescribed period of limitation, and allowing under the circumstance contemplated by section 5 a suit to be instituted after the prescribed period has expired For these reasons we think that under section 5 of the Limitation Act, the plaintiff was entitled to institute on the 11th of April 1898, the suit in respect of the third instalment of rent for 1302 Fasli, and that no part of the suit is barred by limitation As regards the rest of the case the lower appellate Court in its judgment refers to its judgment in appeal No 19, to which second appeal No 587 of 1899 before us relates, and says that the facts of this case are the same, and the questions involved are the same as those which he considered in his former judgment In that former judgment the learned Judge upholds the decision of the Court of first instance as to the actual extent of the lands in question submerged or otherwise unculturable , and we think that in the present case therefore he similarly adopts as to this point the decision of the Court of first instance Under these circumstances it is not necessary to remand the case to the lower appellate Court, and we think that the proper order is to allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs

Appeal decreed

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23 A 282 (=21 A W N 74)

[282] APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji

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BENI PRASAD KUARI (*Plaintiff*) v RATUL THAKUR AND ANOTHER (*Defendants*) * [21st March, 1901]

Act No XII of 1881 (*North-Western Provinces Rent Act*), *sections* 1, 104, 93 (*a*)—*Suit for rent—Jurisdiction*

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* Second Appeal No 497 of 1900, from a decree of R Greeven Esq , District Judge of Ghazipur, dated the 10th February 1900 confirming a decree of Maulvi Nizamuddin Ahmed, Assistant Collector of Ballia, dated the 20th March 1899

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[285] definition of the words. We think therefore that an appeal lay in this case to the District Judge under section 189, and that we must allow this appeal, set aside the District Judge's decree and remand the case to him under section 562 of the Code of Civil Procedure for disposal on the merits. The appellant will have her costs of this appeal. Other costs will abide the result.

Appeal decreed and cause remanded.

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23 A. 285 (=21 A. W. N. 83).

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SHEO NARAIN AND OTHERS (*Plaintiffs*) *v.* BENI MADHO AND ANOTHER (*Defendants*).* [23rd March, 1901].

Award—Specific performance—Suit on an award not a suit for specific performance of a contract—Limitation—Act No. XV of 1877 (Indian Limitation Act), sch. II, Art. 113.

Held, that a suit to enforce an award cannot be treated as a suit for specific performance of a contract within the meaning of Article 113 of the second schedule to the Indian Limitation Act, 1877. *Sornavalli Ammal* v. *Muthayya Sastrigal* (1) followed. *Sukho Bibi* v. *Ram Sukh Das* (2) and *Raghubar Dial* v. *Madan Mohan Lal* (3) distinguished.

[Fol. 15 C. P. L. R. 115; 7 O. C. 369; 33 Cal. 881=4 C. L. J. 162; Ref. 10 O. C. 218; 1909 U. B. R. 9; 34 All. 43; 64 I. C. 431; Dist. 26 All. 497=1901 A. W. N. 72; 45 I. C. 813=31 M. L. J. 184].

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Muhammad Ishaq Khan* and Pandit *Madan Mohan Malaviya*, for the appellants.

Pandit *Moti Lal* (for whom Munshi *Gulzari Lal*), for the respondents.

BANERJI and AIKMAN, JJ.—The plaintiff Lekhraj is one of the sons of Jai Ram, and the other plaintiffs are the sons of another son of Jai Ram. The defendants are Umrao, brother of Jai Ram, and Gaya Din and Beni Madho, sons of another brother of Jai Ram. The property in suit is alleged to have belonged to Chain, the father of Jai Ram. Chain died in 1865, and after his death the name of his son Bhawani Prasad, the father of the defendants Beni Madho and Gaya Din, was recorded in the revenue papers. Upon the death of Bhawani Prasad disputes arose in mutation proceedings as to the entry of names [286] and these disputes were referred to arbitration. On the 9th February, 1884, an award was made by which the plaintiffs were declared to be entitled to a 6½ anna share in the property. The award provided that the parties were to continue in possession of the shares declared to belong to each of them, and that Beni Madho was to present a petition in mutation proceedings for the entry of names in accordance with the award. He made such an application, which was granted on the

* Second Appeal No. 92 of 1898 from a decree of J. Sanders, Esq., District Judge of Cawnpore, dated the 1st November, 1897, reversing the decree of Syed Zain-ul-abdin, Subordinate Judge of Cawnpore, dated the 19th September 1895.

(1) (1900) I. L. R. 23 Mad. 593.
(2) (1883) I. L. R. 5 All. 263.
(3) (1893) I. L. R. 16 All. 3.

23 A 283 (=21 A W N 75)

APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice, Banerji

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APPELLATE CIVIL

23 A 283= 21 A W N 75

BENI PRASAD KUARI (*Plaintiff*) v BATULAN BIBI (*Defendant*) * [21st March, 1901]

Act No XII of 1881 (*North Western Provinces Rent Act*), *section* 189—*Suit for rent—Appeal admissible where the question has been whether any rent at all was payable by the defendant*

Held that the words in section 189 of the North Western Provinces Rent Act 1881, ' in which the rent payable by the tenant has been a matter in issue and has been determined include cases in which the question whether any rent at all is payable by the tenant, has been a matter in issue and has been determined *Deo Charan Singh* v *Beni Pathack* (1) referred to

[284] THIS was a suit for rent of an agricultural holding brought under section 93 (*a*) of the North Western Provinces Rent Act, 1881 The defendant pleaded that before the period for which rent was claimed she had resigned the holding under section 31 of the Act, and that consequently no rent whatever was due by her She also pleaded that the holding had been entirely carried away by the river The Court of first instance (Assistant Collector) dismissed the suit on the ground that the holding had been entirely swept away by the river, and that no rent could therefore be claimed in respect of it From this decision there was an appeal to the District Judge, who dismissed it, holding that no appeal lay to him, having regard to the provisions of section 189 of the Rent Act The plaintiff thereupon appealed to the High Court

The Hon'ble Mr *Conlan* and Pandit *Sundar Lal*, for the appellant

Maulvi *Ghulam Mujtaba* (for whom Mr *Abdul Majid*), for the respondent

STRACHEY C J and BANERJI, J —We think that the words in section 189 of the North Western Provinces Rent Act, 1881, "in which the rent payable by the tenant has been a matter in issue and has been determined ' may reasonably be held to include, and do include, cases in which the question whether any rent at all is payable by the tenant has been a matter in issue and has been determined In other words, the expressions used will cover cases in which the matter which has been in issue, and has been determined, is not merely the rate or annual amount of rent payable by the tenant, but the existence of any rent payable by him That view is supported by the judgment of Mr Justice Knox and Mr Justice Burkitt, in Second Appeal No 280 of 1899, decided on the 22nd February 1901 We do not think that it is in any way inconsistent with the judgment in *Deo Charan Singh* v *Beni Pathack* (1), or the judgments in any of the cases therein referred to In saying that "the rent payable by the tenant ' meant "the rate of rent, and not merely the actual amount of money due at any given time by the tenant to the landlord as rent,' it was not intended to give an exhaustive

* Second Appeal No 505 of 1900 from a decree of R Greeven, Esq , District Judge of Ghazipur dated the 10th February 1900, confirming a decree of Maulvi Nizamuddin Ahmad Assistant Collector of Ballia dated the 25th January, 1899

(1) (1899) I L R 21 All 247

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The agreement to refer is, it is true, a contract, and it may be presumed that a contract was also made for the performance of that which the award directs to be done.

The only thing which the award in this case directed to be done was, that an application should be made for mutation of names. That was the only matter of which performance was required, and that, as stated above has been done. The claim is one for possession of immoveable property, and the limitation [288] applicable to it is that prescribed for a suit of that description. We are unable to hold that because the title of the parties, was declared by an award, the suit is one for the specific performance of a contract. In our opinion, a suit founded on an award is not a suit for the specific performance of a contract, any more than is a suit based upon a sale-deed a suit for the specific performance of the contract of sale. The case of *Sukho Bibi* v. *Ram Sukh Das* (1) was referred to in the argument on behalf of the respondent. That case is distinguishable from the present, as the award in that case distinctly provided for something to be done. It is unnecessary therefore for us to say whether or not we agree with that decision. The same remarks apply to the later case of *Raghubar Dial* v. *Madan Mohan Lal* (2).

The result is that we allow this appeal, set aside the decree of the Court below with costs, and restore the decree of the Court of first instance.

The appellants will have the costs of this appeal.

Appeal decreed.

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23 A. 288 (=21 A. W. N. 78.)

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

MADAN MOHAN AND ANOTHER (*Plaintiff*) *v.* RANGI LAL (*Defendant*).* [25th March, 1901].

Guardian and minor—Act No. VIII of 1890 (*Guardian and Wards Act*), *sections* 29, 30 *—Mortgage executed by a minor—Distinction between such mortgage and a mortgage executed by the certificated guardian on behalf of the minor—Act No. XIX of* 1873 (*North-Western Provinces Land Revenue Act*), *sections* 203, 205-*B*.

A mortgage executed by a minor is not void, but only voidable, even where the minor has a certificated guardian appointed by the Court. Where, therefore, a person during his minority had mortgaged with possession certain immoveable property, and subsequently, after attaining his majority, had sold the same property as unincumbered to a third party, without any notice to the mortgagee of his intention to avoid the mortgage it was held that the purchaser could not turn the mortgagee out of possession.

[Ref. 37 Mad. 38.]

THE facts of this case sufficiently appear from the judgment of the Court.

[289] Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chandra Mukerji*), for the appellants.

The respondent was not represented.

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* Second Appeal No. 227 of 1899 from a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Moradabad, dated the 6th February 1899, confirming a decree of Munsif Gokal Prasad, Munsif of Moradabad, dated the 28th February 1898.

(1) (1883) I. L. R. 5 All. 263. (2) (1893) I. L. R. 16 All. 3.

5th June 1884, and the names of the plaintiff Lekhraj, and of Beche Lal, the father of the other plaintiffs were recorded

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APPELLATE CIVIL

23 A. 285= 21 A W N 63

After Beche Lal s death, in 1891, his sons brought a suit for profits That suit was dismissed and thereupon the present suit was instituted on the 3rd January, 1898, by the three plaintiffs for recovery of posses sion of what they alleged to be their share in the property They claim ed that they should be put into possession of an 8 anna share, failing that, that they should get a 6½ anna share, in accordance with the award, and failing that, a 5 anna 4 pie share of the property The Court of first instance granted the plaintiffs a decree for 6½ anna share The plaintiffs submitted to this decree, but the defendants appealed On appeal the learned District Judge held that the claim was barred by article 113 of the second schedule of the Indian Limitation Act He was of opinion that the suit must be deemed to be a suit for the specific per formance of a contract, and that, as it had not been brought within three years from the date of the award the suit was barred by limitation under that article He also held that the plaintiffs had failed to prove posses son "for a period anterior to the twelve years preceding the date of the institution of the suit"

As the finding upon the question of possession was meaningless, and as moreover the learned Judge, in arriving at his conclusion, had omitted to take into consideration material evidence in the case, we referred to him an issue as to whether the defendants were in adverse possession for more than twelve years preceding the date of the institution of the suit On this issue the learned Judge has found against the defendants and has held that the adverse possession of the defendants has not been established He has further found that the plaintiffs were in possession [287] within the twelve years preceding the date of the suit Objections have been taken under section 567 of the Code of Civil Procedure in respect of these findings, but these objections are, in our opinion, untenable There is evidence on the record which justifies the finding, and the findings being findings of fact, must be accepted in second appeal

The learned Judge has omitted to record a finding on the question whether the award of the 9th February, 1884, was binding upon the par ties We referred an issue to him on that point also, and his finding is in favour of the plaintiffs

There remains, therefore, only one more question to be determined in this appeal, namely, whether the suit should be considered as one for the specific performance of a contract, within the meaning of article 113 of the second schedule of the Indian Limitation Act, and whether it is barred under that article We have no hesitation in holding that this is not a suit for the specific performance of a contract The award is the decision of a tribunal constituted by the parties it is a document which declares the title of the parties, and is evidence of the existence of such title on the date on which the award was made This very question was be fore the Madras High Court in the case of *Sornavalli Ammal* v *Muthayya Sastrigal* (1), and it was held in that case that a suit to enforce an award cannot be treated as a suit to enforce a contract within the meaning of article 113 We entirely agree with the view of the learned Judges who decided that case, and with the reasons given by them for that view It is impossible to hold that every suit on the basis of an award is a suit upon a contract, or is a suit for the specific performance of a contract

(1) (1900) I L. R. 23 Mad 593

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of such a transfer must be sought in the general law. Section 7 of the Transfer of Property Act makes competency to transfer dependent upon the competency to contract as defined by the Indian Contract Act. It has been held that a sale as well as a contract by a minor is not void, but only voidable. That was held in *Mahammad Arif* v. *Saraswati Debya* (1). That was a case, not of a mortgage, but of a sale, and it resembles the present in the circumstance that the transfer was made by a minor while under the guardianship of a guardian appointed under Act No. XL of 1858. Effect was given to the sale, as it had not been avoided by the minor or after his death by his heir. The question therefore is whether the mortgage in this case was ever avoided by the mortgagor Piare Lal. It is not suggested that he has ever done anything to avoid the mortgage, except in so far [291] as such avoidance may be inferred from the sale to the plaintiff of the 19th April, 1897, shortly after Piare Lal had attained majority. In the deed of sale it is recited that the vendor sells the property free from all incumbrances. In order, however, to constitute an avoidance of a contract, it is necessary that there should be a communication of the intention to avoid the contract made to the other contracting party. There is absolutely nothing to show that any such intention was communicated to the defendant, or that he at any time had knowledge of the expressions in the deed of sale to which reference has been made. As nothing has ever been done by the mortgagor to avoid the mortgage, the mortgage holds good, and the purchase by the plaintiff was subject to the mortgage, and he is not entitled to turn the defendant who is entitled to possession under the mortgage, out of possession. Therefore the decree of the Court below was right and this appeal must be dismissed. We make no order as to costs, as the respondent is not represented.

Appeal dismissed.

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23 A. 291 (=21 A. W. N. 86.)

FULL BENCH.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.

MUHAMMAD SADIQ AND ANOTHER (*Defendants*) *v.* LAUTE RAM (*Plaintiff*).* [3rd April, 1901.]

Act No. XIX of 1873 (*North-Western Provinces Land Revenue Act*) *sections* 112, 113, 241 (*f*)—*Partition—Trees a proper subject of partition by the Revenue Authorities—Question of title not raised at the time of partition, but subsequently by a suit in a Civil Court—Jurisdiction—Civil and Revenue Courts.*

If a party to a partition which is being conducted by the Revenue authorities under Chapter IV of the North-Western Provinces Land Revenue Act, 1873, desires to raise any question of title affecting the partition, he must do so according to the procedure laid down in sections 112 to 115 of the Act. If a question of title affecting the partition, which might have been raised under sections 112 and 113 of the Act during the partition proceedings, is not so raised, and the partition is completed, section 241 (*f*) of the Act debars the parties to the partition from raising subsequently in a Civil Court any such question of title. *Muhammad Abdul Karim* v. [292] *Muhammad*

* First Appeal from order No. 89 of 1900 from an order of Pandit Giraj Kishore Dat, Additional Subordinate Judge of Saharanpur, dated the 2nd June 1900.

(1) (1891) I. L. R. 18 Cal. 259.

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STRACHEY, C J and BANERJI, J —The plaintiff in this case is the purchaser of a house under a deed of sale executed by one Piare Lal on the 19th April, 1897 In obtaining possession he was resisted as to a portion of the house by the defendant, who claims possession under a mortgage executed in his favour on the 22nd September 1894 by Piare Lal, who was then a minor, and by Musammat Lal Kunwar, Piare Lal's mother, who had obtained a certificate of guardianship under Act No XL of 1858 By reason of section 2 of the Guardian and Wards Act, 1890, the appointment as guardian of Musammat Lal Kunwar must, so far as may be, be deemed to have been made under the Act now in force No permission was given by the Court to the mortgage by the guardian of the house in question as required by section 29 of the Act The lower appellate Court has treated the mortgage as valid, and executed for consideration, and has dismissed the suit The plaintiff appeals from that decision, and contends that the mortgage is of no effect as against him by virtue of the provisions of sections 29 and 30 of Act No VIII of 1890 He relies particularly on section 30, which provides that "a disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby" In the view which we take of this case it is not necessary to determine whether the mortgage in favour of the defendant regarded as a mortgage executed by the guardian of the minor without the permission of the Court, is voidable under section 30 at the instance of the plaintiff as a purchaser from the minor after the attainment of the latter's majority In the present case, as already pointed out, the mortgage was executed, not only by the guardian, but by the minor Piare Lal himself Sections 29 and 30 have reference exclusively to the disposal of immoveable property by the guardian, and there is no express provision in the Act as to the effect of a transfer, not by the guardian, but by the minor himself while under guardianship So far as the Act is concerned the effect of its provisions appears to be that a person wishing to take a transfer of property belonging to a minor has an [290] opportunity of securing himself against the subsequent avoidance of the transfer by seeing that the transfer is duly executed by the guardian with the permission of the Court, but that if it is not so executed he takes the property subject to the risk of the transfer being afterwards avoided That the effect of the Act is not absolutely to prohibit and to make illegal every transfer by a minor who is under guardianship is a conclusion which is strengthened by the analogous provisions of the North Western Provinces Land Revenue Act of 1873 as amended by Act No VIII of 1879 Section 203 of the Act of 1873 gives power to the Court of Wards to sell or mortgage the property of disqualified proprietors whose estates are under its superintendence, and who include minors among various other persons There was no express provision in the Act of 1873 relating to transfers by disqualified proprietors themselves, and consequently section 205 B was inserted in the Act by section 24 of Act No VIII of 1879 Section 205 B provides that "persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon, or interest in, such property or any part thereof" There is no similar provision in Act VIII of 1890, and we think that no such prohibition can be implied in that Act Since, therefore, the Act of 1890 is silent as to transfers by a minor who is under guardianship, the effect

Shadi Khan (1) and so far as in conflict with the present case *Nasrat-ul-lah* v *Majib-ul lah* (2) overruled *Hardeo Singh* v *Narpat Singh* (3) referred to

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Held also that trees growing upon land the subject of partition by the Revenue authorities go with the land and may properly be partitioned along with it by the Revenue authorities

FULL BENCH

[Appr 1 C P L R 5 Ref 29 All 601=1907 A W N 190=4 A L J 578 1907 A W N 175 11 O C 115 12 O C 97=2 I C 273 13 A L J 779= 30 I C 189 51 I C 25=17 A L J 797=41 All 626 41 All 182 64 I C 438 Fol 7 A L J 1156=33 All 169 28 I C 878 58 I C 122=18 A L J 928 43 All. 91 Dist 25 All 19 28 All 394=1906 A W N 30= 3 A L J 48 38 All 243 57 I C 128=42 All 574=18 A L J 739]

23 A 291= 21 A W N 86

IN the suit out of which this appeal arose the plaintiff claimed a declaration of his right to certain trees, which, he alleged belonged exclusively to one Diwan Mal, through whom he claimed The defendants were in possession by virtue of an order for partition made by a Revenue Court The Court of first instance dismissed the plaintiff s suit on the preliminary ground that it was not cognizable by a Civil Court On appeal the lower appellate Court disagreeing with that view remanded the case under section 562 of the Code of Civil Procedure for trial on the merits From that order of remand the defendants appealed to the High Court

Diwan Mal, through whom the plaintiff claimed, was a co-sharer in a certain village, his share including three groves The defendants were co sharers in the same village The share of Diwan Mal together with the groves was sold in execution of a decree and purchased by the plaintiff Prior, however, to the plaintiff s purchase the defendants had applied for perfect partition of their fractional share with everything appertaining to it Diwan Mal was made a party to these proceedings, and the partition was concluded, the trees also being partitioned in the absence of any objection made within proper time on the part of Diwan Mal Hence the present suit The plaintiff did not claim any of the land which had been allotted on partition to the defendants, he contended that the Revenue Court had no power to allot to the defendants the trees standing on such land, which, he said, were the exclusive property of Diwan Mal

On this appeal —

Mr *Abdul Raoof*, for the appellants argued that the order of the Court of first instance was right Revenue Courts had undoubtedly power to distribute land, and trees were part of the land upon which they stood Such being the case any person [293] objecting to the trees being partitioned was bound to file his objections before the Revenue Court within the time and in the manner laid down by sections 111, 112 and 113 of the Land Revenue Act, 1873 In the present case no objections were filed within time, and therefore the partition of the trees was properly proceeded with Under the state of circumstances section 241 of the Land Revenue Act forbade any interference by a Civil Court with the partition of either the land or the trees Mr *Abdul Raoof* relied on the case of *Hardeo Singh* v *Narpat Singh* (3) and distinguished *Muhammad Abdul Karim* v *Muhammad Shadi Khan* (1) and *Nasrat ul lah* v *Majib ul lah* (2)

Babu *Sital Prasad Ghosh* for the respondent

(1) (1887) I L R 9 All 429
(2) (1891) I L R 13 All. 309
(3) (1897) I L R 20 All 75

Shadi Khan (1) and, so far as in conflict with the present case, *Nasrat-ul-lah* v *Majib-ul-lah* (2) overruled *Hardeo Singh* v *Narpat Singh* (3) referred to

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FULL BENCH

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[Appr. 17 O P L R 5, Ref. 29 All 604=1907 A W N 190=4 A L J 578, 1907 A W. N 175, 11 O C 115, 12 O C 97=2 I C 273, 13 A L J 779=30 I C 189, 51 I C 25=17 A L J 797=41 All 626 41 All 182 64 I C 438, Fol 7 A L J 1156=33 All 169 28 I C 878, 58 I C 122=18 A L J 928, 43 All 91, Dist 25 All 19, 28 All 394=1906 A W. N. 30=3 A L J 43, 38 All. 243, 57 I C 128=42 All 574=18 A L J 739]

23 A 291=21 A W N 86

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Diwan Mal, through whom the plaintiff claimed, was a co-sharer in a certain village, his share including three groves The defendants were co sharers in the same village The share of Diwan Mal together with the groves was sold in execution of a decree and purchased by the plaintiff. Prior, however, to the plaintiff's purchase the defendants had applied for perfect partition of their fractional share with everything appertaining to it. Diwan Mal was made a party to these proceedings, and the partition was concluded, the trees also being partitioned in the absence of any objection made within proper time on the part of Diwan Mal. Hence the present suit The plaintiff did not claim any of the land which had been allotted on partition to the defendants, he contended that the Revenue Court had no power to allot to the defend ants the trees standing on such land, which, he said, were the exclusive property of Diwan Mal.

On this appeal.—

Mr. *Abdul Raoof*, for the appellants, argued that the order of the Court of first instance was right. Revenue Courts had undoubtedly power to distribute land, and trees were part of the land upon which they stood Such being the case any person [293] objecting to the trees being partitioned was bound to file his objections before the Revenue Court within the time and in the manner laid down by sections 111, 112 and 113 of the Land Revenue Act, 1873 In the present case no objections were filed within time, and therefore the partition of the trees was properly proceeded with Under the state of circumstances section 241 of the Land Revenue Act forbade any interference by a Civil Court with the partition of either the land or the trees. Mr *Abdul Raoof* relied on the case of *Hardeo Singh* v. *Narpat Singh* (3) and distinguished *Muhammad Abdul Karim* v *Muhammad Shadi Khan* (1) and *Nasrat-ul-lah* v. *Majib ul-lah* (2)

Babu *Sital Prasad Ghosh* for the respondent

(1) (1887) I L R 9 All 42J
(2) (1891) I. L. R 13 All. 309
(3) (1897) I L. R 20 All 75

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the distribution of the "land" of a mahal by partition, and says nothing about trees; that the sections of Chapter IV relating to partition also say nothing about trees; that consequently the Revenue Court had no jurisdiction to partition trees growing on the land which it divided, and that as regards trees therefore section 241 (*f*) does not exclude the jurisdiction of the Civil Courts. In my opinion there is no force in this argument. As a matter of general principle, I think that, *primâ facie*, provisions in an enactment, such as the Land Revenue Act, relating to land, would, in the absence of anything in the context to the contrary, apply to the trees growing upon the land; and when tho sections of the Act relating to partition are examined, I think that they clearly include a power in the Revenue Courts to partition trees as well as the land on which they grow. Sections 108 and 122 show that what is partitioned off is a share or shares, and that may clearly include trees as well as land which, prior to the partition, formed the joint property of the co-sharers. Section 124 makes special provision with regard to buildings. Section 126 provides that tanks, wells, water-courses and embankments shall be considered as attached to the land, for the benefit of which they were originally made. There was no necessity for any provision that trees should be considered as attached to the land on which they grow. Section 127 provides that certain things, namely, places of worship [297] and burial-grounds, which, previous to the partition, were held in common, are, in the absence of express agreement among the parties, not to be divided but still held in common. There is no similar provision with regard to trees, and the inference is that the trees like the land would be divided, and would not continue to be joint property of the co-sharers after the partition of the land. It has been suggested that where, prior to the partition, both lands and trees have been the joint property of the co-sharers, the business of the Revenue authorities making the partition is to divide the land into separate parts, but to leave the trees standing upon those separate parts, the joint property of the co-parcenary body just as they were before; the result of the partition ultimately being a number of separate plots with joint trees upon them. Such a result would, to a considerable extent, defeat the object of the co-sharers in seeking partition, and I can see nothing in the Act to justify the view that it is what the Legislature intended. This conclusion is supported by the judgment of my brothers Knox and Aikman in Second Appeal No. 518 of 1891, decided on the 19th of July, 1893. In the present case the application for partition distinctly shows that what was asked for was a partition both of the land and of "everything appertaining to the above land," which would include trees. I think that when the Revenue authorities allotted to the defendants the land forming Nos. $\frac{143}{2}$ and $\frac{143}{3}$, they must be understood to have also awarded to them the trees standing on those lands as part thereof, and that they had jurisdiction to do so.

The second contention by which the plaintiff seeks to avoid the effect of section 241 (*f*) requires careful consideration, for it has the authority of a previous decision of this Court in its favour. The argument is that section 241 (*f*) does not prohibit a Civil Court from trying any suit, the object of which is to determine a question of title or proprietary right to land, and that a Civil Court may exercise jurisdiction in such a suit, even if this involves the exercise of jurisdiction in the matter of

thing appertaining to the above land Diwan Mal did not join in the application for partition He was made a party to the partition proceedings with other co sharers No objection to the partition was made by [295] Diwan Mal under sections 112 and 113 of the Act on or before the days specified in the notice served on the co sharers under section 111 But on the 14th of April, 1898, the Assistant Collector passed an order, which referred expressly to the "groves belonging to the proprietors," details of which were given The material portion of the order is as follows :—"With respect to the grove situated in khewat No 1, Tula Mal and Diwan Mal at this stage raise objection to the following effect — 'The grove has been planted by us and it does not belong to all the proprietors of khewat No 1' Muhammad Sadiq for himself and other co sharers does not admit this As Tula Mal and Diwan Mal raise no objection under section 113, therefore this grove of the proprietors of khewat No 1 will be partitioned according to the shares' Accordingly khewat No 1 was divided among the co sharers, and among other plots, Nos $\frac{143}{2}$ and $\frac{143}{3}$ forming part of one of the groves, No 143, were allotted to the defendants with the trees standing upon them This led to the institution of the present suit The plaintiff does not claim any of the land, as distinguished from the trees, which has been allotted on the partition to the defendants He does not dispute their right to the land forming Nos $\frac{143}{2}$ and $\frac{143}{3}$, but he contends that the Revenue Court had no power to allot to the defendants the trees standing on those plots which, he says, belonged exclusively to Diwan Mal

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Now as this is a suit for a declaration of the plaintiff's title to property—a suit of a Civil nature—the Civil Courts have, under section 11 of the Code of Civil Procedure, jurisdiction to try it, unless it can be shown to be a suit of which their cognizance is barred by any enactment The enactment which the defendants contend bars the cognizance of the suit by the Civil Court is section 241 of the North Western Provinces Land Revenue Act (No XIX of 1873), which provides that "no Civil Court shall exercise jurisdiction over any of the following matters" *Among the following matters, clause (f)* specifies "the distribution of the land or allotment of the revenue of a mahal by partition," and the last paragraph of the section provides that "in all the above cases jurisdiction shall rest with the Revenue authorities alone" The enactment in clause *(f)* is not merely that a Civil Court is not to alter the distribution of the land made on partition, but that it is not [296] to "exercise any jurisdiction over the matter' of such distribution of the land That would, I think, exclude a suit in a Civil Court which sought a declaration impugning the distribution which by partition the Revenue authorities had effected The object of such a declaration could only be to obtain in some manner an alteration in the distribution that had been made If such a declaration were binding upon the Revenue Court so as to compel the Revenue Court to alter the distribution, *it would clearly be an exercise of jurisdiction in the matter of* the distribution If the declaration were not binding on the Revenue Court it would be a mere *brutum fulmen* Now the object of this suit is undoubtedly to establish the plaintiff's ownership and possession in respect of property which the Revenue authorities in dividing khewat No 1 by partition have allotted to the defendants The plaintiff meets this plea, first, by the argument that section 241 *(f)* refers only to

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its order of remand under section 562 of the Code. That case is undoubtedly in point. So far as I understand the decision, it is based on the view that, inasmuch as in regard to questions of title arising in partition proceedings under section 113 of the Act on or before the day specified in the notice, the Civil Court is expressly given either original or appellate jurisdiction, and inasmuch as there is nothing in the remaining sections about partition expressly barring the determination by the Civil Court of such question arising after the day specified, or to confine the final determination of such questions to the Commissioner under section 132; therefore under section 11 of the Code the Civil Courts have jurisdiction to decide such questions, notwithstanding section 241 (*f*), even in a suit brought after the distribution of the land by partition, and the Commissioner in appeal under section 132 has no jurisdiction to adjudicate upon such questions. With regard to section 241 (*f*) there is the following passage at page 433 of the report:—" It is true that in one sense the determination of title by a Civil Court may affect the distribution of land of a mahal by partition, but it would affect such distribution so far only as the distribution of the land depended on title, but it [300] would not affect the distribution on all or any of the various questions or considerations which the Assistant Collector or Collector would have to deal with in making the partition. In our opinion section 241 of the Act does not bar the jurisdiction of the Civil Court to adjudicate upon questions of title or proprietary right in cases such as that under consideration." I am unable to agree with that view for two reasons. The first is, that it appears to ignore the extremely general terms in which the prohibition of section 241 (*f*) is expressed. The second is, that it overlooks the reason why questions of title, which are raised under sections 112 and 113 on or before the day specified in the notice fall within the original or appellate jurisdiction of the Civil Courts. The reason is, that in such cases the adjudication by the Civil Court takes place before the completion of the partition, and in fact before anything is done in the partition, since, as I have already pointed out, the Collector is bound, where he leaves the matter to a Civil Court to decide, to decline to grant the application for partition, and where he elects to decide it himself, the District Judge or the High Court may direct a stay of the partition pending an appeal from his decision. The jurisdiction of the Civil Court under such circumstances, in dealing with questions of title, does not produce the practical administrative inconvenience involved by interference with the distribution of land and allotment of the Government revenue of the mahal which the completed partition has effected. The Legislature intended to give to co-sharers raising questions of title a limited opportunity and a limited time for having such question determined by a Civil Court, and in effect provided that such questions might only be so determined if raised at such a time as to avoid the inconvenience to which I have referred arising where interference with an actually completed distribution is sought. The opposite view appears to me to involve all sorts of difficulties and anomalies. It involves this, that a co-sharer may entirely ignore sections 112 and 113 of the Act; may raise no objection involving a question of title on or before the day specified in the notice; may wait even until after an order for partition has been made and the land divided in accordance with the order, and may then upset the whole arrangements of the partition which [301] the Revenue Court has effected, and may seek to recover from the

the distribution of the land of a mahal made on partition by the Revenue authorities and the allotment of its revenue At first sight, that certainly is a startling contention, because it seems [298] directly opposed to the terms of section 241 (*f*) According to that section, the test is whether the Civil Court is exercising jurisdiction over the matter of the distribution of the land by partition Here the partition of the land was made by the Revenue authorities, and by it certain lands and trees were awarded to the defendants A suit in the Civil Court, the object of which is expressly stated to be a declaration that the defendants, have no right to what has been allotted to them by the partition and that the Revenue Court had no power to make its order seems obviously whithin the prohibition stated in the section So far as section 241 is concerned, it does not seem to be material whether the object of the suit is to determine a question of title or not The test is not the nature of the questions which may be raised in the suit, but the nature of the matter over which the Court is asked to exercise jurisdiction, that is in the present case, the distribution of the land by partition Section 113 of the Act has been referred to as qualfying section 241 (*f*), and as showing that where a question of title or proprietary right is raised, a Civil Court has jurisdiction I do not think that section 113 qualifies section 241 (*f*) in the slightest degree The effect of section 113 is that where an objection to the partition raising a question of title or proprietary right is made by a co sharer on or before the day specified in the notice served under section 111, the Collector or the Assistant Collector may either decline to grant the application for partition until the question in dispute has been determined by a competent Court, or may, himself proceed to inquire into the merits of the objection as a Civil Court according to the procedure prescribed by the Code of Civil Procedure for civil suits , and in the latter case his decision declaring the rights of the parties is under section 114 open to appeal to the District Judge or the High Court But a question of title raised under section 113 is raised before any order for partition is made and the land distributed, and if the Collector or Assistant Collector leaves the question to be determined by a competent Civil Court, he must in the *meantime, "decline to grant the application" for partition If he adopts* the alternative course of proceeding to inquire into the merits of the objection, then upon an appeal being made, the District Court [299] or High Court may under section 114 direct a stay of the partition pending the decision of the appeal In other words, until the Civil Court decides the matter, either as a Court of first instance or as a Court of appeal, the partition is not further proceeded with, and is only resumed after the Civil Court s decision In such a case there is nothing in the Civil Court's determination of the question of title in the least inconsistent with section 241 (*f*), which only prohibits the exercise of jurisdiction by a Civil Court in so far as it is an exercise of jurisdiction over the *matter of the distribution of the land In the present case the suit is* brought after the partition has been completed, and its object is clearly to interfere with the distribution by asserting a right in the plaintiff to property which has been allotted to the defendants So far, therefore, section 241 (*f*) appears to be an answer to the suit But the plaintiff relies on the judgment in *Muhammad Abdul Karim* v *Muhammad Shadi Khan* (1), on the authority of which the lower appellate Court has made

(1) (1887) I L R 9 All 429

his claim, if successful, would, if it could have any operative effect, affect, and seriously affect, both the distribution of the land and the allotment of the revenue of the mahal as sanctioned and confirmed by the Collector of Saharanpur in 1898 I am unable to accede to the contention of the learned vakil for the respondent when he seeks to separate the jurisdiction of the Revenue Court as to the trees standing on the land from its jurisdiction as to the land on which they stand He admits that this contention is not supported by any authority It is in direct conflict with all I know of the practice and procedure in partition cases The Revenue Courts, when they proceed to partition a mahal, take knowledge of all the properties, and the right to the properties comprised in a mahal, of whatever nature those may be, and deal with them free of all interference from any outside authority, and the North Western Provinces Land Revenue Act seems to me to give them full warrant for such action on their part The difficulties and anomalies which would follow if we accepted the view laid down in *Muhammad Abdul Karim* v *Muhummad Shadi Khan* (1) have been very carefully and fully pointed out by the learned Chief Justice, and I *do not propose to go over that ground* Section 113 of the North-Western Provinces Land Revenue Act gives ample opportunity to co sharers recorded and in possession to have their claims judicially decided before partition begins We have not to deal with the case, and I do not say anything about it, if such a co sharer is from any cause left out of the partition proceedings, whether from want of notice or otherwise But a co sharer who has received notice and does not avail himself of the opportunity given by section 113, has only his *laches* to thank when he finds himself debarred, as I hold he is, from afterwards raising any objections which he could have raised, and should have raised, before To the case of *Nasrat ul lah* v *Majib ul lah* (2) I was myself a party, and I am bound to say that upon giving it fuller consideration I am not prepared to adhere, and do not adhere, to the view laid down in pages 312 [305] and 313 As regards this I fully agree with what has been said by the learned Chief Justice For these reasons and the reasons given by him I agree in the order proposed

1901 April 3 — Full Bench 3 — 23 A 291= 21 A W N 86

BLAIR, J —I agree in the order proposed for the reasons given by the Chief Justice and my brother Knox

BANERJI, J —I also am of opinion that the cognizance by the Civil Court of a suit like the present is forbidden by section 241 (*f*) of Act No XIX of 1873 That a Revenue Court effecting a partition of a mahal under Chapter IV of that Act can partition
under partition, appears from the scope of t
detail by the learned Chief Justice That b
the land of a mahal ' referred to in clause (*f*) includes in my opinion, an allotment of the trees standing on that land The trees which are in question in this suit having been partitioned and allotted to the share of the defendants, the Court of first instance rightly held that section 241 (*f*) bars the present suit The suit is, it is true, one for a declaration of right, but it relates to the distribution made by partition, and thus falls within the purview of clause (*f*) of section 241 The opinion of the lower appellate Court to the contrary has no doubt, the support of the ruling of this Court in *Muhammad Abdul Karim* v *Muhammad Shadi Khan* (1), but, with all deference, I am unable to agree with the view

(1) (1887) I L R 9 All 429 (2) (1891) I L R. 13 All. 309

other co sharers what the Revenue Court has so allotted to them upon some question of title as to which up to that moment he has been absolutely silent In that way he may disturb, not merely the possession which the Revenue Court has awarded to the other co sharers, but the arrangements in respect of the Government revenue which a completed partition also involves Whether after the time specified in the notice, and after the time within which section 113 would be applicable, a Civil Court has jurisdiction to entertain a suit arising out of an application for partition, and raising a question of title prior to any actual distribution of the land by partition, whether such a suit would fall within the prohibition of section 241 (*f*), or whether questions of such a kind raised at such a time can only be dealt with by the Revenue Courts, are matters which it is not necessary to decide in this case and upon which I express no opinion What we have here to deal with is a suit raising such questions, which were never raised under section 113 of the Act, and which is instituted after the distribution of the land by partition has been completed and with a view to disturbing that distribution For these reasons I cannot agree with the judgment in *Muhammad Abdul Karim* v *Muhammad Sadi Khan*, (1) and I hold that if the exercise of jurisdiction by a Civil Court would disturb or in any way affect the distribution of land made by partition, it is barred by section 241 (*f*), no matter whether questions of title or any other kind of questions are raised in the suit The decision in that case is irreconcilable with that in *Hardeo Singh* v *Narpat Singh* (2). It was there held that if no objection has been made under section 113 by a co sharer in possession before the day specified in the notice, and where section 113 therefore does not come into operation, section 241 (*f*) prohibits the Civil Courts from exercising any jurisdiction in the matter of the distribution of land or the allotment of revenue of the mahal by partition So far as this goes I agree with it, though I should put it unconditionally, and should say that the effect of section 241 (*f*) is absolutely to prohibit the Civil Courts from exercising any jurisdiction in the matter specified But I infer from the last paragraph of page 77 [302] of the report read with the reference to the case of *Nasrat-ul lah* v *Majib-ul lah* (3) and with other expressions, that the learned Judges held that if, in fact, an objection raising a question of title was made on or before the day specified in the notice, and if the Assistant Collector, in disregard of the provisions of section 113, did not deal with the question in either of the two ways indicated in that section, in that case the question of title might be entertained by the Civil Court after the completion of the partition, and even if the decision had the effect of interfering with the distribution, notwithstanding section 241 (*f*) When the case of *Nasrat ul lah* v *Majib ul lah* (3) is examined, that impression is confirmed The second paragraph of the head note in the report of that case is as follows —"If a Revenue Court in disposing of an application for partition determines a question of title, it must in so doing act in conformity with the provisions of section 113 of Act No XIX of 1873 If it disposes of the application otherwise than in the manner comtemplated by section 113, its proceedings are *ultra vires*, and will not debar the parties from suing in a Civil Court for a declaration of their right to partition' Now there a partition had actually been

1901 APRIL 3 — FULL BENCH — 23 A 291= 21 A W N 86

(1) (1887) I L R 9 All 429
(2) (1897) I L R. 20 All 75
(3) (1891) I L. R 13 All 303.

1901 April 12 — Revisional Criminal — 23 A 306= 21 A W N 103

THE facts of this case sufficiently appear from the judgment of the Court

Mr *W Wallach* (for whom Mr *R K Sorabji*) for the applicants

The Assistant Government Advocate (Mr *W K Porter*) for the Crown

BLAIR, J —This is a petition in revision Ali Husain and Hakim ullah have been tried by the Joint Magistrate of Bareilly for an offence under section 380 of the Indian Penal Code, convicted, and sentenced, each of them to two years' rigorous imprisonment On appeal the Sessions Judge upheld the convictions and sentences The petition is based on the allegations that the offence committed, being committed, if at all, in the van of a goods train, does not fall within the purview of section 380, and that there was no evidence on the record that the accused were guilty of theft The severity of the sentence is also impugned I am of opinion that the goods van in which the goods were carried was a place used for the custody of property, and none the less so because it was used also for the transport of property The other question is a more serious one So far as one can understand the scanty evidence, the applicants and two other persons (*palladars*) were travelling for the purpose of doing service to the company as goods porters or otherwise They were allowed to travel in the break van, from which it is possible that a person accustomed to trains should have had access through a man hole to the goods stolen, and afterwards found in the break van That the goods were so found, I have no doubt, nor that they were covered up and concealed by the scanty garments, such as persons of this class would carry as clothes in the month of October There is evidence that, upon some totally different articles being missed from the train, some person or persons in charge of the train proposed to search the four coolies They declined to be searched What was said to them precisely and what was their reply we are left to guess We do not even know whether the speech in which the request was made was addressed to any particular one or more of them, nor do we know whether the refusal was made [308] by one or more of them It is also said by one witness that the man confessed One of them used words which have been interpreted as a confession We know not but that some expressions may have been used by one or two of the other coolies, and then by a natural effort of imagination or inference have been imputed to the applicants In all these cases there is a danger in such general expressions, which ought always to be reduced as far as possible to particularity by the presiding Magistrate or Judge Such a descriptive statement as that a man confessed ought to have been followed by asking what were the words used upon which such construction was placed When those goods had been found, expressions may have been used which, though not intended to amount to a confession, may well have been so interpreted by an official of the company I am left therefore in doubt as to the precise part taken at the time prior to, at and after the discovery of the cloth by either of the applicants or by the other two *palladars* The question as to who it was that did or said—whatever was said—or done, is of grave importance in the face of certain evidence on the record It has been said or suggested that these men performed the duty of goods porters It is also proved that in more than one place along the railway line parcels of goods from the package of *thans* of cloth were taken out and delivered at different stations Presumably they were so

1901 April 3. — Full Bench. — 23 A. 291=21 A. W. N. 86.

adopted in that case. In that case it was substantially held that section 241 (*f*) does not bar a suit in the Civil Court to establish title to the land allotted by partition, if the question of title was not raised within the time specified in the notice issued under section 111, and was not determined under section 113 and the following sections. That, in my opinion, would be reading into clause (*f*) of section 241 a limitation which is not to be found in it. It seems to me that what the Legislature declares is that after a partition has been made in accordance with the provisions of the Land Revenue Act, and has been confirmed, it is not open to the parties to the partition proceedings to re-open the partition by a suit in the Civil Court. If a party wishes to raise a question of title, he may do so under section 112, and have it determined in the manner provided for [306] in section 113. Whether, before the completion of partition, he can have it determined by the institution of a suit in the Civil Court, is a question which it is not necessary to decide in this case. But it is clear that the proper time for raising a question of title is before the completion of the partition proceedings. If a party does not avail himself of the opportunity which he has before the completion of partition to have his title determined, it seems that the Legislature by enacting section 241 (*f*) intended that he should be debarred from raising afterwards any question which would have the effect of disturbing the partition to which he was a party, and I cannot concur with the rulings in which a contrary view was held. For the above reasons I agree in the order proposed by the learned Chief Justice.

Aikman, J.—I also agree with the order proposed by the learned Chief Justice, and I entirely concur in all that he has said. It appears to me that the intention of the Legislature was that all questions of title should be decided before the work of partition was actually entered upon. I have long doubted the propriety of the decision in the case *Muhammad Abdul Karim* v. *Muhammad Shadi Khan* (1) and I am glad it is now authoritatively overruled.

Appeal decreed.

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23 A. 306 (=21 A. W. N. 103.)

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

KING-EMPEROR *v.* ALI HUSAIN AND ANOTHER.* [12th April, 1901.]

Act—1860—XLV (Indian Penal Code), section 380—Theft from a railway van—Property found in an adjoining van, in which four railway coolies were travelling—Evidence.

On suspicion of theft of certain articles from a running goods train, a van on the train, in which four railway coolies were travelling was searched. The property missed was not found, but, hidden under a heap of clothing belonging to the four coolies, were discovered 10 *thans* of cloth, which on investigation were ascertained to have been abstracted from the next van. *Held*, that none of the four coolies travelling in the van where the 10 *thans* [307] of stolen cloth were found could be convicted of the theft of the cloth in the absence of evidence to connect one or more of them individually with the possession of the cloth.

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* Criminal Revision No. 167 of 1901.

(1) (1887) I. L. R. 9 All. 429.

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Revisional Criminal.

23 A 306= 21 A W N 103

The facts of this case sufficiently appear from the judgment of the Court

Mr *W Wallach* (for whom Mr *R K Sorabji*) for the applicants

The Assistant Government Advocate (Mr *W. K Porter*) for the Crown

Blair, J —This is a petition in revision Ali Husain and Hakim ullah have been tried by the Joint Magistrate of Bareilly for an offence under section 380 of the Indian Penal Code, convicted, and sentenced, each of them to two years' rigorous imprisonment On appeal the Sessions Judge upheld the convictions and sentences The petition is based on the allegations that the offence committed, being committed, if at all, in the van of a goods train, does not fall within the purview of section 380, and that there was no evidence on the record that the accused were guilty of theft The severity of the sentence is also impugned I am of opinion that the goods van in which the goods were carried was a place used for the custody of property, and none the less so because it was used also for the transport of property The other question is a more serious one So far as one can understand the scanty evidence, the applicants and two other persons (*palladars*) were travelling for the purpose of doing service to the company as goods porters or otherwise They were allowed to travel in the break van, from which it is possible that a person accustomed to trains should have had access through a man hole to the goods stolen, and afterwards found in the break van That the goods were so found, I have no doubt, nor that they were covered up and concealed by the scanty garments, such as persons of this class would carry as clothes in the month of October There is evidence that, upon some totally different articles being missed from the train, some person or persons in charge of the train proposed to search the four coolies They declined to be searched. What was said to them precisely and what was their reply we are left to guess We do not even know whether the speech in which the request was made was addressed to any particular one or more of them, nor do we know whether the refusal was made [308] by one or more of them. It is also said by one witness that the man confessed One of them used words which have been interpreted as a confession We know not but that some expressions may have been used by one or two of the other coolies, and then by a natural effort of imagination or inference have been imputed to the applicants In all these cases there is a danger in such general expressions, which ought always to be reduced as far as possible to particularity by the presiding Magistrate or Judge Such a descriptive statement as that a man confessed ought to have been followed by asking what were the words used upon which such construction was placed When those goods had been found, expressions may have been used which, though not intended to amount to a confession, may well have been so interpreted by an official of the company. I am left therefore in doubt as to the precise part taken at the time prior to, at and after the discovery of the cloth by either of the applicants or by the other two *palladars* The question as to who it was that said or said—whatever was said—or done, is of grave importance in the face of certain evidence on the record It has been said or suggested that these men performed the duty of goods porters It is also proved that in more than one place [illegible] railway line parcels of goods from the parties of [illegible] taken out and [illegible] at different stations Presumably

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adopted in that case. In that case it was substantially held that section 241 (*f*) does not bar a suit in the Civil Court to establish title to the land allotted by partition, if the question of title was not raised within the time specified in the notice issued under section 111, and was not determined under section 113 and the following sections. That, in my opinion, would be reading into clause (*f*) of section 241 a limitation which is not to be found in it. It seems to me that what the Legislature declares is that after a partition has been made in accordance with the provisions of the Land Revenue Act, and has been confirmed, it is not open to the parties to the partition proceedings to re-open the partition by a suit in the Civil Court. If a party wishes to raise a question of title, he may do so under section 112, and have it determined in the manner provided for [306] in section 113. Whether, before the completion of partition, he can have it determined by the institution of a suit in the Civil Court, is a question which it is not necessary to decide in this case. But it is clear that the proper time for raising a question of title is before the completion of the partition proceedings. If a party does not avail himself of the opportunity which he has before the completion of partition to have his title determined, it seems that the Legislature by enacting section 241 (*f*) intended that he should be debarred from raising afterwards any question which would have the effect of disturbing the partition to which he was a party, and I cannot concur with the rulings in which a contrary view was held. For the above reasons I agree in the order proposed by the learned Chief Justice.

AIKMAN, J.—I also agree with the order proposed by the learned Chief Justice, and I entirely concur in all that he has said. It appears to me that the intention of the Legislature was that all questions of title should be decided before the work of partition was actually entered upon. I have long doubted the propriety of the decision in the case *Muhammad Abdul Karim* v. *Muhammad Shadi Khan* (1) and I am glad it is now authoritatively overruled.

Appeal decreed.

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23 A. 306 (=21 A. W. N. 103.)

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

KING-EMPEROR *v.* ALI HUSAIN AND ANOTHER.* [12th April, 1901.]

Act—1860—*XLV* (*Indian Penal Code*), *section* 380—*Theft from a railway van—Property found in an adjoining van, in which four railway coolies were travelling—Evidence.*

On suspicion of theft of certain articles from a running goods train, a van on the train, in which four railway coolies were travelling was searched. The property missed was not found, but, hidden under a heap of clothing belonging to the four coolies, were discovered 10 *thans* of cloth, which on investigation were ascertained to have been abstracted from the next van. *Held*, that none of the four coolies travelling in the van where the 10 *thans* [307] of stolen cloth were found could be convicted of the theft of the cloth in the absence of evidence to connect one or more of them individually with the possession of the cloth.

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* Criminal Revision No. 167 of 1901.

(1) (1887) I. L. R. 9 All. 429.

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21 A W N
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Kuar executed a deed of gift of that 4 anna share to Ganga Kuar In 1896 Ganga Kuar had the name of Nokhe Singh, who is related to her, entered in the revenue papers as owner of the whole 8 anna share This led to the [310] present suit The plaintiff is the son of a brother of Jawahir Singh He contends that under the deed of gift of 1864 executed by Jawahir Singh, Ganga Kuar took only a life interest in the 4 annas, that under the deed of gift of 1874 only Babbo Kuar's life interest in the other 4 annas could pass, and that therefore, as to the whole 8 annas share, Ganga Kuar could transfer no absolute estate The Courts below have held that under the gift of 1864 Ganga Kuar took, not merely a life interest, but an absolute estate in the 4 annas, which she was competent to alienate but that as regards the 4 anna share given to her by Babbo Kuar in 1874 she could make no transfer beyond the widow's lifetime They therefore dismissed the suit as regards the first 4 anna share, and decreed it as regards the second 4 anna share Against the lower appellate Court's decree the plaintiff appeals, and Nokhe Singh files cross objections under section 561 of the Code of Civil Procedure Before us the cross objections have not been pressed We have to deal only with the 4 anna share given to Ganga Kuar by her father Jawahir Singh in 1864

In the Court of first instance, for some reason which has not been explained, the deed was not produced, though at the end of the plaint it was stated that it would be filed at the next hearing The lower appellate Court says in its judgment that the defendants do not produce the deed It was apparently overlooked by that Court, and by those representing the parties, that a certified copy had been admitted in evidence by that Court, as appears from the endorsement The material portion of the deed is as follows —"That I have in my proprietary possession a 2 anna share out of the 4 anna zamindari share, which is an 8 anna mahal in the name of me, the executant, in mauza Para Rabat, pargana Ghatampur, and it is owned and possessed by me without the participation of any one else

"That as I have now become old and have no son, I have of my own free will and accord made a gift of the aforesaid 2 anna share, with lakes marshy lands, water and forest produce, trees bearing fruit and not bearing fruit, sayar items, saline earth, tanks, groves, fish, *pashi* (rice of spontaneous growth) and unclaimed trees, all the zemindari dues in the village, to Musammat [311] Gangia, my widow daughter, in consideration of her excellent duty which she has done towards me I have taken out the property given in gift of my possession, and put the donee in possession thereof I shall make a formal application also to the Collector's Court for mutation of names The donee, Musammat Gangia, shall have the power to take everything given to her in gift into her possession, and she shall make collections and pay the Government revenue The property given in gift shall not at all be liable for any debt due by the husband of the donee, Musammat Gangia, or by Khairati If after my death my heirs bring any sort of claim in respect of the property given in gift it shall be false and invalid I and my representatives have ceased to have any claim to the aforesaid property The gift is lawful, legal, valid and enforceable, and exchange and separation of considerations have taken place in a single meeting ' The word "Khairati" in the copy is obscure, and there is no reference in the record to any person of that name. The copy of

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23 A. 306=
21 A. W. N.
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taken out and delivered at stations by one or more of the *palladars* under the direction of some higher official. We have no evidence as to which of them were so employed. It would manifestly be not only possible, but easy for the men remaining behind to remove some of those *thans* of cloth in the absence of the others, and to cover them up with the clothes of all of them. However, it does not seem to have been proved that the absentees, whichever they were, knew that these bundles of cloth, which might have been brought in their absence, were there, and if they knew it, that in itself is not sufficient evidence of theft or possession by them. No doubt the circumstances are such as to raise the gravest suspicion against these men. But there is in my opinion, no evidence sufficient to base the convictions upon. The petition is allowed and the convictions and sentences are set aside.

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23 A. 309=(21 A. W. N. 84.)

[309] APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

THAKUR SINGH (*Plaintiff*) v. NOKHE SINGH AND ANOTHER (*Defendants*).* [13th April, 1901.]

Gift—Construction of document—Clause in deed of gift excluding claims of the donor or his heirs or representatives.

A Hindu transferred to his daughter a portion of his immoveable property by an instrument which purported to be a deed of gift, the consideration of which was the dutiful behaviour of the donee towards the donor. The deed in particular contained a clause absolutely excluding all claims which might be made in the future by the donor or by his heirs and representatives to the property, the subject of the deed

Held that the deed conveyed to the donee a heritable estate with the power of alienation. *Kanhia* v. *Mahin Lal* (1) and *Ram Narain Singh* v. *Pearay Bhugut* (2) referred to.

[**Dist.** 30 Cal. 20 ; **Ref.** 42 Cal. 561; 9 O. C. 119.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal* for the appellants.

Pandit *Sundar Lal* and Munshi *Jung Bahadur Lal* for the respondents.

STRACHEY, C. J. and BANERJI, J.—This is a suit for a declaration that an alienation of certain immoveable property made by the defendant No. 2 Musammat Ganga Kuar, in favour of the defendant No. 1, Nokhe Singh, is void and of no effect beyond Ganga Kuar's lifetime. The property in question is an eight anna zemindari share in a village Para, which formerly belonged to Jawahir Singh, the father of Ganga Kuar. On the 5th September, 1864, Jawahir Singh executed a deed of gift of 4 annas out of the 8 anna share to Ganga Kuar. She obtained possession. After Jawahir Singh's death the remaining 4 annas came into the possession of his widow Babbo Kuar. On the 20th January, 1874, Babbo

*Second Appeal No. 728 of 1898, from a decree of J. Sanders, Esq., District Judge of Cawnpore, dated the 17th September 1898, confirming the decree of Rai Kishan Lal, Subordinate Judge of Cawnpore, dated the 28th March 1898.

(1) (1888) I. L. R. 10 All. 425. (2) (1883) I. L. R. 9 Cal. 830.

23 A. 313 (=28 I. A. 203=3 Bom. L. R. 713=5 C. W. N 649)

1901 April 30, May 1 & 16 — Privy Council. — 23 A 313=28 I A 203=3 Bom L. R 713=5 C W. N. 649.

[313] PRIVY COUNCIL

PRESENT:

Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch, and Sir Ford North.

SHANKAR SARUP AND OTHERS (*Plaintiffs*) v MEJO MAL AND OTHERS (*Representatives of Lala Phul Chand, Original Defendant*) [30th April, 1st and 16th May, 1901.]

[On appeal from the High Court of Judicature at Allahabad.]

Act No. XV of 1877 (Indian Limitation Act), schedule II, Article 13—Order in execution of decree—Civil Procedure Code, Section 295—Suit to recover assets wrongly distributed—What are "Proceedings in a suit"—Priority of mortgages—Intention of parties as to abandonment of prior security

By a bond of the 4th May, 1883, shares in certain villages were hypothecated for Rs 15,500 to the plaintiffs On the 30th June, 1883, a bond hypothecating the same shares in the villages was executed by the mortgagor in favour of the defendant. On the 3rd November, 1883 another bond was executed by the mortgagor by which the same shares in the villages were mortgaged to the plaintiffs for Rs 20,000 The bond of the 3rd November, 1883, recited that Rs 15,500 were then due on account of the bond of the 4th May, and after stating that interest on that sum and other debts which had been incurred brought the total amount due from the mortgagor up to Rs 20,000, declared that until repayment of that sum with interest the [illegible] bond [illegible] the [illegible] arch, [illegible] debt due under the bond of the 3rd November In the plaint in the suit in which [illegible] only, and [illegible] was alone [illegible] n execution of the decree. In the *application for execution of this decree, however, the* defendant admitted that the plaintiffs' mortgage of the 4th May, 1883, was a subsisting and prior charge to his own of the 30th June, 1883 In execution of those decrees the villages were sold, and on the 7th February, 1883, the Subordinate Judge of Meerut made an order under section 295 of the Civil Procedure Code for distribution of the proceeds of the sale By this order he held that the defendant was entitled to be paid in preference to the plaintiffs on the ground that their decree rested solely on the bond of the 3rd November 1883, and not on that of the 4th May, 1883, and that their rights were [illegible] 30th [illegible] In a [illegible] sale [illegible] May, [illegible] arose on the 7th February, 1883, the date of the order under which the sale proceeds [illegible] bond of the 4th May, 1883, and *consequently were not entitled to priority* over the defendant's bond of June, 1883

Held that the suit was not one to set aside the order for distribution, nor did that order stand in the way of the suit, which was one to recover proceeds paid *to a person who was not entitled to receive them Such a suit was specially* provided for by section 295 of the Code of Civil Procedure, which enables a distribution of the sale proceeds to be made according to what seem at the time

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the deed kept in the District Registrar's office, which we obtained for purposes of comparison, is to the same effect.

The question is whether the deed constitutes an absolute gift or only creates a life estate in favour of Ganga Kuar. It is unnecessary to consider the cases which were cited to us in argument regarding the construction of gifts in favour of Hindu females, and the presumption which the cases are said to establish as to the intention of a Hindu donor making such a gift. The question depends on the terms of the deed of 1864. There is nothing in it which indicates that it was the intention of the donor to limit the gift to Ganga Kuar's lifetime. On the contrary, all its terms suggest an absolute gift, and if the donee were a male we think that no question could arise.—In our opinion the deed constitutes an absolute gift of the 4 anna share to Ganga Kuar. The most important sentence is the last but one that we have quoted :—" If after my death my heirs bring any sort of claim in respect of the property given in gift, it shall be false and invalid. I and my representatives have ceased to have any claim to the aforesaid property." These words, we think, give Ganga Kuar by implication a heritable estate with the power of alienation. [312] They absolutely exclude all claims which may be made in the future by the donor or his heirs and representatives in respect to the 4 anna share. Whatever may be meant by the sentence about "Khairati," it clearly does not exclude the liability of the 4 anna share for the donee Ganga Kuar's debts, but only for debts incurred by her husband or "Khairatirati." The cases most nearly resembling the present are *Kanhia* v. *Mahin Lal* (1) and *Ram Narain Singh* v. *Pearaya Bhugut* (2) in both of which similar expressions excluding the claims of the donor and heirs were held to create a heritabls estate with power of alienation in the donee. In these cases the gift was made by a husband to his wife. Here the gift was made by a father to his married daughter, who according to the lower appellate Court, is not proved to have been at that time a widow. At the time when the gift was executed the donor's wife and another daughter were living. The object of the gift as stated by the deed was to reward the donee for her dutiful behaviour to the donor. The gift was of a part only of the donor's zemindari property. The rest went to his widow for her life in the ordinary way. The suggestion made on behalf of the appellant is that, as regards this 4 anna share, the donor intended merely to give his daughter the life interest, which otherwise she would have taken along with her sister after the widow's death ; that he desired merely to alter the order of succession by making her life interest in the 4 anna share come before, instead of after, the widow, and before, instead of along with, the donee's sister. We think that there is nothing in the terms of the gift or in the circumstances of its execution which supports this construction. We think that the Courts below have taken a right view of the deed, and that this appeal and the cross objections must be dismissed with costs.

Appeal dismissed.

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(1) (1888) I. L. R. 10 All. 495. (2) (1883) I. L R. 9 Cal. 830.

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MAY 1 & 16
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23 A 313=
28 I A 203=
3 Bom L R
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that Rs 16,197 were due for principal and interest on the bond of the 4th May, 1883, and that by reason of other debts and advances there was now due Rs 20,000, he granted a second hypothecation upon the 12 biswa share in Chichora, Aminabad, and Chauki (amongst other villages), and a new hypothecation on his original 8 biswa share in the same villages The terms of the bond, so far as they were material to the contention in this appeal, were—

" I, Muhammad Ismail Khan, do hereby declare that Rs 15,500 are due on account of a bond dated the 4th May, 1883, in which the mortgagor s right in respect of 12 biswas in each of the villages' (mentioning eight villages, including Chichora, Aminabad, and Chauki) " was hypothecated, and up to this date Rs 697 8 0 on account of interest on the said bond, total [316] Rs 16,197 8 0, are due ' After mentioning other sums due to the Sarups and Sakla Lal the bond continued .—

" Therefore now, with the consent of the aforesaid obligees, I have executed this bond for Rs 20,000 (twenty thousand) in favour of Damodar Sarup, Har Sarup, and Shankar Sarup and Lala Sakla Mal, and I do hereby agree and give it in writing that the above mentioned money, together with interest at 14 annas per cent per mensem, will be paid on demand And until repayment of this money I do hereby hypothecate the mortgagor s right in 12 biswas in each of the villages which were hypothecated in the bond for Rs 15,500 In addition to the above I do also hereby hypothecate the mortgagor s right in 8 biswas in each of the aforesaid villages '

By this bond one moiety of the amount was declared to be due to the Sarups and the other moiety to Sakla Lal

On the 18th February, 1884, the Sarups filed a suit against Ismail Khan, claiming to have their moiety (Rs 11,174) realized by sale of the 20 biswa share in the hypothecated villages, and on the 10th February, 1885, a decree was passed as prayed On the 15th April Sakla Lal assigned his moiety of the amount due under the bond of the 3rd November, 1883, to the Sarups, and on the 4th May they brought a suit against Ismail Khan for realization of this moiety by sale of the 20 biswa share of the villages mortgaged, and obtained a decree on the 20th June, 1885 These two suits were brought on the bond of the 3rd November, and not on that of the 4th May, 1883, and the bond of the 3rd November, 1883, was alone mentioned in the decrees in those suits and in the subsequent orders in execution of the decrees On the 22nd April Phul Chand applied for execution of his decree of the 6th March, 1884, *and in his petition for execution admitted* that the bond of the Sarups of the 4th May, 1883, was prior to his claim

On the 12th June, 1886, an order was made for the sale of Ismail Khan's villages in execution of, amongst others, Phul Chand s decree of the 6th March, 1884, and the Sarups's two decrees of the 10th February and the 20th June, 1885, and on the 20th October, 1887, the three villages of Chichora, Aminabad, and Chauki were sold in satisfaction of these decrees On the 7th February, 1888, the Subordinate Judge of Meerut held a proceeding, in which the parties to the present appeal and others were represented, to decide how the sale proceeds should be distributed under the above decrees, and his order in that proceeding was that Rs 6,328 out of the sale proceeds of a 12 biswa share of the village [317] Chichora, Rs 2,690 out of those of the 12 biswa share of the village Aminabad, Rs 924 1 6 out of those of the 12 biswa share of the village Chauki, in all Rs 9,912 1 6, should be paid to the defendant Phul Chand for the reasons that the whole 20 biswa share of the said

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to be the rights of the parties without such distribution importing a conclusive adjudication on those rights. The suit was therefore not barred by Art. 11 of the Limitation Act.

That article was also inapplicable because the order for distribution was "a proceeding in a suit." *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate* (1) cited with approval.

Held also that in the terms of the bond of the 3rd November, 1883, it did not impair the effect of the bond of the 4th May, 1883, as a subsisting hypothecation. Nor did the fact of the plaintiffs having sued on the later bond and not on the earlier one allow the inference to be drawn that they had relinquished their rights under the earlier bond; by so suing they did nothing to imply, or lead others to believe, that they had abandoned the former hypothecation. The defendant, moreover, in the suit on his own bond had expressly recognised the bond of the 4th May, 1883, as a subsisting and prior hypothecation.

[Ref. 39 Mad. 62; 1 L. W. 403=26 M. L. J. 106=23 I. C. 909; 38 Mad. 221; 39 Mad. 1164; Fol. 21 M. L. T. 255=1917 M. W. N. 280=32 M. L. J. 553=38 I. C. 117; 30 Cal. 583; 45 Mad. 70; Dist. 55 I. C. 452=27 M. L. T. 66=38 M. L. J. 108= 1920 M. W. N. 92=43 Mad. 381; Fol. 14 L. W. 334]

APPEAL from a decree (9th July, 1897) of the High Court at Allahabad, reversing a decree of the Subordinate Judge of Meerut (16th April, 1895) in favour of the plaintiffs.

The suit out of which the appeal arose was brought by the present appellants, Damodar Sarup, Shankar Sarup, and Har Sarup, against one Ismail Khan as a *pro forma* defendant and Lala Phul Chand (now represented by the respondents), the object of the suit being to recover from Lala Phul Chand the sum of Rs. 9,942-1-6 principal, and Rs. 1,782-14-6 interest, Rs. 11,725 in all, on account of the sale-proceeds of certain villages which, by an order of Court in execution of certain decrees, had been paid over to him: the question as to whether it was wrongly or rightly so paid in view of the claim of the Sarups to priority in respect of the debt due under a deed of hypothecation, dated the 4th May, 1883 (which was incorporated in a subsequent deed of the 3rd [315] November, 1883) over the lien of Lala Phul Chand under a deed of the 30th June, 1883, forming the main issue in the suit. The facts giving rise to the suit were as follows:—

The Sarups on the 20th July, 1882, purchased from the three sisters of Ismail Khan a 12-biswa share (3-5ths) in certain villages, Chichora, Aminabad, and Chauki; and in January, 1883, Ismail Khan, the holder of the remaining 8-biswa share (2-5ths) of the villages, brought a suit against the Sarups and their vendors for pre-emption. This suit was compromised on the terms that the Sarups were to receive Rs. 15,500 from Ismail Khan in consideration of their relinquishing the villages purchased by them. On the 4th May, 1883, Ismail Khan executed a bond in favour of the Sarups, by which he hypothecated the 12-biswa share in each of the villages to secure the payment of the Rs. 15,500 with interest in six months. Subsequently, on the 30th June, 1883, Ismail Khan executed a bond in favour of Lala Phul Chand for Rs. 7,000, and as security hypothecated, amongst other property, the three villages Chichora, Aminabad, and Chauki. Phul Chand sued Ismail Khan on this bond, and on the 6th March, 1884, obtained a decree declaring his lien over the three villages.

On the 3rd November, 1883, Ismail Khan executed another bond in favour of the Sarups and one Lala Sakla Lal, in which, after reciting

(1) (1884) I. L. R. 15 Bom. 438.

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created by a bond of May, 1883, and therefore prior in point of time to the incumbrance in favour of the appellant and the decree which followed from that incumbrance There can be no doubt whatever, indeed it is admitted, that the Court ... hand had no ... ve not in the ... between the ... to hold that ... n of the decree ... Phul Chand ... under the decree which he ... every scrap of the property to satisfy the whole claim ... t decree and that the rest, or any portion ... other decree For these reasons we ... Court below, and dismiss the respondent s suit with costs in all Courts'

From this decision the plaintiffs appealed

[319] Mr. *J D Mayne*—for the appellants, contended that the intention was quite clear that the hypothecation under the bond of the 4th May, 1883, was not to be extinguished or given up when the bond of the 3rd November, 1883, was executed The latter bond was based on the former one, the former one was recited in the latter, and was incorporated with it, and the High Court was in error in considering that there was no connection between the two bonds The appellant s security therefore, being of a prior date, was entitled to priority over that of Phul Chand

Mr *G E A Ross*—for the respondent The recital of one bond by the other is not conclusive that the later one was not substituted for the earlier one The conduct of the parties shows their intention that the former bond was to be considered cancelled or extinguished by the new one The bond of the 3rd November 1883 was that sued upon no suit was brought on the bond of the 4th May, 1883 In the suit brought on the later bond and in the execution proceedings there is no mention of the earlier bond, that is, the latter bond was treated as being a perfectly new transaction, and Phul Chand was not made a party for the same reason The fact that he was not joined in the suit showed that the earlier bond was not being proceeded on, see section 85 of the Transfer of Property Act (IV of 1882) On the question of limitation, the suit is substantially one to set aside the order of the Subordinate Judge in execution, and should have been brought within one year from the date of that order Not having been so brought it is barred by Art 13, Sch II of the Limitation Act The case of *Gauri Prasad Kundu* v *Ram Ratan Sircar* (1) is precisely in point. That case distinguishes the case of *Ram Kishen* v *Bhawani Das* (2), and refers to the cases decided under the old law, section, 270 of Act VIII of 1859, which corresponds with section 295 of Act No XIV of 1882, and is in principle the same—see *Dwarkanath Biswas* v *Roy Dhunpat Singh* (3), *Gogaram* v *Kartick Chunder Singh* (4), and *Wooma Moyee Burmonya* v *Ram Buksh Chetlangee* (5)

[320] Mr *Mayne* was called on the question of limitation, and contended that Art 13 was not applicable That article expressly only applied to "any proceeding other than a suit" The present proceedings are proceedings in a suit A similar case was decided in the Bombay

(1) (1886) I L R 13 Cal 159
(2) (1876) I L R 1 All 333
(3) (1872) 17 W R. 227
(4) (1868) B L R. Sup Vol. 1022, 9 W R 514
(5) (1871) 16 W R. 11.

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three villages had been mortgaged to him by the deed, dated the 30th June, 1883, on which the decree of the 6th March, 1881, was based.

Hence this plaint in the suit in which the plaintiffs (the Sarups) alleged that their cause of action arose on the 7th February, 1883, the date on which the order for payment of the said sum of Rs. 9,942-1-6 to the defendant Phul Chand was passed by the Subordinate Judge. The plaint was filed on the 4th February, 1891. In the plaint the plaintiffs set out the proceedings already mentioned; they stated that the money paid to Phul Chand in respect of his mortgage of the 30th June, 1883, ought to have been paid to them under their mortgage of the 4th May 1883, which took priority over that of Phul Chand; and they prayed for a decree directing him to refund to them the sums so received with interest.

The defendant Phul Chand in his written statement submitted that the claim was barred by Art. 13, Sch. II of the Limitation Act; that the hypothecation of the 4th May, 1883, did not continue in force after the deed of the 3rd November, 1883, was executed; and that the plaintiffs' hypothecation had no such priority as was claimed. If the deed of the 4th May, 1883, did continue in force, he submitted that he ought to have been made a party to the suit brought to enforce it.

The only issues amongst those settled which were material on this appeal were—

(1) Is the suit barred by Art. 13, Sch. II of the Limitation Act XV of 1877?

(2) Whether the hypothecation mentioned in the deed, dated the 4th May, 1883, was transferred to the deed dated, the 3rd November, 1883, and whether, with reference to it, the debt due to the plaintiffs was prior to that due to the defendant Phul Chand?

On the 29th July, 1891, the Subordinate Judge dismissed the suit on the ground that it was barred by limitation under Art. 13, [318] Sch. II of the Limitation Act. On appeal the High Court on the 27th June, 1893, reversed the decision of the Subordinate Judge on this issue, and remanded the case for disposal on the merits.

On the further hearing the Subordinate Judge decreed the suit in favour of the plaintiffs for the sum of Rs. 11,706. In his judgment he said:—

"The bond of the 4th May, 1883, was renovated on the 3rd November, 1883. Looking to the wording of their subsequent bond, it is quite manifest that the prior charge created under the former bond of the 4th May, 1883, was expressly kept subsisting. The second defendant Lala Phul Chand's bond in which the same property is hypothecated is dated the 30th June, 1883, and is executed by the same defendant, Ismail Khan By virtue of the recital in the plaintiffs' deed of the 3rd November, 1883, Lala Phul Chand's deed creates only a puisne incumbrance on that property."

The defendant, Phul Chand, appealed to the High Court, and a Bench of that Court (KNOX and BURKITT, JJ). on the 9th July, 1897, made a decree reversing the decree of the Subordinate Judge, and dismissing the plaintiff's suit with costs in all Courts.

The Judges of the High Court in their judgment observed:—

"The present suit is for the recovery of the assets which were paid over to Phul Chand on the ground that although the decree of the respondent was based on a bond subsequent in point of time to that upon which the appellants' decree was based, the incumbrance of the subsequent bond was in reality an incumbrance

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obtained on those plaints and also of the orders for execution which followed in due course Meantime Lala Phul Chand had sued on his bond, and the claims of both parties as well as those of other creditors having matured, an order was made for sale and the sale took place The sequel of those judicial proceedings was the distribution of the price, and in carrying this out as well as what had preceded, the Subordinate Judge of Meerut was acting under the Civil Procedure Code, 1882, and particularly section 295 On the 7th February, 1888, an order was made for distribution of the price, and in it the Judge held that Lala Phul Chand was entitled to be paid in preference to the appellants on the ground that in their decrees the appellants' rights were rested solely on the bond of November, 1883, and not to any extent on the bond of May, 1883, and accordingly that their rights were inferior to that of Lala Phul Chand under his bond of June, 1883 The money was accordingly paid over to Lala Phul Chand

[322] The appellants thereafter on the 4th February, 1891, filed the present petition of plaint the remedy sought being that Lala Phul Chand should be ordered to return to the appellants the proceeds of the sale on the ground of the priority of the hypothecation in their favour made in May, 1883 The answer of the respondents is, *first*, that the suit is time barred under Art 13 of the Limitation Act the suit not having been brought within one year of the order for distribution made by the Subordinate Judge on the 7th February, 1888; and, *second*, that the appellants had lost their right to found on the bond of May, 1883, as conferring on them a priority over Lala Phul Chand's bond of June, 1883 The Subordinate Judge of Meerut held the suit to be barred, and by decree, sealed on the 3rd August 1891, he dismissed it On the 27th June, 1893, this decree was set aside by the High Court of the North West Provinces and the case was remanded The Subordinate Judge on the 16th April, 1895, gave to the appellants the decree sought for, but this decree was on the 9th July, 1897, set aside by the High Court, who dismissed the suit with costs in all Courts Against this decision the present appeal has been brought

The theory of the respondents' plea that the suit is time barred is that it is truly a suit to set aside the order of the 7th February, 1888, by which the Subordinate Judge ordered payment to Lala Phul Chand of the proceeds of the sale That the money now sued for is the money so authorized to be paid over is certain But it is to be observed that the same section of the Civil Procedure Code which authorized the order for payment to Lala Phul Chand Authorizes also the present suit by the appellants The 295th section, while providing that the Judge under whose authority the sale takes place shall distribute the proceeds, provides also that if all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets It seems to their Lordships, therefore, that the present suit is in no sense an action to set aside the order of distribution of the 7th February, 1888, and that that order does not stand in the way of the present suit The scheme of section 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at [323] the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re adjusted by a suit such as the present Their Lordships approve of this decision on this point in *Vishnu Bhikaji Phadke* v. *Achut*

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23 A. 313=28 I. A. 203=3 Bom. L. R. 713=5 C. W. N. 649.

High Court—*Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate* (1), and it was held that the proceedings were proceedings in a suit, and that it was not necessary to set aside the order under section 295 of the Civil Procedure Code. That section expressly provides for a suit in such a case as this—a suit to recover assets wrongly distributed in execution, not one to set aside the order. The Bombay case refers to a Madras case, *Sivarama* v. *Subramanya* (2), and to a case decided by the Judicial Committee, *Mangal Pershad Dichit* v. *Grija Kant Lahori* (3), as showing what are proceedings in a suit. Art. 13 not being applicable, either Art. 62 or Art. 120 would apply, and under either of those articles would this suit be barred.

The judgmet of their Lordships was delivered by.

LORD ROBERSTON—The competition between the appellants and the present respondents, who are the legal representatives of the original respondent, Lala Phul Chand, deceased, is for money realized by the judicial sale of certain villages, and paid over under judicial warrant to Lala Phul Chand. The villages were ordered to be sold in execution of certain decrees, of which one was held by Lala Phul Chand and two by the appellants. Those decrees proceeded upon mortgages; and the question on the merits of the suit is which of the parties had the preferable security.

The three bonds giving rise to the dispute were all validly granted, and will now be stated in chronological order without reference to any distinctive particulars irrelevant to the present controversy. On the 4th May, 1883 the villages (to the extent of certain shares also dealt with in the other two bonds) were hypothecated in favour of the appellants for Rs. 15,500. On the 30th June, 1883, a bond of hypothecation of the same property was executed in favour of Lala Phul Chand for Rs. 7,000. On the 3rd November, 1883, a bond of hypothecation of the same property was executed in favour of persons now represented in interest by the appellants [321] for Rs. 20,000. The terms of this bond require further statement. It begins by declaring that Rs. 15,500 are due on account of the bond of the 4th May, 1883, in which the mortgagor's right was hypothecated. Then it sets out that interest is due and that other debts have been incurred, bringing out a total indebtedness of Rs. 20,000; and until repayment of all this money the borrower hypothecates what had been hypothecated in the bond for Rs. 15,500. In addition to the above he hypothecated certain other shares in the same villages. The interest under this new bond was to be 14 annas per cent. per mensem (the interest under the bond of May having been 12 annas).

In 1885 the appellants obtained decrees for the amount of the debt under the bond of November, 1883, and for enforcement of the hypothecation by sale. (Two decrees were taken, and not one only, merely because the amount of the bond was payable in moieties, but the appellants having come to be in right of both moieties, this introduces none but an apparent complication). As the respondent's contention on the merits depends mainly on these proceedings, it is necessary to point out that in their plaints the appellants sued on the bond of November, 1883, alone, and not on the bond of May, 1883; and this was the tenor of the decrees

(1) (1884) I. L R.15 Bom. 438.
(2) (1885) I. L. R. 9 Mad. 57.
(3) (1881) I. L. R. 8 Cal. 51; L. R. 8 I. A. 123.

Held, that the grant was only for life, notwithstanding the use of the word "hamesha."

[Dist 27 M L J 691, Ref 26 Mad 202 (P C), 33 I C 264=2 O L J 746

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23 A 324=3 Bom L R 307=11 M L J 160=28 I A 65=5 C W N 569=8 Sar 34

APPEAL from a decree (12th August, 1898), reversing on second appeal a decree (18th November, 1896) of the District Judge of Rae Bareli, which affirmed a decree (25th June, 1895) of the Subordinate Judge of Rae Bareli

The plaintiff appellant was the granddaughter of Abdul Hakim Khan, deceased, formerly the Talukdar of Anawan in the tahsil and district of Rae Bareli She became entitled to a one fourth share in that taluk The remaining three fourths were owned by the second defendant Muhammad Saiyid Khan, the registered talukdar The first defendant Tasadduq Husain Khan, son of Chedu Khan, deceased, brother of the said Abdul Hakim, was now the only respondent The third defendant was Nawab Sahib Asghar Husain Khan, mortgagee of the whole taluqa under a mortgage from the second defendant The parties to the appeal, both in the Court of the District Judge and in that of the Judicial Commissioner, were only the plaintiff and the first defendant The facts of the case are stated in their Lordship's judgment

The question on this appeal was as to the construction of a decree of the 11th December, 1863, made in the Court of the Commissioner of the Lucknow Division upon an award of arbitrators of the same date, directing that Abdul Hakim should always ("hamesha") pay Rs 70 a month from 1271 Fasli to Chedu Whether this allowance, which was paid during Chedu's [325] life, was to cease on his death, or to be a heritable charge in favour of Chedu and his heirs, was the question After Chedu's death, which took place on the 29th December, 1889, payment of the allowance continued, being made by Muhammad Saiyid Khan, the second defendant, to Tafa-zul Husain, the first defendant This payment was made a charge in the talukdari accounts, and Aziz un nissa's one fourth share was debited accordingly To this she objected, and on the 4th July, 1894, in this suit she claimed a declaratory decree that the right to the allowance on Chedu's death had ceased, and that Tasadduq was not entitled to receive the allowance from her as he had claimed to do to the extent of her one fourth share She also claimed a declaration as against the other defendants that, if they should pay the allowance, they should not be entitled to make a deduction from her share of the profits of the taluq

Tasadduq denied that the right to the allowance was only for his father's life In this he was supposed by the Taluqdar Muhammad Saiyid, while Saiyid Asghar Hussain was neutral, asking for his costs, each filing a separate written statement

The principal issue raised the questions whether the allowance to Chedu Khan was for his maintenance, and only for his lifetime, or was a heritable interest.

The Subordinate Judge decided this in favour of the plaintiff, that it was terminated by the death of Chedu Khan

On an appeal by Tasadduq alone this judgment was affirmed by the District Judge, who said —"Both the decree and the award " are silent as " to whether the grant was to be continued to Chedu Khan's heirs, and " in the absence of words conferring a perpetual or heritable right, I " cannot come to any other conclusion but that the grant was personal " on account of his services 'Hamesha' is used in the award, but

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Jagannath Ghate (1), and they concur in the further observation made by the learned Judge in that case that the application of the 13th article is also precluded by the fact that the order for distribution was a step in an execution proceeding, and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit.

On the merits their Lordships hold that the appellants are entitled to prevail. If the bond of November, 1883, be considered on its own terms, there is no room for the suggestion that it superseded the bond of May so as to impair the effect of that bond as a subsisting hypothecation. The argument of the respondents was rather that the appellants by their suing on the bond of November and not on the bond of May had relinquished their rights under the bond of May. No such inference can legitimately be drawn. The appellants did not need to sue on the bond of May in order to obtain sale for the whole of their debt, that being comprised in the bond of November. But in suing on the bond of November they did nothing to imply, or to lead others to believe, that they abandoned what, apart from abandonment, was a subsisting hypothecation; and in point of fact Lala Phul Chand in the suit on his own bond expressly recognised the bond of May as a subsisting and prior hypothecation.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be reversed and the appeal to it ordered to be dismissed with costs and the decree of the Subordinate Judge of the 16th April, 1895, be restored. The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants—Messrs. *T. L. Wilson* and *Co.*
Solicitors for the respondent—Messrs. *Barrow, Rogers* and *Nevill.*

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23 A. 324 (=3 Bom. L. R. 307=11 M. L. J. 160=28 I. A. 65= 5 C. W. N. 569=8 Sar. 54.)

[324] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Davey, and Lindley, and Sir Richard Couch.

AZIZ-UN-NISSA (*Plaintiff*) *v.* TASADDUQ HUSAIN KHAN (*Defendant*).
[22nd February and 9th March, 1901.]

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

Construction—Duration of a grant—Use of words "always" or "for ever."

The use of the words "always" or "for ever" in a grant of an allowance from a proprietor is not inconsistent with restriction of the interest to the life of the grantee.

Where the circumstances under which the grant was made, the expressions used in an award of arbitrators with a decree thereon supporting this view, were such as to show that the grant was a personal one in favour of the grantee for his life, and was not intended to operate as a grant of a heritable interest.

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(1) (1884) I. L. R. 15 Bom. 438.

Bibi (1), and, as showing the result where the circumstances were of the opposite character, *Toolshi Pershad Singh* v. *Raja Ramnarain Singh* (2)

Mr. *C W. Arathoon*, for the respondent, contended that the word "hamesha" in the decree and the award had been rightly construed by the Judicial Commissioner Chedu Khan had been entitled, at the re-annexation, to a share in the taluq of which however his brother alone received the sanad There was a right, which had not been enforced, that Chedu should have had a beneficial interest, of which the taluqdar should have been a trustee for him, in respect of his share If circumstances then were referred to for aid in the construction of this grant, they were in support of the judgment now appealed from The erroneous assumption had been on the part of the original Court and the Court of first appeal, that for a heritable interest in the taluq, a share, in fact, thereof, a mere life interest in an allowance had been granted and accepted as compensation The words "of permanent duration," far from being overborne and controlled by the circumstances and expressions, were supported by them and should receive effect

Mr. *L DeGruyther* replied

Afterwards, on the 9th March, 1901, their Lordships judgment was delivered by Sir Richard Couch

[328] The question in this appeal is the construction of an award made on the 11th December, 1863, in the proceedings which followed the institution of a suit in the Court of the Deputy Commissioner of Rae Bareli by Chedu Khan against Abdul Hakim Khan The facts which led to it are these: Taluqa Anawan was formerly the property of Allahadad Khan He had two daughters who married Abdul Hakim Khan and Saadat Khan, and after the re annexation of Oudh this estate was settled with the husbands of these ladies and a sanad was granted to them Chedu Khan and Abdul Hakim were brothers, and on the 13th December, 1859, Chedu instituted a suit in a Revenue Court against Abdul Hakim for a quarter share of the taluqa as in accordance with an agreement with Abdul Hakim and Saadat said to be embodied in the proceedings, dated 4th June, 1858, of the Court of Captain Orr, late Deputy Commissioner of the district of Rae Bareli These proceedings are not in the record of this appeal, but there is in it an agreement, dated 31st January, 1858, by which Abdul Hakim, after stating that his brother Chedu Khan by instituting the proceeding got his brother Saadat and himself released from prison, said: "I hereby declare and commit it to "writing that I shall never and on no account be on bad terms with the "said brother and at all I have no objection to the giving of my brother's "half share in the estate when I get possession of the estate, rather at "the time of the execution of the lease" The suit was dismissed on the 13th October, 1860, on the ground that the claim was not cognizable by a Revenue Court, Chedu being told that he was at liberty to have recourse to the Civil Court for damages incurred from time to time on account of Abdul Hakim's breach of promise.

Thereupon Chedu Khan brought a suit in the Court of the Deputy Commissioner of Rae Bareli against Abdul Hakim, claiming Rs. 70 a month from the 13th September, 1860, "compensation for breach of "contract" in not giving him a share of the taluqa as promised in the

(1) (1866) I. L. R. 8 All 3?, L. R. 13 I. A. 1?? (2) (1885) I. L. R. 12 I. A. ... I. L. R. 12 Cal. 117.

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23 A. 324=3 Bom. L. R. 307=11 M. L. J. 160=28 I. A. 65=5 C. W. N. 569=8 Sar. 54.

"'hamesha' or 'for ever' cannot be interpreted to the effect of the "grant being heritable or other; and the next sentence, that Chedu "Khan was to continue to obey his brother, refers to a personal obliga- "tion. I am of opinion that the 'gujara' ceased with the life of Chedu "Khan."

[326] On a second appeal to the Judicial Commissioner's Court that decision was reversed in a judgment which concluded thus:—

"In the present case there are several circumstances which the "Court of appeal does not appear to have considered. It has held that "Chedu Khan had a valid agreement in his favour, which would have "entitled him to claim half the estate. That claim being barred by the "sanad, the only course open to Chedu Khan was to claim the equiva- "lent of the estate in money. As a matter of fact the calculation of "Rs. 70 a month was based on an estimate of the full profits of a half "share in the estate. There can be no doubt that in the Civil Court "Chedu Khan claimed the allowance for himself and his heirs for ever. "The Deputy Commissioner states that in his judgment. There having "been no pleading before the Deputy Commissioner that the allowance "should be limited to the life of Chedu Khan, it appears to me that the "proper construction to be placed upon the concluding words of the "judgment is that the claim is decreed in full. Assuming that the cash "allowance was intended to be a complete compensation for the loss of "the land, it is obvious that a compensation limited to the life of Chedu "Khan would not be a complete compensation for the loss of the land. "Construing the award together with all these circumstances, it appears "to me that the word 'hamesha' used therein was intended to grant an "estate of inheritance. The decree of the Court below is set aside. "The claim is dismissed with costs in all Courts."

On this appeal by the plaintiff,

Mr. *L. DeGruyther*, for the appellant, argued that the Judicial Commissioner had not rightly construed the decree of 1863, and had reversed the judgment of the District Judge without good ground. There were no circumstances here which would justify an indefinite extension of the duration of the grant. The circumstances under which a grant had been made were to be considered in giving no more than their due effect to such words as meant "always" and "for ever." Where the circumstances indicated a grant for life, those words indicated no extension of it from any force in the words themselves. They might be used either in a grant for life where the circumstances and expressions, as here, showed the true construction to be that the grant was for life or they might be used in connection with a grant for an estate [327] of inheritance. The judgment under appeal only arrived at the conclusion that the interest here granted was heritable by erroneously assuming that Chedu Khan had an absolute title to a share in the taluq, and, being kept out of it by Abdul Hakim, his brother, had received an absolute grant of a permanent charge in compensation for his having been deprived of it. The expresssions used in granting the allowance showed that the grant was a personal one for services by Chedu Khan rendered to the donor, and, taken with the circumstances, showed that the construction put upon the grant by the original Court and the first Court of appeal was correct. Reference was made to *Rameshar Bakhsh Singh* v. *Arjun Singh* (1); *Maulvi Muhammad Abdul Majid* v. *Fatima*

(1) (1900) I. L. R. 23 All. 194; L. R. 28 I. A. 1.

used therein was intended to grant an estate of inheritance, and sets aside the decree of the District Judge and dismisses the suit. Now it has been held by this Board that the words "always and for ever" in a will do not *per se* extend the interest given beyond the life of the person who is named (*Maulvi Muhammad Abdul Majid* v. *Mussamat Fatima Bibi*) (1). They are not inconsistent with limiting the interest given, but the circumstances under which the instrument is made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the Courts to presume that the grant was perpetual (*Toolshi Pershad Singh* v. *Rajah Ram Narain Singh*) (2). This ruling applies equally to the award and the Commissioner's order upon it. Their Lordships do not see in the circumstances under which the award was made any which would enable them to pronounce that the Rs. 70 a month were to be paid after the death of Chedu Khan. The last line of the award seems to indicate that it was for him personally. If Chedu had any title to a share in the taluqa before the Government took possession of it in 1858, he had none after the sanad which was granted by the Government, as his name was not in it. This is noticed by the Commissioner in the [331] judgment he gave before the reference to the arbitrators. Chedu's right was only under the agreement, and the Commissioner concluded his judgment by saying that the issue was reduced to "what consideration "is Chedu Khan entitled to in consequence of Abdul Hakim's promises "and agreements with him?" The arbitrators say in the award that they had inquired into the case, and they may have considered that justice would be done by giving to Chedu the Rs. 70 per month for his life, that being a sufficient reward for his services in obtaining the release of Abdul Hakim and Saadat from prison.

1900
FEB. 22.
MARCH 9.

PRIVY COUNCIL.

23 A. 331=
3 Bom. L. R
307=11
M. L. J. 160=
28 I. A. 65=
5 C. W. N.
563=8 Sar.
51.

Their Lordships will humbly advise His Majesty to reverse the decree of the Judicial Commissioner, and order the appeal to him to be dismissed with costs.

The *respondent* will pay the *costs of this appeal*.

Appeal allowed.

Solicitors for the appellant—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent—Messrs. *Barrow, Rogers, and Nevill.*

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23 A. 331 (=21 A. W. N. 91)

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

CHUNNI LAL (*Plaintiff*) *v.* ABDUL ALI KHAN AND OTHERS (*Defendants*).*
[13th April, 1901.]

Act No. IV of 1882 (Transfer of Property Act), sections [illegible]—Decree for sale—Decree assigned before the passing of an order absolute—Appeal—Assignee not made a party to appeal until after expiry of limitation—Civil Procedure Code, section 3[illegible]—Lis pendens.

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* Second Appeal No. [illegible] of 1899 from a decree of [illegible] Lal Chand, [illegible] Officiating Subordinate Judge of Shahjahanpur, dated the 10th March 1899, reversing a decree of Maulvi Muhammad Hamid Hasan, Munsif of Pawayan, [illegible], dated the [illegible] March [illegible].

(1) (1896) L. R. 23 I. A. 155, at p. 163. (2) (18[illegible]) L. R. 12 I. A. [illegible] at p. [illegible].

1900
FEB. 22.
MARCH 9.

PRIVY
COUNCIL.

23 A. 324=
3 Bom. L. R.
307=11
M.L.J. 160=
28 I. A. 65=5
C. W. N. 569
=8 Sar. 54.

agreement, and the Deputy Commissioner made a decree for him for "Rs. 70 per mensem from the date that defendant entered into possession "of his share of the taluqa Anawan chargeable against defendant's share." Abdul Hakim appealed to Colonel Barrow, the Commissioner at [329] Lucknow, who appears to have doubted if Chedu could recover any damages. In his judgment he says:—"The document A (the "agreement) is no specific contract, for no amount is mentioned in it; "but it is a clear expression of appellant's determination to do something "for his brother (respondent); but the allusions here are also to land and "not to cash." The Commissioner followed this by saying that the case was susceptible of adjustment out of Court. After the judgment was delivered the parties being present agreed to refer to three native gentlemen who were named the decision as to the amount that should be paid by Abdul Hakim to Chedu Khan. The award was made on the same day (11th December, 1863) and is as follows:—"That from 1271 Fasli "(1864) Abdul Hakim shall always pay to Chedu Khan Rs. 70 per "mensem, and that the latter should give up his claim in respect of pre-"vious years and should realize from Abdul Hakim Khan Rs. 70 every "month. Parties being present our decision stated above was read over "to them: Chedu accepted it, but Abdul Hakim Khan did not. This "arbitration award, together with deed of agreement, is submitted to "you (the Commissioner) for orders. Moreover (we hold) that Chedu "Khan should always remain obedient to Abdul Hakim Khan." Thereupon the Commissioner upheld the decision of the Deputy Commissioner awarding Rs. 70 a month to Chedu Khan, to be paid by Abdul Hakim, but reversed so much of the decree as awarded arrears of instalments.

Chedu Khan has died and the question in this appeal is whether the respondent, who is his son, is entitled to the Rs. 70 per month, a suit having been brought by the appellant, the granddaughter of Abdul Hakim, for a decree, declaring that the right to receive it ceased at the death of Chedu Khan, the payment of it having continued to be made to the respondent by the lambadar of the estate. The Subordinate Judge, who first heard the suit, held that the agreement was purely and simply a grant to Chedu personally and not to his heirs, and made the decree prayed for. On an appeal to the District Judge of Rae Bareli he held the same and referred to the sentence in the award that Chedu was to continue to obey his brother as being a personal obligation. He dismissed the appeal, and there was then a further appeal to the [330] Judicial Commissioner, who reversed the decree and dismissed the suit. The reasons which he has given in his judgment for this decision are unsatisfactory. He begins by saying that the District Judge had based his judgment almost entirely on the interpretation of the word "hamesha" (always or for ever), and that there are several circumstances which the Court does not appear to have considered, and it has held that Chedu Khan had a valid agreement in his favour which would have entitled him to claim half the estate. The District Judge did not hold this: on the contrary he says in his judgment that an agreement was said to have been executed admitting Chedu Khan to share in a moiety of the taluqa, that the Rent Courts rejected the agreement as not genuine, the Civil Court of first instance accepted it; but the appellate Court doubted its genuineness and held it to be invalid. The Judicial Commissioner then says that construing the word, together with the circumstances he refers to, it appears to him that the word "hamesha"

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been held to be an order passed in execution of the decree under section 88. That is quite true in a sense and for certain purposes of the Limitation Act and the Code of Civil Procedure; but it does not alter the fact that the decree under section 88 is a preliminary and conditional one, which requires to be supplemented by the order absolute, and is not final in itself. In America it appears to have been held that in the analogous case of a decree for foreclosure, the suit continues for the purposes of *lis pendens* until the mortgagee is actually placed in possession under his foreclosure. (See Van Fleets' Treatise on the Law of Former Adjudication, p. 1098; and Hukum Chand on Res Judicata, pp. 697-698.) In his edition of the Transfer of Property Act, Dr. Rash Behari Ghose (2nd [335] Ed., p. 435) refers to an unreported decision of the Calcutta High Court as an authority for the proposition that in the case of a sale by a mortgagee under a decree the proceedings for the purposes of *lis pendens* must be taken to continue till the property is actually sold. It was suggested that the doctrine would not be applicable, because the thing that was transferred here was not immoveable property within the meaning of section 52 of the Transfer of Property Act but the decree itself. But the decree represented all the interest which the mortgagee had in the mortgaged property, and the transfer of the decree undoubtedly carried with it a transfer of that interest in immoveable property, which, after the transfer, obviously did not remain in the mortgagee, and therefore passed with the decree to its assignee. It was a transfer to which, I think, the doctrine of *lis pendens* was applicable, because it was made before the final decree in the suit in the original Court. Now that being so, and Chunni Lal having been made a respondent under section 372 of the Code, the question is how does this affect the plea of limitation? I think it shows that no question of limitation can arise. Assuming that the purchase was made *pendente lite*, it was not necessary to add Chunni Lal as a respondent to the appeal at all, and the decree passed on appeal would be binding on him, though only the original mortgagees had been made parties. Now if Chunni Lal would have been bound by the appellate Court's decree without his having been made a party to the appeal at all, he would not be less bound if he were made a party to the appeal after a certain time. He was added as a respondent under section 372, not as a matter of right, but because his assignors, having no further interest in the matter, could not be expected to support a decree in which they had no longer any concern. It is clear from the terms of section 372 of the Code that when a party is brought on the record under that section, there is, as regards him, no new suit at all. He is added in the suit already instituted, and that suit is "continued by or against" him. The phraseology of section 372 in this respect is totally different from that of section 22 of the Limitation Act or section 32 of the Code, which has been so much discussed in the argument. In the same way where, by reason of section 372 read with section 582, a person is added as [336] a respondent, there is, as regards him, no new suit or appeal dating from the time when he was so added. The original suit continues, and the original appeal continues, and no new suit or appeal begins. The essence of section 372, whether applied to proceedings in the Court of first instance or proceedings in appeal, is that the suit is one from the beginning, and that the addition of the transferee does not initiate, as regards him, a new proceeding. The new respondent introduced in that

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A decree under section 88 of the Transfer of Property Act, 1882, being only a decree *nisi* and not a final decree, the suit in which such a decree is passed does not terminate until an order absolute is made under section 89. Where therefore such a decree is assigned before any order absolute is made, the assignee takes subject to all the liabilities resulting from the application of the doctrine of *lis pendens*. Such an assignee, for example, may properly be made a party, under section 372 of the Code of Civil Procedure, to an appeal from the decree preferred against his assignors, and it is not competent to him to raise any defence, such as a plea of limitation, to the appeal which could not be raised by his assignors.

[Ref. 9 C. W. N. 171 ; 13 C. W. N. 787 ; 29 I. C. 631 ; 9 C. W. N. 883 ; 2 N. L. R 178 ; 3 P. R. 1907=3 P. L. R. 1108 ; 31 Cal. 612 (F. B.)=11 C. W. N. 521=5 C. L. J. 486=2 M. L. T. 312 ; 53 I. C. 428=10 L. W. 281=37 M. L. J. 449=1919 M. W. N 699=26 M. L. T. 339=43 Mad. 37 ; Fol. 32 M. L. J. 407=29 I. C. 631=10 Mad. 722 ; 3 C. L. J. 288 ; 18 I. C. 193 ; 29 All. 76=1906 A. W. N. 283=3 A. L. J. 675 ; 12 N. L. R. 50=33 I. C. 496.]

[332] THE facts of this case are fully stated in the judgment of the Chief Justice.

Mr. *W. K. Porter* and Munshi *Gobind Prasad*, for the appellant.

Maulvi *Ghulam Mujtaba* (for whom Pandit *Sundar Lal*), for the respondents.

STRACHEY, C. J.—This was a suit for sale upon a mortgage. The original plaintiffs in the suit were Kalyan Mal and Lekhraj. On the 18th March, 1898, the Court of first instance gave the plaintiffs a decree for sale in the form prescribed by section 88 of the Transfer of Property Act, 1882. After the decree was passed the decree-holders sold it to the appellant before us. No order absolute for sale was ever passed under section 89 of the Transfer of Property Act. At the time of the sale of the decree no appeal had been presented against the decree on behalf of the defendants. Shortly after the transfer an appeal against the decree was presented. To that appeal they made respondents only the original plaintiffs, Kalyan Mal and Lekhraj. It is clear from the fourth paragraph of their memorandum of appeal to the lower appellate Court that at the time when they instituted that appeal they were aware of the transfer of the decree to the present appellant. On the 29th July, 1898, the Appellant Chunni Lal made an application to the lower appellate Court that he should be made a respondent in the appeal in substitution for the original respondents, saying that, by reason of the transfer to him, he was interested in the suit, and that he had no additional evidence to adduce. That application purported to be made under section 372 of the Code of Civil Procedure. On the 10th October, 1898, the lower appellate Court made an order purporting to be passed under section 372, read with section 582 of the Code, to the effect that it was necessary to make Chunni Lal a party, as the decision of the appeal might affect his purchase ; and accordingly Chunni Lal was added as a respondent to the appeal, but the names of the original respondents, Kalyan Mal and Lekhraj, still remained on the record as respondents. The application of the 29th July, 1898, was made some time after the period of limitation would have expired if the appeal had originally been brought against Chunni Lal alone. The lower Appellate Court took [333] certain additional evidence, held that the mortgage-debt had been statisfied, set aside the decree of the first Court, and dismissed the suit as against all the respondents before it. Against that decree Chunni Lal now appeals, and his main ground is that, as regards him, the appeal must be taken as not having been preferred until the 10th of October,

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applied under section 372 of the Code to be substituted for the original plaintiffs as a respondent to the appeal which had already been brought against those plaintiffs. The order directing him to be added to the record purports to have been made under the same section. If that section applied to the case, it was not open to the present appellant to raise any plea of limitation which his assignors could not have raised. He was added with the object that the appeal which had already been instituted against his assignors should be continued against him also. No fresh appeal was filed against him, but the appeal which had originally been [338] instituted was continued as against him. That being so, no question of limitation could arise. The real point in the case is whether section 372 did apply to the case of the present appellant. He was the assignee of a decree which was a decree *nisi* for sale under section 88 of the Transfer of Property Act. He took that decree subject to its being made absolute by an order under section 89 of that Act. Until such order was made it cannot be said that the suit had come to an end. Therefore as he took the assignment *pendente lite*, the doctrine of *lis pendens* applies to his case. Section 372 was consequently applicable, and the appellant was not competent to raise any plea of limitation which, as I have said above, his assignors could not have put forward. Upon the other points which were discussed in this appeal I am in full accord with what has been said by the learned Chief Justice. I agree in dismissing the appeal.

Appeal dismissed.

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23 A. 338 (=21 A. W. N. 95.)

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

CHIMMAN LAL (*Defendant*) *v.* BAHADUR SINGH (*Plaintiff*).*
[16th April, 1901.]

Usufructuary mortgage—Mortgagee put into possession—Contemporaneous lease of mortgaged property to mortgagee—Lease and mortgage not one but separate transactions.

On September 18th, 1883, Chimman Lal by a usufructuary mortgage of that date, in consideration of a loan of Rs. 1,350, put Bahadur Singh into possession of certain property. He covenanted with the mortgagee to pay him interest at the rate of annas 14 per cent., which after deducting the Government revenue (which the mortgagor undertook to pay and did pay regularly), left the sum of Rs. 141-12 payable annually by the mortgagor to the mortgagee for interest. It was further agreed that the mortgagee should pay himself the interest from the profits of the mortgaged property; and further that if the amount of the profits in any year exceeded the sum payable as interest the surplus should be applied by the mortgagee in reduction of the principal of the loan, and on the other hand that if the profits fell short of the sum payable for interest, the defendant-mortgagor would be liable for the balance and would pay it along with the mortgage-money. A further clause permitted the mortgagee at any time he chose to call in the mortgage money, and to recover it with interest and costs from the mortgagor and the mortgaged property.

[339] By an instrument of even date the mortgagor (who under the abovementioned usufructuary mortgage had put the mortgagee in possession, executed to the latter a qabuliat, or rent agreement, by which he acknowledged

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* Second appeal No. 249 of 1899 from a decree of J. J. McLean, Esq., District Judge of Meerut, dated the 22nd December, 1898, confirming the decree of Babu Nehal Chandar, Additional Subordinate Judge of Meerut, dated the 26th September 1896.

way can, I think, only take such pleas as his assignors could have raised and cannot introduce any new issue That being so I think that the main ground of appeal by Chunni Lal fails

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The other ground which has been urged on his behalf relates to the manner in which evidence was taken by the lower appellate Court I must say that the circumstances in which that evidence was taken are not very satisfactory The Court appears to have been under the mistaken impression that when Chunni Lal was made a respondent under section 372, he would not be bound or affected by the evidence which had been given in the Court of first instance and that therefore it was necessary to take the evidence of certain persons over again I infer that this was the view of the Court from the terms of the order directing the evidence to be taken Then the decision of the lower appellate Court is based upon the omission in certain account books produced by Lekhraj of any mention of the mortgage debt, and the fact that Lekhraj did not produce in that Court any account books for certain years in which, if that debt were outstanding, it might have been mentioned The account books which were produced were produced by Lekhraj in the lower appellate Court He was directed to produce them in consequence of an application of 22nd September, 1898 in which the defendants, appellants in that Court offered to be bound by Lekhraj s statement on oath if he would make such a statement and produce his account books Ultimately, after Chunni Lal was brought on the record, that offer was withdrawn but in the meantime, acting apparently on the assumption that it would hold good, Lekhraj produced the books, an order was made for their examination and for a report upon them by a commissioner, and at the hearing of the appeal the report of the commissioner regarding the account books was [337] taken into consideration So far as the books are concerned, it cannot be said that the provisions of the last paragraph of section 568 of the Code requiring the Court to record the reasons for the admission of additional evidence were complied with, but any irregularity in the admission and treatment of the account books, as well as in the examination of Lekhraj, appears to be covered by the fact that no objection was raised to those proceedings in the Court below It is expressly recorded that the pleaders on both sides agreed to the examination of Lekhraj he himself produced the books, and no objection was ever made to their consideration or to the consideration of the commissioner s report regarding them There is not a trace of any objection being made and that being so I do not think that we ought to interfere on that ground with the decision of the Court below The Court below clearly recognised that the *onus* lay upon the defendants to prove their plea of payment It found in substance that they had sustained that *onus*, and that consequently the mortgage debt must be considered to have been paid We cannot in second appeal consider whether the Court s reasons for that conclusion were well founded I think that this appeal must be dismissed with costs

BANERJI, J —I am of the same opinion The contention of the learned counsel for the appellant that the appeal of the respondents to the Court below as against the present appellant was barred by limitation is in my opinion, untenable No question of the application of section 22 of the Limitation Act, or of section 32 read with section 582 of the Code of Civil Procedure, arises in this case The present appellant

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agreement, by which he acknowledged to have received from the mortgagee a lease of the mortgaged premises, to hold good up to the redemption of the mortgage, at an annual rental of Rs. 141-12, which he promised to pay by two equal half-yearly instalments, the rent if not paid on fixed dates to bear interest at the rate of 12 per cent. per annum. The qabuliat is in the strictest form of a lease between a landlord and a tenant, and sets forth the remedies available to the plaintiff-respondent under section 36 of the Rent Act by ejectment of the appellant in case of failure to pay the stipulated rent on the due dates.

In framing his plaint the respondent ingeniously founded on both the documents described above. He takes the principal amount due from the usufructuary mortgage deed, but makes no claim for any interest as due under that instrument. For interest he turns to the qabuliat, and describing the rent payable under it as "lease money," and also as "profits due under the lease, that is, the interest on the mortgage money," which, he says, was realizable along with the mortgage money, he claims Rs. 1,365 as due. The reason why he has abandoned any claim to interest under the mortgage deed is evident. The interest payable under the mortgage was simple interest, while the rent due under the qabuliat carried interest at 12 per cent. on any unpaid arrear. The plaintiff moreover not merely claimed the 12 per cent. interest [341] but also compound interest thereon. We are surprised to see that both the lower Courts supported him in that matter.

For the appellant, it is contended that the plaintiff was not entitled to treat the two separate instruments as one transaction and to found one part of his claim on one document and the remainder on the other. For the respondent, reliance was placed on the case of *Altaf Ali Khan* v. *Lalta Prasad* (1), in that case there is one observation in which we fully concur, namely (on p. 498), that "each case must be decided with reference to its own peculiar circumstances."

The case now before us differs most materially from the reported case just cited. In the usufructuary mortgage deed of September 18th, 1883, there is nowhere any reference or allusion whatever to the lease. The latter in its turn in no way purports to be dependent on or to be a part of the mortgage transaction; and indeed the only reference it makes to the latter is in the provision that the lease is to expire on redemption of the mortgage. Different rights are given by the two instruments. The mortgage deed authorizes the mortgagee to recover his principal and interest from the mortgagor and the mortgaged property, while under the qabuliat the lessor, in order to recover arrears of rent, is authorized to make use of the provisions of the Rent Act for the purpose of ejecting the defendant on his failure to pay rent. We find ourselves unable, on the facts of this case, to say, as in *Altaf Ali Khan* v. *Lalta Prasad* (1), that "the lease was granted simply to provide a mode for realizing the interest payable on the mortgage," if that be the true test in such a case as we are considering.

On the contrary, the case seems to us to come well within the rule laid down in S. A. No. 1112 of 1894, decided on the 8th April, 1897, a case which, we think, ought to be reported.

* The judgment in this case was as follows :—

* EDGE, C.J. and BLAIR, J.—The defendant, Musammat Husan Jahan Begam, on the 27th May, 1880, granted a usufructuary mortgage to the plaintiff, the consi-

(1) (1897) I. L. R. 19 All. 496.

to have received from the mortgagee a lease of the mortgaged premises to hold good up to the redemption of the mortgage, at an annual rental of Rs 141 12, which he promised to pay by two equal half yearly instalments, the rent, if not paid on fixed dates, to bear interest at the rate of 12 per cent per annum The qabuliat was drawn up strictly in the form of a lease between a landlord and a tenant, and set forth the remedies available to the lessor under section 36 of the Rent Act by ejectment in the case of failure to pay the stipulated rent

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Held, that under the circumstances set forth above the mortgage and the lease were two distinct transactions A suit on the qabuliat would lie only in a Revenue Court, and the plaintiff was not entitled to recover rent for more than three years from the date of his suit *Altaf Ali Khan* v *Lalta Prasad* (1) distinguished

[Fol 23 All 341 N Ref 6 O C 18 6 O C 26 33 M L J 581=22 M L T 422=1918 M W N 75=43 I C 286, 50 I C 134=17 A L J 481=41 All 399 57 I C 384=1920 Pat 250

THE facts of this case sufficiently appear from the judgment of the Court

Mr *R Malcomson*, Munshi *Jang Bahadur Lal* and Babu *Sital Prasad Ghosh*, for the appellant

Pandit *Sundar Lal* and Babu *Debendra Nath Ohdedar*, for the respondent

KNOX and BURKITT, JJ —In the suit out of which this second appeal has arisen the plaintiff respondent sued for sale of certain property which had been mortgaged usufructuarily to him by the defendant-appellant on September 18th, 1883

He also sued for " lease money and the interest thereon,' making, with the principal for the loan, a total sum of Rs 2,715, in default of payment of which he asked that the mortgaged property should be sold

Both the lower Courts decreed the claim with a slight deduction The defendant appeals

It appears that on the date mentioned above the appellant defendant, by an usufructuary mortgage of that date, in consideration of a loan of Rs 1,350 put the plaintiff respondent into possession of the property now sought to be sold He covenanted with the plaintiff to pay him interest at the rate of 14 annas per cent, which after deducting the Government revenue (which the defendant undertook to pay and did pay regularly) left the sum of Rs 141 12 payable annually by the defendant to the [340] plaintiff for interest It was further agreed that the plaintiff mortgagee should pay himself the interest from the profits of the mortgaged property, and further that if the amount of the profits in any year exceeded the sum payable as interest, the surplus should be applied by the plaintiff mortgagee in reduction of the principal of the loan, and on the other hand that if the profits fell short of the sum payable for interest, the defendant-mortgagor would be liable for the balance and would pay it along with the mortgage money A further clause permitted the mortgagee at any time he chose to call in the mortgage money and to recover it with interest and costs from the mortgagor and the mortgaged property

By an instrument of even date the mortgagor defendant, appellant (who under the abovementioned usufructuary mortgage had put the mortgagee in possession) executed to the latter a qabuliat, or rent

(1) (1897) I L R 19 All 496

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the rent reserved by the lease carried interest, which he further interpreted to mean compound interest.

We allow this appeal. We set aside the decree of the lower Courts. We give to the plaintiff-respondent a decree for recovery of the principal sum of Rs. 1,350 by sale of the mortgaged property under section 88 of the Transfer of Property Act, allowing to the mortgagor six months from to-day within which to avoid sale by paying that amount to the plaintiff or into Court. We [345] give the plaintiff further a decree for

The transaction between the parties, that is, the granting of a usufructuary mortgage and the subsequent granting of a lease to the mortgagor of the mortgaged premises, is one exceedingly common in this part of India; whether it may be known in other parts of India we do not know. The grant of such a lease by a mortgagee to his mortgagor has been invariably treated, not only in the civil Courts and in the Courts of revenue, but outside the Courts in these Provinces, as a transaction of lease, and as putting the parties in exactly the same position as that in which they would have stood if, instead of having been mortgagor and mortgagee, they were the zemindar and any other person taking a lease of the land.

The Subordinate Judge dismissed the suit altogether. The District Judge appears to us to have misunderstood the whole nature of the transaction. In reference to the deed he says:—"The deed above would be a usufructuary mortgage, but as next day a qabuliat was executed by the mortgagor, possession was clearly not given, and the deed becomes a simple mortgage." A usufructuary mortgage does not become a simple mortgage if possession is not given. It is recorded in the deed that possession was given, and beyond that, over three years' rent was actually paid; and further the mortgagee having possession granted a lease to the mortgagor of the mortgaged premises, and the mortgagor attorned to him. The mortgagee was in possession through his tenant, the mortgagor. The mortgagee could have granted that lease to whomsoever he liked, but for his own purposes, possibly for the convenience of all parties, he took the mortgagor as his tenant and granted the lease to him.

The District Judge gave the mortgagee a decree for sale for the principal, for rent due, and for costs. The defendant, the mortgagor, has brought this appeal. It is contended on behalf of the defendant that none of the events having happened, which would have entitled the mortgagee to bring a suit for sale, he was not entitled to a decree for sale. In our opinion that contention must prevail. The condition in the mortgage, by which the mortgagee was entitled to bring a suit for sale, depended for its coming into force on the happening of certain events, none of which have happened. The fact that the mortgagee has put the mortgagor into possession as his tenant is not a disturbance of the mortgagee's possession within the meaning of the condition. It is further contended that the mortgagee has by reason of limitation lost all his remedies by suit for the principal money, it being contended that articles 59 and 116 of the second schedule of the Indian Limitation Act, 1877, apply in this case. In our opinion neither of these articles applies. The demand mentioned in the mortgage deed was obviously intended by the parties to be an actual demand. It was contemplated by the parties that the transaction should go on until the mortgagee should make a demand at the end of a year, or until at the end of a year the mortgagor should redeem. In our opinion the suit, if it were a suit to recover the principal money, would not be barred by limitation. It has been contended, and we think successfully, that the mortgagee is not entitled to sue for interest as such He obtained under his mortgage possession of the mortgaged premises and a right to take the profits in lieu of interest. If he had granted the lease of the 28th May, 1880, to any third person instead of to the mortgagor, it is obvious, if he failed to get the rent out of such person he could not claim the interest of the principal money from the mortgagor; that the person whom the mortgagee selected as his tenant happened to be the mortgagor cannot alter the position. The mortgagee-lessor is entitled to sue the mortgagor-lessee for rent payable under the lease so far as his remedy for that rent is not barred by limitation. Now the Court in which he ought, in accordance with section 93 of Act No. XII of 1881, to have brought his suit for rent was a Court of revenue and not a civil Court; and so far as this suit may be treated for the purpose of settling matters between the parties as a suit for rent, it is subject to the limitation provided by section 94 of Act No. XII of 1881, that is, to a limitation of three years. It is practically immaterial for the purpose of our jurisdiction whether the

[342] The facts of that case are almost on all fours with those of the present case It was there held that the lease was a lease, and operated as such to establish the relationship of landlord and tenant between the parties It was there held that in suing on the rent agreement in a civil Court the plaintiff had sued in a Court which had no jurisdiction to entertain that portion of the claim So in the present case we find that the effect of the qabuliat was to establish between the parties the relationship of landlord and tenant We find that that relationship did exist between them, and that rent was paid for a long series of years by appellant to respondent, the payment being recorded on the back [343] of the qabuliat In S A No 1112 of 1894 cited above, the learned Judges, acting under sections 206, 207 and 208 of the Rent Act (as the first appeal had been heard by the District Judge) gave the plaintiff a decree for the three years' rent not barred by limitation So in the present case we think all that the plaintiff can claim is the rent of three years previous to suit Our decree for that rent will be a money decree only, as the qabuliat nowhere makes the rent reserved in it chargeable on the mortgaged property For this result plaintiff has only himself to thank Being entitled to simple interest on the mortgage bond, he deliberately omitted to sue for such relief, and in lieu of [344] it he sued in a civil Court for rent due from an agricultural tenant (which that Court had no jurisdiction to give him), and he did so because

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demand the mortgagee might bring a suit against the mortgagor

As we construe the deed, it was not intended to give to the mortgagee a right to sue for sale merely in the event of the mortgage money not being paid on demand in that case the mortgagee was left to his ordinary remedy to recover his money, which would not be by a suit for sale One can understand the reason why the mortgagee was given more extensive powers in one case than in the other He was to be the mortgagee in possession, taking the whole of the profits into his own hands for his own benefit in lieu of interest It was reasonable that he should, if undisturbed in possession and not affected by any prior mortgage be left to the ordinary remedies of a usufructuary mortgagee it was also reasonable that the parties should agree that in case of disturbance in possession or complications arising from a previous mortgage having been granted the mortgagee should be entitled to such benefit as he might obtain by a suit
a suit for sale had not been
mortgagee the only remedy
one else claiming a title ha
by section 68 of the Transfer of Property Act, 1882

This mortgage cannot be considered as anything else than a usufructuary mortgage, containing the special provisions to which we have referred Now on the 28th May, 1880 the mortgagee having, as is recited in the mortgage, obtained possession, granted a lease of the mortgaged premises to the mortgagor for the term of the mortgage at a yearly rent of Rs 150 payable half yearly in Aghan and Baisakh The mortgagor entered under that lease and attorned to the mortgagee as his tenant, and paid him a considerable amount of rent from time to time For some years however the mortgagor lessee has made default in payment of rent, and the mortgagee lessor the plaintiff here, has brought this suit as a suit for sale of the mortgaged premises, claiming to sell them, not only for the principal moneys due, but also for the sums in arrear, which were due as rent

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Chowdhry Wahed Ali v. *Jumaee* (1) followed; *Nagamuthu* v. *Savarimuthu* (2), *Gour Kishore Chowdhry* v. *Mahomed Hassim Chowdhry* (3), *Kameshwar Pershad* v. *Run Bahadur Singh* (4), *Masih-ullah* v. *Kifayati* (5), *Jangi Nath* v. *Phundo* (6) and *Mukarrab Husain* v. *Hurmat-un-nissa* (7), approved; *Ramaswami Sastrulu* v. *Kameswaramma* (8), *Sankaravadivammal* v. *Kumarasamya* (9), *Vibhudapriya Thirthasami* v. *Vidianidhi Thirthasami* (10) and *Gowri* v. *Vignesvar* (11), dissented from; *Basti Ram* v. *Fattu* (12), *Dhani Ram* v. *Chaturbhuj* (13), and *Gadicherla China Seetayya* v. *Gadicherla Seetayya* (14) referred to.

[Fol. 29 Cal. 696; Diss. 15 C. P. L. R. 106; 17 C. P. L. R. 178; Ref. 26 All. 447; 7 A. L. J. 264; 32 All. 321; Dist. 6 Bom. L. R. 697.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, Babu *Jiban Chandar* and Babu *Devendra Nath Ohdedar*, for the appellant.

Pandit *Madan Mohan Malaviya* and Munshi *Gokul Prasad*, for the respondent.

STRACHEY, C. J. and BANERJI, J.—This is an appeal from an order of remand under section 562 of the Code of Civil Procedure. The Court of first instance dismissed the suit on the preliminary ground that it was barred by section 244 of the Code of Civil Procedure. On appeal the lower apppellate [347] Court held that the suit was not barred, and remanded the case to the first Court for trial on the merits. The question is, which of the Courts below was right.

A suit was brought by one Gobardhan upon a simple money bond executed by Ram Das. It was brought after the death of Ram Das against his widows as his legal representatives. Two cousins of Ram Ras, Sarju and Dwarka, were added as defendants to the suit upon their own application. They pleaded that Ram Das and themselves formed a joint Hindu family; that upon his death all his rights and interests vested in them by survivorship, and that he left no estate against which the plaintiff's claim could be enforced. On the 28th June, 1889, the Court passed a decree, of which the material part was as follows:—"Plaintiff's claim with *ex parte* costs be decreed against defendants Nos. 1 and 2, Musammats Manki and Bhagi, and the answering defendants will bear their costs." Thus the Court did not decide the question raised by Sarju and Dwarka, and passed no decree against them, though the decree did not state in terms that the suit as against them was dismissed. At all events, there was no decree which could be executed against Sarju and Dwarka by the decree-holder. Subsequently the decree-holder, in execution of the decree against the other defendants, attached and put up for sale a fixed-rate holding as the property of Ram Das, and it was purchased by the present defendant, Kalka Prasad. The plaintiff in this suit claims under an assignment made by Sarju and Dwarka in 1899. He seeks to recover possession of the fixed-rate holding on the ground that on the death of Ram Das it passed by survivorship to the assignors, Sarju and Dwarka, and could not afterwards be sold in execution of a decree as assets of Ram Das in the hands of his representatives. The question is,

(1) (1872) 11 B. L. R. P. C. 149.
(2) (1891) I. L. R. 15 Mad. 226.
(3) (1868) 10 W. R. C. R. 191.
(4) (1886) I. L. R. 12 Cal. 458.
(5) Weekly Notes, 1893, 67.
(6) (1888) I. L. R. 11 All. 74.
(7) (1895) I. L. R. 18 All. 52.
(8) (1899) I. L. R. 23 Mad. 361.
(9) (1885) I. L. R. 8 Mad. 473.
(10) (1898) I. L. R. 22 Mad. 131.
(11) (1892) I. L. R. 17 Bom. 49.
(12) (1886) I. L. R. 8 All. 146.
(13) Weekly Notes, 1899, p. 184.
(14) (1897) I. L. R. 21 Mad. 45.

rent of the three years previous to the date of the institution of the suit at the rate of Rs 141 12 in each year 1301, 1302 and 1303 Fasli with simple interest thereon at 12 per cent per annum up to date of suit, and at 6 per cent per annum from date of suit up to realization

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We allow the appellant his costs in this Court and in the two lower Courts, which he may set off against the sum we have decreed against him for rent

Appeal decreed

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[346] APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji

KALKA PRASAD (*Defendant*) v BASANT RAM (*Plaintiff*) *
[16th April 1901]

Civil Procedure Code, section 244—Execution of decree—Party to suit in which the decree was passed—Party against whom no decree was passed not precluded from bringing a suit

Section 244 of the Code of Civil Procedure presupposes a decree enforceable by the decree holder against the person between whom and the decree holder the question referred to therein arises It has no application to questions arising between the decree holder and persons against whom there is no decree to be executed

Where therefore certain persons had intervened in a suit as defendants and

[illegible]

title to which there had been no adjudication

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suit was brought for rent in the right or wrong Court (at least so we read sections 206, 207 and 208 of Act No XII of 1881) as this case went on appeal to the District Judge

We propose to give the plaintiff a decree for what, in our opinion, he would have been entitled to if he had sought his proper remedy although we must observe that his remedy for recovery of the principal money was one which he could only have sought in a civil Court, and that his remedy to recover such rent as was not time barred was one which he could only have sought in a Court of Revenue

We set aside the decree of the District Judge, and make a decree for money in favour of the plaintiff for Rs 1,500, principal money due, and we give him a decree for rent which became due and payable within three years of the date of the suit, and for interest at the rate of 6 per cent per annum on that rent in this way —

[illegible]

interest on Rs 1,500 and on the total amount of our decree at 6 per cent till liquidation

We have come to the conclusion that inasmuch as the plaintiff's suit was untenable in the form in which he brought it, and inasmuch as part of the relief which we have granted to him he could not have obtained except in a Court of Revenue by a suit in that Court if it had not been for sections 206—208 of Act No XII of 1881, each party must bear his own costs of this litigation in all Courts

* First Appeal from order No 47 of 1900, from an order of L Stuart, Esq, District Judge of Benares, dated the 26th March, 1900

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under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit, with respect to any question which may arise between him and the other parties relating to the execution of the decree, within the meaning of section 11 of the Act of 1861. But their Lordships consider that there are other grounds upon which the judgment in the present case may be supported. In their view it is not satisfactorily established that there is an existing decree which warranted any execution whatever against the respondent. It has been already pointed out that the original decree was amended by the High Court on appeal by a decree directing Jumaee to be released from the suit altogether * * * In point of form, therefore, the decree releasing her altogether was left standing. * * * When, therefore, the appellant insists that the present suit is not competent, because the questions relating to the execution ought to have been determined in the former suit A, his objection, which relates only to procedure, may, their Lordships think, be properly met by the counter-objection that in point of procedure his own decree in suit A is ineffectual, as actually drawn up to support any execution against Jumaee, and that the proceedings which may have virtually set it right and warranted some execution have lost all efficacy for that purpose by his own acts. Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorizing an execution against the respondent's estate; and consequently the question in the present suit is one not properly [350] relating to the execution of a decree but to a sale under orders which have not the support of any decree."

Two points are noticeable. First, having regard to the first sentence quoted from page 156, it is doubtful whether their Lordships would hold a defendant, whether sued in a representative capacity or otherwise, to be "a party to the suit" within section 11 of Act No. XXIII of 1861 or section 244 of the present Code, unless "a decree has been properly passed and proceedings taken under it to obtain execution against" him. Secondly, their Lordships clearly hold that a question regarding the liability of property to attachment and sale in execution raised by a defendant, against whom the decree does not warrant any execution whatever, but who is released by it altogether from liability, is "one not properly relating to the execution of a decree" within the meaning of those sections.

This case has so often been cited as an authority on the first point discussed in the judgment, namely, as to a person against whom a decree has been passed and execution taken in a representative capacity being a party to the suit, that it is strange that its bearing on the second point should have been generally overlooked. That part of the decision is not referred to in the headnote of the report.

In Madras the latest case is the decision of the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma* (1). It was there held that "when a party, defendant in a suit, is exonerated from such suit, the suit being dismissed against him and a decree passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, the latter is not entitled to maintain a suit for

(1) (1899) I. L. R. 23 Mad. 361.

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whether the suit is barred by section 244 (c) of the Code as raising a question between the parties to the suit in which the decree was passed or their representatives relating to the execution, discharge, or satisfaction of the decree The plaintiff is a representative of Sarju and Dwarka within the meaning of section 244 (c) The section has been held to apply to a suit brought by a party to the former suit, or his representatives, to recover from an auction purchaser the property sold in execution, on the ground that the sale was illegal *Basti* [348] *Ram* v *Fattu* (1), *Dhani Ram* v *Chaturbhuj* (2) The appeal raises two questions The first is whether a defendant against whom no decree is passed is a party to the suit within the meaning of section 244 (c) The second is whether, assuming him to be a party to the suit, any question raised by him or his representatives in proceedings taken by the decree-holder in execution against another defendant is a question relating to the execution, discharge, or satisfaction of the decree within the meaning of the section Upon these questions there are various rulings of the High Courts, some of which are conflicting All, or almost all of them, entirely overlook the most important authority on the subject—the judgment of the Privy Council in *Chowdhry Wahed Ali* v *Jumaee* (3) That case was decided upon the construction of section 11 of Act No XXIII of 1861, the terms of which, so far as regards the present questions, are substantially the same as section 244 (c) of the Code, but in which there was no express mention of the representative of parties to the suit in which the decree was passed The respondent was one of the defendants in a suit for possession and mesne profits She claimed part of the property in suit in her own right As regards other parts, she was sued in a representative capacity The first Court, though stating in its judgment that her title to the share which she claimed in her own right was proved, nevertheless gave the plaintiff a general decree for possession and mesne profits against all the defendants On appeal the High Court held that she had been unnecessarily made a party to the suit, and ordered that she should be released from it, and the suit dismissed as against her with costs (see 2 B L R, Full Bench, at p 75) In their judgment the Privy Council pointed out that although the grounds of the High Court's decision did not touch the respondent's liability in her representative capacity, still, owing probably to some mistake in drawing up the decree, her release from liability was absolute That decree, the Privy Council held, stood unreversed and unamended In execution of his decree for mesne profits the plaintiff caused a part of the property which belonged to the respondent in her own right to be attached and sold After various [349] complicated proceedings she brought a suit to obtain a declaration that the execution sale should be set aside and her possession of the property confirmed The substantial question considered by the High Court in Full Bench and by the Privy Council was whether the suit was barred by section 11 of Act No XXIII of 1861 The High Court held that it was not on the ground that a party sued in a representative capacity was not a party to the suit within the meaning of the section The Privy Council agreed with the High Court's conclusion but not with its reasons At pages 156 and 157 of the report they say —"In a case, then, in which a decree has been properly passed and proceedings taken

(1) (1886) I L R 8 All 146
(2) Weekly Notes, 1899, p 181
(3) (1872) 11 B L R P C 149

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The only reported Bombay case is *Gowri* v. *Vigneshvar* (1), which is to the same effect as the decision of the Madras Full Bench. The learned Bombay Judges quote a passage from the judgment of the Privy Council, but entirely overlook the greater part of what the Privy Council discussed and decided. The only question which they consider is, whether a person against whom there is no decree can be considered a party to the suit within the meaning of section 244, and this they answer in the affirmative on the ground that the contrary view requires that the words of the section should be read as if they were "parties to the decree in the suit or in the appeal in which the decree was passed." As to whether, assuming such a person to be a party to the suit, the question between him and the decree-holder is of the nature contemplated by section 244 the judgment is altogether silent.

There are two Calcutta cases on the point—*Gour Kishore Chowdhry* v. *Mahomed Hassim Chowdhry* (2) and *Kameshwar Pershad* v. *Run Bahadur Singh* (3). In the former it was held that a defendant who was excluded from decree in favour of the plaintiff, though "a party to the suit," must, as regards the execution of the decree from whose operation he was released, be considered a stranger to the suit, in which he had no further interest or concern, and was not precluded from suing by section 11 of Act No. XXIII of 1861. In the latter case the opinion of Mitter and Agnew, JJ., is exactly the same as that of [353] Shephard and Wilkinson, JJ., in *Nagamuthu* v. *Savarimuthu* (4). They say (at page 464) that section 244 (*c*) does not apply, because, although the respondent was a party to the suit, no decree was passed against him. "Although he was a party to the suit, still the question that has arisen is not a question relating to the execution *of the decree* which was passed in the suit in favour of the plaintiff." Though the learned Judges do not mention the judgment of the Privy Council, their opinion is entirely in accordance with it.

In this Court there are three cases, all of which support the conclusion arrived at in this case by the lower appellate Court. The first is *Masih-ullah* v. *Kifayati* (5), where a decree against one of the defendants was set aside on appeal. On an objection made by her to the attachment and sale of a house in execution of the decree against another defendant, it was held that she was not a party to the suit, raising a question in the sense of section 244. In *Jangi Nath* v. *Phundo* (6) a decree was passed against the obligor of a hypothecation bond personally and for sale of the hypothecated property. There was another defendant who was made a party only because she claimed the hypothecated property. Upon the decree-holder seeking to enforce the decree against property other than the hypothecated property, she objected in the execution department. It was held that, so far as the decree was sought to be enforced against property other than the hypothecated property, she was a stranger to the action, and the question did not fall within section 244 (*c*). That decision was followed in *Mukarrab Hussain* v. *Hurmat-un-nissa* (7). It was there held that a defendant who was by the decree released from all liability was not a party to the suit within the meaning of section 244 (*c*), and that, as there was no decree against

(1) (1892) I. L. R. 17 Bom. 49.
(2) (1868) 10 W. R. C. R. 191.
(3) (1886) I. L. R. 12 Cal. 458.
(4) (1891) I. L. R. 15 Mad. 226.
(5) Weekly Notes, 1893, p. 67.
(6) (1888) I. L. R. 11 All. 74.
(7) (1895) I. L. R. 18 All. 52.

recovery of possession of the property, and that the question of his claim to, and to recover possession of, the property is a question falling within section 244, Civil Procedure Code of 1882 so as to debar him from maintaining such suit The judgment approves of *Sankaravadivammal* v *Kumarasamya* (1) and *Vibhudapriya Thirthasami* v *Vidianidhi Thirthasami* (2) It distinguishes [351] *Gadicherla Chinna Seetayya* v *Gadicherla Seetayya* (3) on the ground that there the names of the defendants exonerated were removed from the suit and they had thereby ceased to be parties

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In regard to this decision it is to be observed that neither in the judgment nor apparently in the argument was the judgment of the Privy Council in *Chowdhry Wahed Ali* v *Jumaee* (4) referred to In the second place, it is based upon a consideration of the question whether an exonerated defendant is a party to the suit within the meaning of section 244, and only a slight and indirect reference is made to the equally important question dealt with by the Privy Council whether, assuming him to be a party to the suit, a question between him and the decree holder can be considered a question relating to the execution of the decree within the meaning of the section This is the more singular because the Full Bench mentions, with a mere expression of dissent, the judgments of Mr Justice Shephard and Mr Justice Wilkinson in *Nagamuthu* v *Savarimuthu* (5), in which, although the judgment of the Privy Council is not referred to, the learned Judges express a view entirely in accordance with that of the Judicial Committee That view is that, assuming a defendant, against whom a suit has been dismissed, to be nevertheless a party to the suit, yet, as between him and the decree holder, no question relating to the execution of the decree within the meaning of the section can arise, because against him there is no decree to be executed At page 228 of the report Mr Justice Shephard says —"In my opinion, regard being had to the language of the section, a question relating to the execution of the decree presupposes a person against whom execution is sought, and cannot arise as between the decree holder and persons who, so far as concerns execution, are complete strangers In the present case the defendants were dismissed from the prior suit on appeal But a much stronger case might be put to illustrate the inconvenience of giving a larger operation to the section For instance, in a suit against two defendants, the plaintiff might withdraw the suit against one, with or without liberty to bring a fresh suit, and obtain a decree against [352] the other The defendant against whom the suit was withdrawn would, of course, be a party to the suit in which the decree was passed But he would have no concern in the execution of the decree, and, in my opinion, no question relating to the execution could arise between him and the decree holder If it be correct to say that the object of the section is to put a limit to litigation and prevent one suit growing out of another, it is clear that in such a case as the one put the section ought not to be applicable It cannot have been intended to prohibit suits between persons as between whom no adjudication in respect of their right has as yet taken place"

(1) (1885) I L R 8 Mad 473
(2) (1898) I L R 22 Mad. 131
(3) (1897) I L R 21 Mad. 45
(4) (1872) 11 B L R P C 149
(5) (1891) I L R 15 Mad 226

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In execution of a decree for sale upon a mortgage executed by the father of a joint Hindu family, certain joint family property was put up to sale without specification of the interests of the other members of the family. On suit by the sons their interests, amounting to four-fifths of the entire property, were exempted. The auction purchaser thereupon brought a suit against the decree-holders and the sons to recover four-fifths of the price paid by him.

Held (1) that the auction purchaser's remedy by suit was not excluded by reason of section 315 of the Code of Civil Procedure; (2) that the auction purchaser could not recover anything as against the decree-holders, but (3) that the auction purchaser had acquired a lien on the interests of the sons to the extent of four-fifths of the purchase money, which could be enforced by sale of their interest to that extent in the property exempted from sale in their favour, *Munna Singh* v. *Gajadhar Singh* (1), *Kishun Lal* v. *Muhammad Safdar Ally Khan* (2), *Sundara Gopalan* v. *Venkatavarada Ayyangar* (3), *Dorab Ali Khan* v. *Abdul Azeez* (4), *Ram Narain Singh* v. *Matab Bibi* (5), *Derry* v. *Peek* (6). *Hariraj Singh* v. *Ahmad-ud-din Khan* (7), *Dharam Singh* v. *Angan Lal* (8) and *Muhammad Askari* v. *Radha Ram Singh* (9), referred to.

[Fol. 27 All. 537=1905 A. W. N. 99=2 A. L. J. 244 ; **Ref.** 26 All. 407 (F. B.)=1904 A. W. N. 74 ; 5 L. B. R. 58 ; 39 All. 114 ; 33 All. 708 ; 18 A. L. J. 905=58 I. C. 105 ; 63 I. C. 425 ; **Rel.** 16 I. C. 215 ; **Ref.** 7 Bur. L. T. 18 ; 33 I. C. 1003 ; 20 A. L. J. 337 ; 43 All. 67.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Sundar Lal* and Mr. *J. Simeon*, for the respondents.

STRACHEY, C. J. and BANERJI, J.—The plaintiff in this case is a purchaser, at a sale in execution of a decree for sale, of an 8¼ biswas zemindari share which was mortgaged by Shib Singh, the head of a joint Hindu family, consisting of himself, his sons, and his grandsons. After the sale the sons of Shib Singh obtained a decree against the plaintiff and the mortgagees decree-holders, **[356]** declaring that their interests, amounting to four-fifths of the mortgaged property, were not affected by the decree or the sale, as they had not been made parties to the suit for sale as required by section 85 of the Transfer of Property Act, 1882. The decree for sale was for Rs. 13,913-10-6. The amount paid by the plaintiff on his purchase was Rs. 12,000. The present suit is brought against (1) the decree-holders to whom the Rs. 12,000 were paid and (2) the sons and grandsons of Shib Singh. The plaintiff claims to recover from the decree-holders Rs. 9,600, being four-fifths of the Rs. 12,000 purchase money with interest. In the alternative he claims to recover the same amount from the sons and grandsons of Shib Singh by sale of their rights and interests (four-fifths) in the mortgaged property. The certificate of sale has not been produced; but having regard to the pleadings and to the judgment of the Court below, it must be taken that what was put up for sale and purchased by the plaintiff for Rs. 12,000 was the entire 8¼ biswas share and not merely Shib Singh's one-fifth share therein. It has been found by the Court below, and the finding has not been disputed before us, that the mortgage was executed by Shib Singh for necessary family purposes so as to be binding on the joint family, of which he was the head

(1) (1883) I. L. R. 5 All. 577.
(2) (1891) I. L. R. 13 All. 383.
(3) (1893) I. L. R. 17 Mad. 228.
(4) (1878) L. R. 5 I. A. 116.
(5) (1880) I. L. R. 2 All. 828.
(6) (1889) L. R. 14 A. C. 337.
(7) (1897) I. L. R. 19 All. 545.
(8) (1899) I. L. R. 21 All. 301.
(9) (1900) I. L. R. 22 All. 307.

him, a question arising between him and the decree holder was not a question relating to the execution of the decree within the meaning of the section

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The result is that the decisions of this Court and of the Calcutta High Court are substantially in accordance with the judgment of the Privy Council The decision of the Madras [354] Full Bench and of the only reported judgment of the Bombay High Court overlook the effect of the judgment of the Privy Council and we cannot follow them

Apart from authority, we entirely agree with the observations of Mr Justice Shephard and Mr Justice Wilkinson in *Nagamuthu* v *Savarimuthu* (1) Mr Justice Shephard gives an instance of a plaintiff withdrawing a suit against a particular defendant, with or without permission to bring a fresh suit, and obtaining a decree against another It would be unreasonable to hold that in such a case, as the first defendant was a party to the suit in which the decree was passed, any objection raised by him in execution of the decree against the other defendant would fall within section 244 A particular person may be added as a defendant on obviously insufficient grounds, by mistake, or for vexatious purposes only Is the fact of his having been so added, though no decree is passed against him, to deprive him of his rights of suit, or to confine the determination of his rights to the execution department, if in execution against another person the decree holder chooses to attach his property ? Why should he merely on account of the wholly unreasonable and unjustifiable joinder, be placed in a different position from any other person who, on the attachment of his property, would have a right to establish his title by suit ? In our opinion section 244 (c) was not intended to prohibit, and does not prohibit, a separate suit in such circumstances It presupposes a decree enforceable by the decree holder against the person between whom and the decree holder the question referred to arises, and has no application to questions arising between the decree holder and persons against whom there is no decree to be executed

For these reasons we think the order of remand passed by the lower appellate Court was right, and we dismiss this appeal with costs

Appeal dismissed

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23 A 355 (=21 A W N 101)

[355] APPELLATE CIVIL

Before Sir Arthur Strachey, Knight, Chief Justice and Mr Justice Banerji

SHANTA CHANDAR MUKERJI (*Plaintiff*) v NAIN SUKH AND OTHERS (*Defendants*) * [17th April, 1901]

Execution of decree—Sale in execution—Decree on mortgage of joint family property executed by the father alone—Sale of joint family property—Subsequent exemption of sons interests—Suit by purchaser for refund of purchase money—Rights of auction purchaser as against the decree holder and as against the sons—Civil Procedure Code, section 315—*Act No IV of* 1882 *(Transfer of Property Act) section* 182

*First Appeal No 138 of 1897 from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 30th March, 1897

(1) (1891) I L R 15 Mad 226

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property beyond those made by all applicants for execution under the Code. In the third place, it is not suggested that the alleged misrepresentation amounted to fraud, and nothing short of actual fraud in the sense of dishonesty would entitle the plaintiff to compensation or damages, *Derry* v. *Peek* (1). For these reasons we think that, so far as regards the claim against the decree-holders for a refund of the purchase money, the decision of the Court below was right.

We have next to deal with the claim against the sons and grandsons of Shib Singh. This part of the case is by no means free from difficulty, but we think, upon full consideration, that the plaintiff is entitled to succeed. The result of the decree obtained by the sons of Shib Singh on the 11th November, 1895, was that the plaintiff's purchase was declared to be a valid purchase in respect of a fifth share only. So that after the passing of that decree the plaintiff must be deemed to be by virtue of his purchase the owner of a fifth share of the mortgaged property. As has been already observed, the auction sale at which the plaintiff purchased was a sale of the entire 8¼ biswa share, and not merely of a fifth part of that share. Therefore the price which the plaintiff paid was not the price of the one-fifth share which he validly acquired under his purchase but that of the entire 8¼-biswa. As the whole of the Rs. 12,000 paid by him has been appropriated by the mortgagees-decree-holders he has paid towards the discharge of the mortgage a much larger amount than that which represents the value of the one-fifth share of which he is the purchaser. Now, under section 82 of the Transfer of Property Act, 1882, where several properties are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage. As observed in *Hariraj Singh* v. *Ahmad-ud din Khan* (2) this rule is based on the principle enunciated in Fisher on Mortgages, 4th edition, p. 659, "that a fund which is equally [359] liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone." As the debt incurred by Shib Singh was not tainted with immorality, the mortgage made by him was binding on his sons and grandsons, and therefore the four-fifths share of those persons was, equally with his own one-fifth share, liable for the mortgage debt. The one-fifth share of Shib Singh has passed to the plaintiff, and the latter has discharged, not only the fifth share of the debt, for which the property acquired by him was liable, but also a large portion of the rateable share of the debt, for which the shares of the sons and grandsons were liable. The plaintiff having thus discharged the burden which lay on the shares last mentioned is, according to the principle of the rule enacted in section 82, entitled to claim that he should recover from the sons and grandsons the amount by which he has relieved their share of the property from liability for the debt. If he had purchased Shib Singh's share by private sale or in execution of a money decree, and had then redeemed the whole, or practically the whole mortgage, there can be no doubt that he would have had such a charge. It cannot make any difference against him that he has purchased the share, not by private sale or in execution of a money decree, but in execution of a decree for sale, or that the payment of the mortgage money was simultaneous with and formed part of the purchase. Any other conclusion would lead to injustice. If these defendants had been made parties to the suit for sale, they could not, having regard to Shib Singh's position

(1) (1889) L. R. 14 A. C. 337. (2) (1897) I. L. R. 19 All. 545, at p. 548.

and manager The Court below has dismissed the suit against both sets of defendants The plaintiff now appeals

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As regards the claim against the decree holders for a refund of Rs 12,000 purchase money, we think that the Court below was clearly right It has been held that where a sale of immoveable property in execution of decree has been set aside, the purchaser's right to recover the purchase money paid by him is not limited to an application under section 315 of the Code to the Court executing the decree, but he may bring a suit for the purpose—*Munna Singh* v *Gajadhar Singh* (1) and *Kishun Lal* v *Muhammad Safdar Ali Khan* (2) We think that a purchaser is only entitled to receive back his purchase money under the conditions stated in section 315, whether by application under that section or by suit As regards private sales, there is under section 55 (2) of the Transfer of Property Act in the absence of a contract to the contrary, an implied covenant for title by the [357] vendor As regards sales under a decree of a Court, there is no warranty of title either by the decree-holder or by the Court Section 237 of the Code shows that the decree holder, when applying for execution, has only to specify the judgment debtor's share or interest in the property "to the best of his belief,' "and so far as he has been able to ascertain the same" Section 287 and the form of proclamation of sale prescribed by the rules of this Court show that the proclamation only professes to specify the particulars prescribed by the section, including the property to be sold and the judgment debtor's interest therein, "as fairly and accurately as possible," and "as far as it has been ascertained by the Court," and subject to possible errors, misstatements, and omissions (see Rules of the 4th April, 1894 Part II, Appendix B, pp 14 and 15, also Part I, Rule 94) The result is that the purchaser must be taken to buy the property with all risks and all defects in the judgment debtor's title, except as provided by sections 313 and 315, that in the absence of fraud his only remedy is to recover back his purchase money, where it is found that the judgment debtor had no saleable interest in the property at all, and that he cannot by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment debtor had no interest—see *Sundara Gopalan* v *Venkatavarada Ayyangar* (3), *Dorab Ally Khan* v *Abdul Azeez* (4), and *Ram Narain Singh* v *Mahatab Bibi* (5) The plaintiff cannot in this more than in any other case, recover a portion of the price paid as money had and received to his use upon a merely partial failure of consideration, the purchase money not being severable and apportionable between the one fifth share of Shib Singh and the four fifths of the other members of the joint family In the argument before us it was suggested that the claim might be supported on the ground that the plaintiff was induced to buy the property by a misrepresentation on the part of the decree holders that the entire 8¼ biswa share belonged to the judgment debtor Shib Singh But, in the first place, no suggestion was made by the plaintiff in his plaint or otherwise in the Court below It is an entirely new case set up on his behalf for the first time [358] at this stage of appeal In the second place there is no evidence of any such misrepresentation, and nothing to show that the decree holders made any representation on the subject of the

(1) (1883) I L R 5 All 577
(2) (1891) I L R 13 All 383
(3) (1893) I L. R. 17 Mad. 228.
(4) (1878) L. R 5 I A 116, at p 128
(5) (1880) I L. R 2 All. 828

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23 A. 360= 21 A. W. N. 127.

of the present suit. *Subarni* v. *Bhagwan Khan* (1) distinguished; *Sheo Narain Rai* v. *Parmeshar Rai* (2), *Dukhan Kuar* v. *Unkar Pande* (3) and *Kaliani* v. *Dassu Pande* (4) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Satya Chandra Mukherji*, for the respondent.

BANERJI, J.—The suit which has given rise to this appeal was brought by the appellants, who are Zamindars, for recovery of possession of certain lands and for ejectment of the defendant therefrom. The said lands formed the occupancy holding of one Gulzara. He died in November, 1899, and thereupon the defendant applied to the Revenue authorities under section 102 of Act No. XIX of 1873 for the entry of his name. An order was made on the 11th February, 1900, for the entry of the defendant's name in the place of Gulzara. The defendant is now in possession. The plaintiffs allege that the defendant has no right to succeed to the holding of Gulzara and that he is a trespasser. The Courts below have dismissed the suit on the ground that the cognizance of it by a Civil Court is barred by the provisions of the Rent Act, and that the plaintiff's remedy was in a Court of Revenue. The plaintiffs have preferred this appeal, and it is contended that the suit was cognizable by the Civil Court. In my opinion the contention must prevail. By section 93 or section 95 of Act No. XII of 1881 the cognizance of the Civil Court is forbidden in respect of any dispute or matter in which a suit could be brought under the former section or an application made under the latter section. We have therefore to see whether a suit, or an application of the nature specified in sections 93 and 95, could have been instituted by the plaintiffs for the relief which they seek in the present suit. There can be no doubt, as observed by the Full [362] Bench in *Sheo Narain Rai* v. *Parmeshar Rai* (2), that Act No. XII of 1881 provides no means by which a Zamindar can obtain ejectment from his land of a trespasser, and that for the ejectment of a trespasser recourse must be had to a suit in a Civil Court. If the defendant is, as the plaintiffs allege, a trespasser and not the tenant of the land in suit, the only Court in which the plaintiffs could seek this remedy for the ejectment of the defendant is the Civil Court. As he does not admit that the defendant is his tenant, he could not have made an application under section 95 to eject him under sections 35 or 36. Those sections provide for the ejectment of a person who is a tenant, that is to say, is admitted or proved to be a tenant. He could not have made an application under section 10, as such an applicaton can only be made by a tenant, and I have not been referred to any other provision of the Rent Act under which the plaintiffs could apply to the Revenue Court to eject the defendant. As the defendant is in possession, he could not have preferred an application under section 95 (*n*), and it does not appear that he could have applied under any other clause of the section. Therefore this is not a case in which a suit could be brought or an application made under section 93 or section 95 in regard to the matter which is in controversy. That being so, the only Court in which the plaintiffs could bring their suit was the Civil Court. In *Dukhan Kuar* v. *Unkar Pande* (3) it was held that where the plaintiff could not, upon

(1) (1896) I. L. R. 19 All. 101.
(2) (1896) I. L. R. 18 All. 270.
(3) (1897) I. L. R. 19 All. 452.
(4) (1898) I. L. R. 20 All. 520.

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23 A 355= 21 A W N 101

in the joint family and to the nature of the debt secured, have resisted a sale of their four fifths interest Notwithstanding the decree in that suit, the mortgagees could sue these defendants for the balance due on the mortgage *Dharam Singh* v *Angan Lal* (1) and *Muhammad Askari* v *Radha Ram Singh* (2) They have benefited by the payment made by the plaintiff which has wiped out nearly the whole of the mortgage debt The conclusion at which, in reason and equity, we can arrive is that the plaintiff, as one of the holders of the equity of redemption, who has paid off almost the whole [360] of the mortgage debt, is entitled to contribution from the other holders for the amount paid by him in excess of his share, and to a charge for that amount on their shares of the mortgaged property The total amount of the mortgage debt was Rs 13,943 10 6 Out of this amount Rs 3,000 was realised by the sale of the mortgaged share in Bhojpur purchased by the mortgagees The share purchased by the plaintiff was liable for one fifth of the balance He has therefore paid for the sons and grandsons the sum by which Rs 12,000 exceeds that one fifth This excess amount, which is really more than the Rs 9,600 claimed in the suit, he is, in our opinion, entitled to recover from the sons and grandsons of Shib Singh, and their four fifths share of the mortgaged property, together with interest at the rate provided in the mortgage

The result is that we allow the appeal, set aside the decree of the Court below, and make a decree in the terms of section 88 of the Transfer of Property Act in favour of the plaintiff for Rs 9,600, with interest thereon at the mortgage rate of one rupee per cent per mensem from 20th June, 1895, the date of confirmation of the sale at which the plaintiff purchased to the date of payment, and costs in the Court below and this Court, to be recovered by sale of the rights and interests of the third set of defendants in the 8½ biswa share, unless paid on or before the 16th October, 1901 The appeal is dismissed with costs against the first set of defendants

Decree modified

23 A 360 (=21 A. W. N. 127)

APPELLATE CIVIL

Before Mr Justice Banerji

BARU MAL AND OTHERS (*Plaintiffs*) v NIADAR (*Defendant*) *
[18th April, 1901]

Act No XII of 1881 (*North-Western Provinces Rent Act*), *sections* 93, 95—*Jurisdiction—Civil and Revenue Courts—Suit to eject as a trespasser a person who claimed to be entitled to succeed to the holding of a deceased occupancy tenant*

[illegible]

trespasser who had no right whatever to succeed to the holding of the late occupancy tenant *Held* that such a suit was properly brought in a Civil Court, and could not have been instituted in a Court of Revenue and further, that the decision of the Court of Revenue allowing mutation of names in the defendant s favour could not operate as *res judicata* in respect

* Second appeal No 915 of 1900 from a decree of Pandit Girraj Kishore Datt, Additional Subordinate Judge of Saharanpur, dated the 26th July 1900, confirming a decree of Babu Chajju Mal, Munsif of Saharanpur, dated the 14th June 1900

(1) (1899) I. L R 21 All 301 (2) (1900) I L R 22 All 307

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23 A. 364.

and has passed a decree in favour of the plaintiff, it is not open to the defendant in appeal to question the propriety of the first Court's order permitting the plaintiff to sue as a pauper.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

KNOX, J.—Application to sue as a pauper was made by Musammat Rasulan at a time when, if she had instituted a suit upon payment of a proper fee, the suit would have been amply within time. The application was granted by the Court of first instance. After some delay the Court went on to consider Musammat Rasulan's suit on its merits, and granted her a decree. The defendant appealed, and in her memorandum of appeal took the plea that the plaintiff was not a pauper within the meaning of section 401 of the Code of Civil Procedure, and that her application to sue *in forma pauperis* should not have been granted by the Court of first instance. The lower appellate Court considered this plea, and giving effect to it directed that the plaintiff should pay in a certain sum as Court fees. This she did within the time allowed by the Court. The appeal was then considered upon its merits, and again the plaintiff won her suit, the Subordinate Judge coming to the same conclusion on the merits as the Court of first instance. In the appeal before us the learned vakil for the appellant finds himself unable to contend that he has any case upon the merits. His argument turns upon the question whether the order of the lower appellate Court, passed on the 17th of February, 1899, was or was not an order within the jurisdiction of that Court to pass. That order directed the appellant, within eleven [365] days from the date of its passing, to pay in the Court fees she should have paid on the plaint and other petitions in the Court of first instance. He does not dispute the power of the lower appellate Court to enter into the question whether the plaintiff was or was not rightly permitted to sue *in forma pauperis*. But he contends that by the 28th of February the suit of the plaintiff had become time-barred. The Court was not empowered to permit the plaint to be validated by the affixing of the proper Court-fee stamp at a date when the suit was barred. The order should have been an order for dismissal of the plaint. The learned vakil for the respondent takes his stand in reply upon the decision of the Court of first instance, which held that the plaintiff was a pauper, and which granted the plaintiff's application to sue *in forma pauperis*. This order, he contends, cannot be set aside in appeal. What has therefore to be considered now is, whether an order granting an application to sue *in forma pauperis* is an order which affects the decision of a case, and can be dealt with in appeal in spite of the provisions of section 588 of the Code of Civil Procedure. The order granting an application to sue *in forma pauperis* is an order affecting the institution of a suit rather than an order affecting its decision, and therefore not an order contemplated by section 591 of the Code. In the present case the plaintiff made her application well within time; it was granted; and in accordance with the explanation to section 4 of the Indian Limitation Act of 1877 her suit was instituted when her application for leave to sue as a pauper was filed. Both this Court and the Calcutta High Court have read these words as though they ran as " filed and granted." Accepting this interpretation, the plaintiff's suit was instituted within time, and the lower

the allegations made by him in his plaint, have obtained relief from a Court of Revenue, a Civil Court was competent to entertain the suit and to give the plaintiff a decree for possession as against the defendant The same view was held in the subsequent case of *Kaliani* v *Dassu Pande* (1) The Courts below have relied upon the Full Bench decision in *Subarni* v *Bhagwan Khan* (2) It is on that ruling that the learned vakil for the respondent mainly relies That was a case in which a person who alleged himself to be the tenant of the holding had asked the Court of Revenue ' for possession of the occupancy holding as an occupancy tenant in succession to her parents ' and the suit was brought by the Zamindars in the Civil [363] Court for a declaration that the defendant was not the tenant of the holding, and that the plaintiffs, the Zemindars, were in possession and were entitled to the holding That was not a case like the present, in which the plaintiff seeks to eject the defendant It was held in that case that the dispute was one in which " an application might have been made, and was in substance made, under section 95 of Act No XII of 1881 ' As I have already stated, the defendant in the present suit being in possession could not have made an application to the Court of Revenue under that section The application he did prefer to the Revenue Court was in terms an application under section 102 of Act No XIX of 1873 The order which was passed on that application also purported to be an order under that section, and was founded on the fact that the defendant was in possession Such being the case, the Full Bench ruling referred to above is inapplicable, and the present suit did not relate to a matter in respect of which the cognizance of the Civil Court is excluded by any provision of Act No XII of 1881 It is urged that the order of the Revenue Court directing the entry of the defendant s name has the effect of *res judicata* upon the question of title I am unable to agree with this contention An order under section 102, which must be read with section 64, is based upon the fact of possession, and cannot be deemed to be an order which decides a question of title This was held in *Kaliani* v *Dassu Pande* (1), and I see no reason to depart from the view which was taken in that case In my opinion the Courts below were wrong in throwing out the suit I allow the appeal, set aside the decrees of the Courts below, and remand the case under section 562 of the Code of Civil Procedure to the Court of first instance for trial on the merits. The appellants will have their costs of this appeal Other costs will follow the result

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23 A. 364.

[364] APPELLATE CIVIL

Before Mr Justice Knox and Mr. Justice Aikman

MUMTAZAN (*Defendant*) *v* RASULAN (*Plaintiff*) * [18th April 1901]

Civil [illegible]

pr [illegible]

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* Second Appeal No 392 of 1899 from a decree of Babu Nihal Chunder officiating Subordinate Judge of Shahjahanpur dated the 1st March 1899, confirming the decree of Babu Banke Behari Lal, Munsif of Shahjahanpur, dated the 27th April, 1898

(1) (1898) I L. R 20 All. 520 (2) (1896) I L. R. 19 All 101

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APRIL 22.

APPELLATE
CIVIL.

23 A. 367=
21 A. W. N.
107.

23 A. 367 (=21 A. W. N. 107).

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

BANNA MAL AND OTHERS (*Plaintiffs*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).* [22nd April 1901.]

Act No. IX of 1890 (*Indian Railways Act*), *section* 47 (*b*)—*Responsibility of Railway Company for goods left on its premises without a receipt being obtained for them—Rules framed by the Company under the Act.*

Held, that a rule by which a Railway Company disclaimed all responsibility for goods left on the Company's premises unless certain conditions were fulfilled, the principal of which was that the goods should have been accepted and a receipt given for them by a duly authorized employee of the Company, was a rule properly made under the provisions of the Indian Railways Act, 1890, and that no suit in respect of the loss of goods merely deposited upon the Company's premises without such a receipt being taken for them could be maintained. *Slim* v. *The Great Northern Railway Company* (1) referred to.

[Fol. 1 S. L. R. 77; **Diss.** 39 Bom. 485; **Dist. (and doubted)**; 44 All. 218.]

THIS was a suit for damages for the loss of goods alleged to have been delivered to the Oudh and Rohilkhand Railway Company at Cawnpore on the 28th January, 1895, which goods, according to the plaintiffs, never reached their destination. The defendant denied delivery. It was found that the goods in question had been brought on to the Company's premises; but the defendant replied that the Company was under no liability in respect thereof, because the goods had never been accepted for transmission, and no receipt had been given for them by any duly authorized employee of the Company, as required by rules 49 and 50 of the Goods Tariff Rules of the Company which were rules duly made under the powers conferred by the Indian Railways Act, 1890, section 47 (*b*). The particular rules applicable were as follows:—

Oudh and Rohilkhand Railway. Goods Tariff.

[368] "*Paragraph* 49.—The railway hereby gives public notice that it will not be responsible for articles of any description, whether booked as parcels, as luggage or as goods, and whether for conveyance by passenger or goods trains, unless they shall have been properly packed, marked, directed and described, and shall have been signed for as received by one of the authorized clerks or agents of the Railway.

"*Paragraph* 50.—Also that the Railway will not undertake responsibility for loss of, injury or damage to, goods brought on to the Railway premises to be despatched, unless they shall have been weighed and accepted and a printed receipt granted for the same by a duly authorized employee of the Railway."

The Court of first instance (Munsif of Cawnpore) dismissed the suit. The plaintiffs appealed; and the lower Appellate Court (District Judge of Cawnpore) dismissed the appeal. The plaintiffs thereupon appealed to the High Court, urging, as before, that the bye-laws in question were inequitable and should not be enforced.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satish Chandra Banerji*), for the appellants.

* Second Appeal No. 407 of 1899 from a decree of J. Sanders, Esq., District Judge of Cawnpore, dated the 6th March, 1899, confirming the decree of Pandit Kanhaya Lal, Munsif of Haveli, District Cawnpore, dated the 29th June, 1897.

(1) (1854) 14 C. B. 647.

appellate Court could not afterwards deal with the order which granted the application The Court of first instance had dealt with the case under section 411 of the Code of Civil Procedure, and the matter might well have been allowed to rest there The appeals fail and should be dismissed

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23 A 364

It has been pointed out by this office that a sum of Rs 12 8 in addition to the amount recovered from the plaintiff by the lower appellate Court, would have been payable by the respondent if she had not been allowed to sue as a pauper Under the [366] provisions of section 411, this amount of Rs 12 8 is a first charge on the subject-matter of the suit, and will be recoverable by Government from the defendant in the same manner as costs of the suit

The appeal is dismissed with costs

AIKMAN, J —I have arrived at the same conclusion The respondent Musammat Rasulan applied under section 403 of the Code of Civil Procedure for permission to sue as a pauper After necessary inquiry the Court of first instance made an order under section 409 allowing the application, and ultimately decreed the plaintiff's claim The defendant appealed The first ground taken in the defendant's memorandum of appeal to the lower Court was that the plaintiff was not a pauper, and ought not to have been allowed to sue as such The lower appellate Court considered this plea and sustained it It thereupon directed the plaintiff to pay into Court, within a time fixed, the Court fee which it held to be payable on the plaint if the plaintiff had not been allowed to sue *in formâ pauperis* The plaintiff complied with the order and paid in the Court fee within the time fixed The learned Subordinate Judge then took up the other pleas raised in the defendant's memorandum of appeal On these pleas he arrived at the same conclusion as the Munsif The defendant s appeal was accordingly dismissed, and the decree of the first Court in the plaintiff's favour affirmed

The defendant comes here in second appeal The only plea urged is, that by the time it was decided that the plaintiff ought not to have been allowed to sue as a pauper her suit was barred by limitation, and it was too late for her to pay the Court fee Had it been necessary, I should have been prepared to hold that this case falls within the purview of section 28 of the Court Fees Act

But I consider that the answer of the learned vakil for the respondent to the plea now urged sufficiently meets it That answer is, that it was *ultra vires* on the part of the lower appellate Court to entertain a plea attacking the order of the first Court which granted permission to the plaintiff to sue as a pauper It is clear that no appeal from such an order is allowed by section 588 of the Code of Civil Procedure The learned vakil for the [367] appellant endeavours to support the order of the lower Court by a reference to section 591 I have no hesitation in holding that section 591 will not help him If the Munsif was in error in allowing the plaintiff to sue as a pauper, it was not an error affecting the decision of the case I agree in the order proposed

Appeal dismissed

1901 FEB. 15. MARCH 23.

PRIVY COUNCIL.

23 A. 369= 28 I. A. 100= 5 C. W. N. 602=3 Bom. L. R. 298= 11 M. L. J. 178.

A taluqdari estate, entered in the lists 1 and 2 prepared under section 8 of the Oudh Estates Act, 1869, descended by section .22, sub-section (11) [370] of that Act to a person "who would have been entitled to succeed to the estate under the ordinary law by which persons of the religion and tribe of the taluqdar would have been entitled."

This was established as to the property now in dispute in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (1). And that a taluqdari estate which has so descended under section 22, sub-section (11), is still subject to the provisions of the Act, and descends as impartible estate, was decided in *Dewan Ram Bijai Bahadur Singh* v. *Rae Jagatpal Singh* (2), which was referred to and followed.

According to Hindu law, the elder son of a wife married at a later date, succeeds to impartible estate in priority over the son later born of a senior wife, and over the son later born of a wife first married.

[Ref. 25 All. 476 (P. C.): 28 Mad 1; 32 All. 599; 43 All. 245=19 A. L. J. 337=40 M. L. J. 449=25 C. W. N. 721=33 C. L. J. 520=60 I. C. 548; 11 O. C. 256.]

APPEAL from a decree (21st March 1895) of the Court of the Judicial Commissioner, affirming a decree (23rd March, 1891) of the Additional District Judge of Rae Bareli which had dismissed the plaintiff's suit.

In this suit, filed on the 27th January 1890, Sitla Bakhsh, the younger of two sons of Raghunath Singh deceased, born of different mothers, claimed, in virtue of his mother's seniority in the order of her husband's marriages, to inherit the impartible taluqdari estate of Pawansi in the Partabgarh district as sole heir. The wife afterwards married was the first to give birth to a son, Shankar Bakhsh; whose son, Sheo Partab Singh, was the defendant respondent, alleging title as such heir through his father, the first born son of Raghunath Singh. Shankar Bakhsh died before this suit was instituted.

This estate, according to a decision in 1877 of the Judicial Committee, in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (1), having been created by sanad, had vested absolutely in the Thakurain Kublas Kunwar, widow of Mahpal Singh, as her *stridhan*, and on her death descended to her daughter, Rani Janki Kunwar, under section 22, sub-section (11), of the Oudh Estates Act, 1869. Kublas Kunwar's name was entered in 1 and 2 of the lists prepared under section 8 of that Act. Janki Kunwar died without any offspring on the 16th December, 1888. The Pawansi talukdari estate then devolved upon the nearest collateral relation, under the same enactment in regard to inheritance, of Mahpal Singh. The successor was to be either one, [371] but not both, of the sons of Raghunath Singh, between whom was raised the question of priority of right.

An alternative claim was that the estate, with reference to the meaning of sub-section (11), had descended as an estate divisible "under the ordinary law," referred to in that enactment, and was not impartible. If it should be decided to be partible, the plaintiff claimed his share. He relied, however, on his alleged title as the son of Raghunath's senior, or first married, wife, "according to the custom of the clan and by law."

Among other issues fixed was one raising the question of the impartibility of taluq Pawansi, with all the property appurtenant to it. Another issue related to the alleged "custom and law" giving priority to a son of a senior wife in the order of marriage, over the elder son of a

(1) (1877) L. R. 5 I. A. 1.
(2) (1890) L. R. 17 I. A. 173; I. L. R. 18 Cal. 111.

Mr *E Chamier*, for the respondent

1901 APRIL 22. APPELLATE CIVIL 23 A 367=21 A W N 107

KNOX and AIKMAN, JJ —This appeal arises out of a suit brought by the plaintiffs, who are now appellants, for damages on account of goods detained, and for the value of a package of goods alleged by them to have been delivered to the defendant, the Oudh and Rohilkhand Railway, on the 28th of January, 1895, at the station of Cawnpore, for despatch to Bareilly The allegation of the appellants is that the package was delivered to the defendant, but never reached its destination The defendant denies delivery It is found that the goods now missing did pass on to the Railway premises But the defendant contends that this does not amount to delivery, and that in any case the defendant is not responsible for the loss of the goods brought on the Railway premises, unless they have been weighed and accepted and a printed receipt granted for the same by a duly authorized employé of the Railway In support of this contention the defendant refers the Court to paragraph 50 to be found at page 14 of what are called Goods Tariff Rules, dated the 1st of [369] January, 1895 This paragraph has been put forward and treated as a general rule made by the Railway Company under section 47 of Act No IX of 1890, clause (*b*) All that we have to see is, whether it is a rule consistent with Act No IX of 1890 Presumably it has received the sanction of the Governor General in Council and been printed in the *Gazette of India* No question upon these points has been raised Indeed it is not alleged, except in a side way that it is inconsistent with the Act The learned vakil who appeared for the appellants referred us to section 42, sub section (1), and contended that in making the rule the Railway Administration was not, according to its powers, affording all reasonable facilities for the receiving, forwarding, and delivering of traffic One obvious answer to this is, that the rule in question, or one similar to it, appears to have found place in rules made by other railway companies The only point taken in the memorandum of appeal is based upon an expression of opinion given by the lower appellate Court to the effect that the rule is inequitable We have not to see whether a rule is or is not inequitable if it is found to be a rule made consistently with the Act, and duly sanctioned and published as required by the Act The dicision of the case is in accordance with the principle laid down in *Slim* v *The Great Northern Railway Company* (1) We think the plaintiffs' suit was properly dismissed The pleas taken in appeal fail, and the appeal is dismissed with costs

Appeal dismissed

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23 A 369 (=28 I A 100=5 C W N 602=3 Bom L R 298=11 M L J 176)

PRIVY COUNCIL

PRESENT

Lords Hobhouse, Davey and *Lindley*, and *Sir Richard Couch*

JAGDISH BAHADUR, (*Plaintiff*) *v* SHEO PARTAB SINGH (*Defendant*)
[15th February and 23rd March, 1901]

[*On appeal from the Court of the Judicial Commissioner of Oudh*]

Act No I of 1869 (Oudh Estates Act) section 22 sub-section (11)—Succession—Impartible taluqdari—Succession of elder son by a junior wife excluding younger son by a first wife—Hindu law

(1) (1854) 14 C B 647

1901 FEB. 15. MARCH 28. — PRIVY COUNCIL. — 23 A. 369= 28 I. A. 100= 5 C. W. N. 402=3 Bom. L. R. 298= 11 M. L. J. 178.

of the words "but of a lower class," in the text of Manu IX, v. 128, to the insertion of these words by Kulluka Bhatta, but to an interpolation by a commentator of less authority, the Judicial Commissioners were of opinion "that the appellant failed to establish satisfactorily by the "text quoted, his contention that in the case of sons by several wives of "[373] the same class the ordinary rule which confers seniority upon "the first-born is departed from in favour of the son of the senior wife, "should such first-born son be born of a junior wife." They stated that the decision of the Judicial Committee in the case last mentioned was binding upon the Court; but having heard the arguments of the advocates, they proceeded to give their opinion as to whether or not the appellant had failed to establish his contention by the texts, as if the question were open. It was decided that the contention had not been borne out and that the ordinary rule prevailed, which conferred the right by seniority on the first-born son.

The Judicial Commissioner said—

"In the present case it was not contended that the wives of Raghunath Singh were not of equal class, or that Shankar Bakhsh Singh was "not the first-born son of his father. The learned advocate for the "appellant urged that the interpolation of the words, 'but born of a "lower class,' in Sir William Jones' translation of section 122, does not "rest on the authority of the commentary of Kulluka Bhatta, and that "their Lordships were misled by this mistake.

"The decision of their Lordships on the question of Hindu Law "raised by the appellant is, however, binding on this Court. Further, "having heard the arguments of the learned advocates of the parties, "both acquainted with Sanskrit, I am of opinion that if the question "were open to us for determination, the appellant has failed to establish "satisfactorily by the texts quoted by him his contention that in the "case of sons by several wives of the same class the ordinary rule which "confers seniority on the first-born is departed from in favour of the son "of the senior wife, should such first-born son be born of a junior wife.

"The argument of the learned advocate for the appellant is "based on the texts of Manu, which were considered by their Lordships. "He points out that the interpolation of the words 'but of a lower "class,' made by Sir William Jones in his translation of section 122, is "not authorized by the commentary of Kulluka Bhatta; and that that "commentator endeavoured to reconcile section 122 with section 125 by "making a distinction [374] between virtuous and vicious sons, and "not by the addition of the words, 'but of a lower class' in section 122 "(see Colebrooke's Digest of Hindu Law, Bk. V. I. 57).

"The learned advocate for the respondent admits that section 122 "was not explained by Kulluka Bhatta in the manner adopted by Sir "William Jones.

"He says that that explanation has the authority of the commentator Prakash. While, however, it appears to be the case that the "addition of the words 'but of a lower class' in Sir William Jones "translation cannot be supported by the commentary of Kulluka Bhatta, "it is clear that the translation of the original text itself is not free from 'doubt. Sir William Jones, Colebrooke, Max Muller, and Loiseleur Des "Longchamps translate the word 'purvaja' in section 122 'as the elder

junior wife These were the main issues throughout, and on this appeal the questions argued and decided were to the same effect

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PRIVY COUNCIL

23 A 369= 28 I A 100= 5 C W N 602=3 Bom. L R 298=11 M L J 178

The judgment of the Additional District Judge was to the effect, (1) that taluq Pawansi, which was entered in list 2, of those required by section 8 of Act I of 1869, was impartible and (2) that Shankar Bakhsh, as the senior surviving son of Raghunath at the death of his father, was entitled to inherit the taluqdari estate as sole heir, so that his son, Sheo Partab Singh was entitled to the succession

Sitla Bakhsh appealed from this on the 22nd June 1891 Pending the appeal he died His great grandson, Jagdish Bahadur, was entered on the record

The Judicial Commissioners, forming the appellate Court, affirmed the judgment of the first Court The material part of their judgment, given by Mr J Deas, with the concurrence of Mr Spankie was the following:—

"The appellant urges that the Lower Court has erred in holding "that the estate in suit is an impartible estate, and the first question "is whether it is an estate of this character

"The name of Thakurain Kublas Kunwar, the taluqdar and prede "cessor of Rani Janki Kunwar, was entered in lists Nos 1 and 2 of the "lists mentioned in section 8 of Act I of 1869 It was decided by their "Lordships in *Brij Indar Bahadur Singh* v *Rani Janki Koer*, *Shankar* "*Baksh Singh* v [372] *Rani Janki Koer*, and *Sitla Baksh Singh* v "*Rani Janki Koer* (1), that Thakurain Kublas Kunwar held the estate "in full proprietary right, that as regarded succession the rights of the "parties claiming descent must be governed by section 22 of Act I of "1869, and that, under clause 11 of section 22 the taluq, which was the "separate property of the widow, descended, in the absence of a proved "custom of her tribe to the contrary, to her daughter Rani Janki "Kunwar in perference to the remote male heirs of her deceased "husband, Mahpal Singh

"It was contended for the appellant that Thakurain Janki Kunwar "having succeeded to the estate under clause 11, that is to say, under "the ordinary Hindu law, did not take the estate under the special pro "visions of the Act, and was not, therefore, an heir of the taluqdar "within the meaning of section 2 of Act I of 1869, and that the estate "in her hands was not subject to the provisions of the Act, and did not "on her death descend as an impartible estate by virtue of the provi "sions of the sections 8, 10, and 22 This question appears to have been "conclusively settled by the decision in *Ram Bijai Bahadur Singh* v "*Jagatpal Singh* (2) Following this, the Judicial Commissioners were of opinion that on the death of Janki Kunwar the Pawansi estate descended as an impartible estate to a single heir They found also that the admitted custom was that one successor alone should succeed

In the next place, on the question whether according to Hindu law the son of the first married wife had precedence of the elder son, born of the junior wife, the principle decided in *Pedda Ramappa Nayanivaru* v *Bangari Seshamma Nayanivaru* (3) was considered applicable Although it was now an established correction not to attribute the use

(1) (1877) L R 5 I A 1
(2) (1890) L R 17 I A 173 I L R 18 Cal. 111
(3) (1880) L R 8 I A 1=I L R 2 Mad 286

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23 A. 369= 28 I. A. 100= 5 C W. N. 602=3 Bom. L. R 298= 11 M. L. J. 178.

"do not contradict one another, as 'purvaja' in 123 may denote the "eldest son of all sons, and 'taduraram' the eldest son of each wife. "This interpretation is supported by one MS., which reads 'Sarvapurvaja' the eldest son of all. But all the other MSS. read 'Sa purvaja.'

"Narayana tries to remove the contradiction between 123 and 125 "by referring the latter rule to questions of etiquette only, [376] such as "formal salutations. Kulluka brings in the difference between 'virtuous "and vicious sons.'

"If Burnell's translation is accepted, the supposed contradiction "between sections 123 and 125 disappears; and, according to Manu, "amongst sons born of different mothers of equal class the first-born son "is the senior.

"The learned advocate for the respondent relies on Burnell's trans-"lation as being the correct one, inasmuch as it gives the same meaning "to the word 'purvaja' in both the verses 122 and 123.

"As the correct translation of verse 123 is doubtful, and as "Manu's own answer to the question propounded by him in verse 123 "cannot be clearly ascertained, it appears to me that the appellant has "failed to establish satisfactorily his contention by the texts quoted by "him.

"I find therefore that by Hindu law Sitla Bakhsh did not by virtue "of being born of the first-married wife acquire seniority over his elder "brother Shankar Bakhsh the first born son of his father, and that "accordingly he was not under that law entitled to succeed to the "impartible Pawansi estate in preference to his elder brother, the first-"born son."

On the plaintiff's appeal—

Mr. *J. H. A. Branson*, for the appellant, argued that it ought to have been held in the Court below that, as Janki Kunwar had succeeded to the Pawansi taluqdari under the enactment in clause 11 of section 22 of Act I of 1869, the results of that enactment must be the following in regard to the two brothers, the sons of Raghunath Singh. That clause was to the effect, in the course of providing special rules of succession, that in default of male lineal descendants, the estate should devolve upon such persons as would have been entitled to succeed under the ordinary law to which persons of the religion and tribe of the last taluqdar were subject, thus bringing in the ordinary Hindu law. The estate was not in the hands of Janki Kunwar as subject to the provisions of the Oudh Estates Act (I of 1869), and it descended from her as an estate under, and governed by, the ordinary Hindu law to which she was subject. The estate was, therefore, not impartible when it descended [377] to her and from her. It was therefore partible between the two brothers.

Reference was made to *Dewan Ram Bijai Bahadur Singh* v. *Rae Jagatpal Singh.* (1)

Upon the next question,—as to the right of the appellant's predecessor in title in consequence of his having been born of the senior wife, the sentence in the text of the institutes of Manu, Chap. IX, said in recent years to have been interpolated, and not to have been put forward under the authority of Kulluka Bhatta, (as it appeared to be, in

(1) (1890) L. R. 17 I. A. 173; I. L. R. 18 Cal. 111.

"son, and in section 125 as 'the son born of the elder wife' Max "Muller gives the following note on section 125 —

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"As this verse and the following one contradict the rules given in "verses 123 and 124, the commentators try to reconcile them in various "ways

"Medh thinks that verses 123 124 are an artharada and have no "legal force, and Ragh inclines to the same opinion Nar and Nand "hold that the seniority, according to the mother's marriage, is of import "ance for the law of inheritance (verses 123 124), but that it has no "value with respect to salutations and the like, or to prerogatives at "sacrifices (verses 125 126) Kull finally, relying on Gov s opinion, "thinks that the rules leave an option, and that their application de "pends on the existence of good qualities and the want of such

"It is, however, probable that according to the custom of Hindu "writers, the two conflicting opinions are placed side by side, and that "it is intended that the learned should find their way out of the difficul "ty as they can

"Burnell and Hopkins, on the other hand, give the same meaning "viz, 'the first born,' to the word 'purvaja' in both sections 122 and "123 ('Ordinances of Manu, 1884)—Their translation of sections "122, 123 and 124 is as follows —

"'122 (Suppose) the youngest son is born by the eldest wife, 'and the first born (son is born) by the youngest wife, how [375] "should the division be between them? If a doubt should arise ex "pressed in these words

"'123 (We answer it thus) The first born should receive one "bull as his portion to be taken out (of the general inheritance), after "this, the other bulls, not the best, (belong), according to their mothers, "to his brothers, who are inferior to him [in point of age]

"'124 But when the eldest (son) is born of the first wife he "should take 15 cows and a bull, then the rest may divide, according to "their mothers, with these words the rule is fixed

"'Their note on verse 123 is as follows :—' Madhatithi and Kulluka "define 'purvaja' as the 'son born of the first wife, even if he is the "youngest' and render 'Swa'matritas, 'in consequence of their 'mothers' as explaining 'inferior' but Ghautama, XXVIII-14, shows "that the eldest son is intended, even when born by other than the first "wife This verse gives the rules for the eldest son, irrespective of his "mother, the next allots him a better portion if his mother is the first "eldest wife'

"Jolly in his 'Hindu Law of Partition, Inheritance, and Adoption, "(Tagore Law Lectures, 1883, p 178,) says :—

"'Manu has discussed the same question, and as far as his mean "ing can be made out he proposes two answers to it: either the son of "the first married wife, though younger, shall get an excellent bull as "his additional share, or the right of primogeniture shall follow the "date of birth alone, just as in the case of twins the first born is consi "dered as the elder of the two The latter view, say the commentators "Madhatithi and Raghavananda, represents Manu's own opinion'

"He adds in a note—

"'Doctor Mayr thinks that the two rules (Manu 9, 123 and 125)

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transferable right in the estate upon Kablas and her heirs male according to the law of primogeniture, and as regards the succession they considered that the rights of the parties claiming by descent must be governed by the provisions of section 22 of Act I of 1869. This Board therefore held that under clause II of section 22 the estate descended to Janki Kunwar, the daughter and only child of Kablas Kunwar, as the person entitled under the ordinary [379] law to which persons of her mother's religion and tribe were subject.

Janki Kunwar died childless on the 16th December 1883. It is not disputed that the succession must be to the heirs of her father and both or one or other or the sons of Raghunath if living would be entitled to succeed to the taluq on her death.

The plaintiff by his plaint claimed to be entitled to the entire taluq together with all other moveable and immoveable property of Janki on the ground that being born of the first wife he was entitled to inherit the entire taluq and other property according to the custom obtaining among his clan and by law. Alternatively he contended that the taluq was or had become partible and claimed to be entitled to a 9 annas share as son of the first wife of Raghunath or at any rate to an 8 annas share. The latter claim was maintained on the ground that, Janki having succeeded under the provisions of clause 11 of section 22, the estate was no longer subject to the provisions of the Act of 1869, but descended from her as an estate under the ordinary Hindu law, and not as an impartible estate, and was therefore partible between the two brothers. By his defence the defendant contended that the estate was impartible by custom. A vast amount of evidence was taken upon this question, but in the opinion of their Lordships unnecessarily. The point is concluded by authority. In the case of *Dewan Ram Bija Bahadur Singh* v. *Rae Jagatpal Singh* (1) their Lordships said :—

"A question might arise upon the construction of clause 11 of "section 22 whether the estate descended as an impartible estate. Their "Lordships are of opinion, looking to the provisions of Act 1 of 1869, "list 2, section 8 and section 22, that it was the intention of the "Legislature that the estate should descend as an impartible estate."

The only question which remains as regards the succession therefore is whether the original plaintiff as son of the first wife of his father was either by custom or by the common law entitled to succeed in perference to his elder brother born of a junior wife. Evidence was taken by the District Judge on the claim by custom, and that learned Judge, after an exhaustive [380] review of the evidence, came to the conclusion that the alleged custom was not proved, and that decision was affirmed in the Court of the Judicial Commissioner. There being thus two concurrent judgments on a question of fact, their Lordships are relieved from examining the evidence, and were not asked by counsel to do so.

The question involved in the claim of the plaintiff by law apart from custom has been considered by this Board in two cases. In *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2) this Board decided that the son of a junior wife was entitled to succeed to an impartible zamindari in preference to the later born son of a senior wife. It is true that in that case the mother of the younger son, although

(1) (1890) L. R. 17 I. A. 173. (2) (1872) 14 Moo. I. A., 570.

Sir William Jones translation of verse 122 in that Chapter,) the argument was that the correction had been established The words " but of a lower class," being now rightly attributed to a commentator of less weight, had lost their force, and the sentence was no longer to be considered as of binding effect, the gloss not having the authority of the author, formerly supposed to have added it, the appellate Court below ought, therefore, to have held that the rights of sons born of mothers married at different times were correctly viewed in verse 123, and that preference had to be given to the son of the earliest, or first married wife

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Reference was made to the Tagore Law lectures for 1880 by Rajkumar Sarvadhikari, the principles of the Hindu Law of Inheritance, lecture V, at pp 224, 239 and 240

It was also contended that the Court below ought to have placed the burden on the plaintiff to prove that by custom the non taluqdari property was impartible, and that it accompanied the impartible taluq No such proof had been given of a custom to that effect Therefore the property should have been held divisible between the parties Also was cited, as showing that impartibility is not extended to personal property of a Zamindar, *Rajah Rajeswara Gajapatu* v *Sri Virapi atapah Gajapaty* (1) And reference was made to *Ramasami Kamaya Naik* v *Sundaralingasomi Kamaya Naik* (2), where the custom was found by two Courts in concurrence in favour of the son of the wife first married

[378] Mr *J D Mayne* and Mr *H Cowell* for the respondent, were heard only as to whether the non taluqdari property followed the same course of descent as the taluqdari They argued that on the plaint, on the other pleadings, and on the issues, the non taluqdari property was treated as belonging to the same hereditary estate as the impartible taluq The claim was one and entire as to all the estate So dealt with by both parties and by both Courts below They referred to *Sundaralingasami* v *Ramasami* (3), which was the last cited case on appeal to England

The judgment of their Lordships was delivered by LORD DAVEY.—

The present appellant is the great grandson and heir of Sitla Bakhsh, the original plaintiff, and was substituted for the latter on his death after the commencement of the suit The respondent is the son and heir of Shankar Bakhsh Sitla Bakhsh was the son of Raghunath by his first wife, Bish Nath Kunwar Shankar Bakhsh was also the son of Raghunath, but by his junior wife, Raj Kunwar Shankar Bakhsh was born before his half brother Sitla Bakhsh and was therefore the elder born son of Raghunath

The suit relates to the succession of the taluq of Pawansi, which, after the annexation of Oudh, was by a sanad granted to a lady named Kablas Kunwar, the widow of Mahpal Singh Her name was entered in the first and second lists mentioned in section 8 of the Oudh Estates Act, 1869 In the case of *Brij Indar Bahadur Singh* v *Ranee Janki Koer* (4) the succession of the taluq on the death of Kablas Kunwar was determined by this Board Their Lordships there held that the sanad conferred and was intended to confer a full proprietary and

(1) (1869) 5 Mad H C 31
(2) (1893) I L R 17 Mad 422, 444
(3) (1899) L R 22 I A 55, 57 I L R 27 Mad 515, 1 Bom L R 850
(4) (1877) I R 5 I A 1

junior wife These were the main issues throughout, and on this appeal the questions argued and decided were to the same effect

The judgment of the Additional District Judge was to the effect, (1) that taluq Pawansi, which was entered in list 2, of those required by section 8 of Act I of 1869, was impartible and (2) that Shankar Bakhsh, as the senior surviving son of Raghunath at the death of his father, was entitled to inherit the taluqdari estate as sole heir, so that his son, Sheo Partab Singh, was entitled to the succession

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"It was contended for the appellant that Thakurain Janki Kunwar "having succeeded to the estate under clause 11, that is to say, under "the ordinary Hindu law, did not take the estate under the special pro "visions of the Act, and was not, therefore, an heir of the taluqdar "within the meaning of section 2 of Act I of 1869, and that the estate "in her hands was not subject to the provisions of the Act, and did not "on her death descend as an impartible estate by virtue of the provi "sions of the sections 8, 10, and 22 This question appears to have been "conclusively settled by the decision in *Ram Bijai Bahadur Singh* v "*Jagatpal Singh* (2) Following this, the Judicial Commissioners were of opinion that on the death of Janki Kunwar the Pawansi estate descended as an impartible estate to a single heir They found also that the admitted custom was that one successor alone should succeed

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(1) (1877) L R 5 I A 1

(2) (1890) L R 17 I A 173 I L R 18 Cal. 111

(3) (1880) L R 8 I A 1=I L R 2 Mad 286

married before the mother of the elder son, was not the first wife, and therefore it is said not to be a direct authority In *Pedda Ramappa Nayanivaru* v *Bangari Seshamma Nayanivaru* (1) a first born son, though by the fourth wife, was held to be entitled to succeed in preference to a younger son born of the third and senior wife whose marriage was subsequent to the deaths of the first two wives The grounds of the judgment are shown very clearly in the passages which are quoted at length by the Judicial Commissioner, and their Lordships will not repeat them It was laid down that the principles upon which the Board held in the former case that the first born was entitled to succeed apply equally to a son of a first married wife and sons of other wives, and that being so it lay upon the defendant to show some positive rule of Hindu law supported either by ancient text or modern decision to the contrary effect, which had not been done The grounds upon which the learned counsel for the appellant endeavoured to escape from the authority of these cases were these The verses of the Laws of Manu, which were referred to by their Lordships, are those numbered 122 to 125 in Chap 9 In Sir William Jones' translation, the 122nd and 125th verses are as follows —" 122 A younger son being born of a first " married wife after an elder son had been born of a wife last married *but* " *of a lower class*, it may be a doubt in that case how the division shall be " made 125 As between sons born of wives [381] equal in their " class and without any other distinction there can be no senior- " ity in right of the mother, but the seniority ordained by law is " according to the birth " The words printed in italics were accepted by Sir William Jones as being, and until recently were generally believed to be, the interpolation of an ancient commentator of great eminence, named Kulluka Bhatta It is said to have been discovered by the research of scholars that the interpolation was not made by Kulluka Bhatta but by a later and inferior commentator, named Prakash, and that statement seems to have been accepted in the Court of the Judicial Commissioner It is thereupon argued that verse 122 (with the omission of the interpolated words) and the two following verses are inconsistent with verse 125, which thus loses any binding authority

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Their Lordships assume for the purposes of their judgment that Sir William Jones was mistaken in attributing the words interpolated in verse 122 to Kulluka Bhatta But they observe that Sir William Jones' version was probably founded on the tradition of the time at which he wrote and has been accepted in the Indian Courts without question *Communis error facit jus* is a sound maxim Their Lordships, however, do not rely upon this consideration alone The Judicial Commissioner has learnedly discussed the various translations which have been proposed by scholars, and the interpretations given by them to the four verses in question and their relation to each other, and he refers to the opinion expressed by Dr Jolly in his Tagore Lectures, 1883 The Judicial Commissioner concludes —" As the correct translation of verse 123 is " doubtful and as Manu's own answer to the question propounded by " him in verse 122 cannot be clearly ascertained, it appears to me that " the appellant has failed to establish satisfactorily his contention by " the texts quoted by him "

Their Lordships think this is firm ground for decision The language of verse 125 is reasonably free from ambiguity, while the meaning

(1) (1880) L R 8 I A 1

"son, and in section 125 as 'the son born of the elder wife' Max
"Muller gives the following note on section 125 —

"As this verse and the following one contradict the rules given in
"verses 123 and 124, the commentators try to reconcile them in various
"ways

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"Medh thinks that verses 123 124 are an artharada and have no
"legal force, and Ragh inclines to the same opinion Nar and Nand
"hold that the seniority, according to the mother's marriage, is of import
"ance for the law of inheritance (verses 123 124), but that it has no
"value with respect to salutations and the like, or to prerogatives at
"sacrifices (verses 125 126) Kull finally, relying on Gov s opinion,
"thinks that the rules leave an option, and that their application de
"pends on the existence of good qualities and the want of such

"It is, however, probable that according to the custom of Hindu
"writers, the two conflicting opinions are placed side by side, and that
"it is intended that the learned should find their way out of the difficul
"ty as they can

"Burnell and Hopkins, on the other hand, give the same meaning
"viz, 'the first born,' to the word 'purvaja' in both sections 122 and
"123 ('Ordinances of Manu, 1884') —Their translation of sections
"122, 123 and 124 is as follows —

"'122 (Suppose) the youngest son is born by the eldest wife
"and the first born (son is born) by the youngest wife, how [375]
"should the division be between them ? If a doubt should arise ex
"pressed in these words

"'123 (We answer it thus) The first born should receive one
"bull as his portion to be taken out (of the general inheritance), after
"this, the other bulls, not the best, (belong), according to their mothers,
"to his brothers, who are inferior to him [in point of age]

"'124 But when the eldest (son) is born of the first wife he
"should take 15 cows and a bull, then the rest may divide, according to
"their mothers, with these words the rule is fixed

"'Their note on verse 123 is as follows —'Madhatithi and Kulluka
"define 'purvaja' as the 'son born of the first wife, even if he is the
"youngest' and render 'Swa matritas,' in consequence of their
"mothers' as explaining 'inferior. but Ghautama, XXVIII-14, shows
"that the eldest son is intended, even when born by other than the first
"wife This verse gives the rules for the eldest son, irrespective of his
"mother, the next allots him a better portion if his mother is the first
"eldest wife'

"Jolly in his 'Hindu Law of Partition, Inheritance, and Adoption,
"(Tagore Law Lectures, 1883, p 178,) says —

"'Manu has discussed the same question, and as far as his mean
"ing can be made out he proposes two answers to it either the son of
"the first married wife, though younger, shall get an excellent bull as
"his additional share, or the right of primogeniture shall follow the
"date of birth alone, just as in the case of twins the first born is consi
"dered as the elder of the two The latter view, say the commentators
"Madhatithi and Ragharananda, represents Manu's own opinion'

"He adds in a note—

"'Doctor Mayr thinks that the two rules (Manu 9, 123 and 125)

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of the words " but of a lower class," in the text of Manu IX, v. 128, to the insertion of these words by Kulluka Bhatta, but to an interpolation by a commentator of less authority, the Judicial Commissioners were of opinion "that the appellant failed to establish satisfactorily by the "text quoted, his contention that in the case of sons by several wives of "[373] the same class the ordinary rule which confers seniority upon "the first-born is departed from in favour of the son of the senior wife, "should such first-born son be born of a junior wife." They stated that the decision of the Judicial Committee in the case last mentioned was binding upon the Court; but having heard the arguments of the advocates, they proceeded to give their opinion as to whether or not the appellant had failed to establish his contention by the texts, as if the question were open. It was decided that the contention had not been borne out and that the ordinary rule prevailed, which conferred the right by seniority on the first-born son.

The Judicial Commissioner said—

"In the present case it was not contended that the wives of Raghu-"nath Singh were not of equal class, or that Shankar Bakhsh Singh was "not the first-born son of his father. The learned advocate for the "appellant urged that the interpolation of the words, 'but born of a "lower class,' in Sir William Jones' translation of section 122, does not "rest on the authority of the commentary of Kulluka Bhatta, and that "their Lordships were misled by this mistake.

"The decision of their Lordships on the question of Hindu Law "raised by the appellant is, however, binding on this Court. Further, "having heard the arguments of the learned advocates of the parties, "both acquainted with Sanskrit, I am of opinion that if the question "were open to us for determination, the appellant has failed to establish "satisfactorily by the texts quoted by him his contention that in the "case of sons by several wives of the same class the ordinary rule which "confers seniority on the first-born is departed from in favour of the son "of the senior wife, should such first-born son be born of a junior wife.

"The argument of the learned advocate for the appellant is "based on the texts of Manu, which were considered by their Lordships. "He points out that the interpolation of the words 'but of a lower "class,' made by Sir William Jones in his translation of section 122, is "not authorized by the commentary of Kulluka Bhatta; and that that "commentator endeavoured to reconcile section 122 with section 125 by "making a distinction [374] between virtuous and vicious sons, and "not by the addition of the words, 'but of a lower class' in section 122 "(see Colebrooke's Digest of Hindu Law, Bk. V. I. 57).

"The learned advocate for the respondent admits that section 122 "was not explained by Kulluka Bhatta in the manner adopted by Sir "William Jones.

"He says that that explanation has the authority of the com-"mentator Prakash. While, however, it appears to be the case that the "addition of the words 'but of a lower class' in Sir William Jones "translation cannot be supported by the commentary of Kulluka Bhatta, "it is clear that the translation of the original text itself is not free from 'doubt. Sir William Jones, Colebrooke, Max Muller, and Loiseleur Des "Longchamps translate the word 'purvaja' in section 122 'as the elder

Sir William Jones translation of verse 122 in that Chapter,) the argument was that the correction had been established The words "but of a lower class,' being now rightly attributed to a commentator of less weight, had lost their force, and the sentence was no longer to be considered as of binding effect the gloss not having the authority of the author, formerly supposed to have added it, the appellate Court below ought, therefore, to have held that the rights of sons born of mothers married at different times were correctly viewed in verse 123, and that preference had to be given to the son of the earliest, or first married wife

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Reference was made to the Tagore Law lectures for 1880 by Rajkumar Sarvadhikari, the principles of the Hindu Law of Inheritance lecture V, at pp 224, 239 and 240

It was also contended that the Court below ought to have placed the burden on the plaintiff to prove that by custom the non taluqdari property was impartible, and that it accompanied the impartible taluq No such proof had been given of a custom to that effect Therefore the property should have been held divisible between the parties Also was cited, as showing that impartibility is not extended to personal property of a Zamindar, *Rajah Rajeswara Gajapaty* v *Sri Virapiatapah Gajapaty* (1) And reference was made to *Ramasami Kamaya Naik* v *Sundaralingasomi Kamaya Naik* (2), where the custom was found by two Courts in concurrence in favour of the son of the wife first married

[378] Mr *J D Mayne* and Mr *H Cowell* for the respondent, were heard only as to whether the non taluqdari property followed the same course of descent as the taluqdari They argued that on the plaint, on the other pleadings, and on the issues, the non taluqdari property was treated as belonging to the same hereditary estate as the impartible taluq The claim was one and entire as to all the estate So dealt with by both parties and by both Courts below They referred to *Sundaralingasami* v *Ramasami* (3), which was the last cited case on appeal to England

The judgment of their Lordships was delivered by LORD DAVEY —

The present appellant is the great grandson and heir of Sitla Bakhsh, the original plaintiff, and was substituted for the latter on his death after the commencement of the suit The respondent is the son and heir of Shankar Bakhsh Sitla Bakhsh was the son of Raghunath by his first wife, Bish Nath Kunwar Shankar Bakhsh was also the son of Raghunath, but by his junior wife, Raj Kunwar Shankar Bakhsh was born before his half brother Sitla Bakhsh and was therefore the elder born son of Raghunath

The suit relates to the succession of the taluq of Pawansi, which, after the annexation of Oudh, was by a sanad granted to a lady named Kablas Kunwar, the widow of Mahpal Singh Her name was entered in the first and second lists mentioned in section 8 of the Oudh Estates Act, 1869 In the case of *Brij Indar Bahadur Singh* v *Ranee Janki Koer* (4) the succession of the taluq on the death of Kablas Kunwar was determined by this Board Their Lordships there held that the sanad conferred and was intended to confer a full proprietary and

(1) (1869) 5 Mad H C 31
(2) (1893) I L R 17 Mad 422, 444
(3) (1899) L R 22 I A 55, 57 I L R. 27 Mad 515 1 Bom L R 850
(4) (1877) I R 5 I A 1

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"do not contradict one another, as 'purvaja' in 123 may denote the "eldest son of all sons, and 'taduraram' the eldest son of each wife. "This interpretation is supported by one MS., which reads 'Sarvapurvaja' the eldest son of all. But all the other MSS. read 'Sa purvaja.'

"Narayana tries to remove the contradiction between 123 and 125 "by referring the latter rule to questions of etiquette only, [376] such as "formal salutations. Kulluka brings in the difference between 'virtuous "and vicious sons.'

"If Burnell's translation is accepted, the supposed contradiction "between sections 123 and 125 disappears; and, according to Manu, "amongst sons born of different mothers of equal class the first-born son "is the senior.

"The learned advocate for the respondent relies on Burnell's trans- "lation as being the correct one, inasmuch as it gives the same meaning "to the word 'purvaja' in both the verses 122 and 123.

"As the correct translation of verse 123 is doubtful, and as "Manu's own answer to the question propounded by him in verse 123 "cannot be clearly ascertained, it appears to me that the appellant has "failed to establish satisfactorily his contention by the texts quoted by "him.

"I find therefore that by Hindu law Sitla Bakhsh did not by virtue "of being born of the first-married wife acquire seniority over his elder "brother Shankar Bakhsh the first born son of his father, and that "accordingly he was not under that law entitled to succeed to the "impartible Pawansi estate in preference to his elder brother, the first- "born son."

On the plaintiff's appeal—

Mr. *J. H. A. Branson*, for the appellant, argued that it ought to have been held in the Court below that, as Janki Kunwar had succeeded to the Pawansi taluqdari under the enactment in clause 11 of section 22 of Act I of 1869, the results of that enactment must be the following in regard to the two brothers, the sons of Raghunath Singh. That clause was to the effect, in the course of providing special rules of succession, that in default of male lineal descendants, the estate should devolve upon such persons as would have been entitled to succeed under the ordinary law to which persons of the religion and tribe of the last taluqdar were subject, thus bringing in the ordinary Hindu law. The estate was not in the hands of Janki Kunwar as subject to the provisions of the Oudh Estates Act (I of 1869), and it descended from her as an estate under, and governed by, the ordinary Hindu law to which she was subject. The estate was, therefore, not impartible when it descended [377] to her and from her. It was therefore partible between the two brothers.

Reference was made to *Dewan Ram Bijai Bahadur Singh* v. *Rae Jagatpal Singh.* (1)

Upon the next question,—as to the right of the appellant's predecessor in title in consequence of his having been born of the senior wife, the sentence in the text of the institutes of Manu, Chap. IX, said in recent years to have been interpolated, and not to have been put forward under the authority of Kulluka Bhatta, (as it appeared to be, in

(1) (1890) L. R. 17 I. A. 173; I. L. R. 18 Cal. 111.

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married before the mother of the elder son, was not the first wife, and therefore it is said not to be a direct authority In *Pedda Ramappa Nayanivaru* v *Bangari Seshamma Nayanivaru* (1) a first born son, though by the fourth wife, was held to be entitled to succeed in preference to a younger son born of the third and senior wife whose marriage was subsequent to the deaths of the first two wives The grounds of the judgment are shown very clearly in the passages which are quoted at length by the Judicial Commissioner, and their Lordships will not repeat them It was laid down that the principles upon which the Board held in the former case that the first born was entitled to succeed apply equally to a son of a first married wife and sons of other wives, and that being so it lay upon the defendant to show some positive rule of Hindu law supported either by ancient text or modern decision to the contrary effect, which had not been done The grounds upon which the learned counsel for the appellant endeavoured to escape from the authority of these cases were these The verses of the Laws of Manu, which were referred to by their Lordships, are those numbered 122 to 125 in Chap 9 In Sir William Jones translation, the 122nd and 125th verses are as follows —" 122 A younger son being born of a first " married wife after an elder son had been born of a wife last married *but* " *of a lower class*, it may be a doubt in that case how the division shall be " made 125 As between sons born of wives [381] equal in their " class and without any other distinction there can be no senior " ity in right of the mother, but the seniority ordained by law is " according to the birth ' The words printed in italics were accepted by Sir William Jones as being, and until recently were generally believed to be, the interpolation of an ancient commentator of great eminence, named Kulluka Bhatta It is said to have been discovered by the research of scholars that the interpolation was not made by Kulluka Bhatta but by a later and inferior commentator, named Prakash, and that statement seems to have been accepted in the Court of the Judicial Commissioner It is thereupon argued that verse 122 (with the omission of the interpolated words) and the two following verses are inconsistent with verse 125, which thus loses any binding authority

Their Lordships assume for the purposes of their judgment that Sir William Jones was mistaken in attributing the words interpolated in verse 122 to Kulluka Bhatta But they observe that Sir William Jones' version was probably founded on the tradition of the time at which he wrote and has been accepted in the Indian Courts without question *Communis error facit jus* is a sound maxim Their Lordships, however, do not rely upon this consideration alone The Judicial Commissioner has learnedly discussed the various translations which have been proposed by scholars, and the interpretations given by them to the four verses in question and their relation to each other, and he refers to the opinion expressed by Dr Jolly in his Tagore Lectures 1883 The Judicial Commissioner concludes —" As the correct translation of verse 123 is " doubtful and as Manu s own answer to the question propounded by ' him in verse 122 cannot be clearly ascertained, it appears to me that ' the appellant has failed to establish satisfactorily his contention by " the texts quoted by him '

Their Lordships think this is firm ground for decision The language of verse 125 is reasonably free from ambiguity, while the meaning

(1) (1880) L R 8 I A 1

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transferable right in the estate upon Kablas and her heirs male according to the law of primogeniture, and as regards the succession they considered that the rights of the parties claiming by descent must be governed by the provisions of section 22 of Act I of 1869. This Board therefore held that under clause II of section 22 the estate descended to Janki Kunwar, the daughter and only child of Kablas Kunwar, as the person entitled under the ordinary [379] law to which persons of her mother's religion and tribe were subject.

Janki Kunwar died childless on the 16th December 1883. It is not disputed that the succession must be to the heirs of her father and both or one or other or the sons of Raghunath if living would be entitled to succeed to the taluq on her death.

The plaintiff by his plaint claimed to be entitled to the entire taluq together with all other moveable and immoveable property of Janki on the ground that being born of the first wife he was entitled to inherit the entire taluq and other property according to the custom obtaining among his clan and by law. Alternatively he contended that the taluq was or had become partible and claimed to be entitled to a 9 annas share as son of the first wife of Raghunath or at any rate to an 8 annas share. The latter claim was maintained on the ground that, Janki having succeeded under the provisions of clause 11 of section 22, the estate was no longer subject to the provisions of the Act of 1869, but descended from her as an estate under the ordinary Hindu law, and not as an impartible estate, and was therefore partible between the two brothers. By his defence the defendant contended that the estate was impartible by custom. A vast amount of evidence was taken upon this question, but in the opinion of their Lordships unnecessarily. The point is concluded by authority. In the case of *Dewan Ram Bija Bahadur Singh* v. *Rae Jagatpal Singh* (1) their Lordships said :—

" A question might arise upon the construction of clause 11 of " section 22 whether the estate descended as an impartible estate. Their " Lordships are of opinion, looking to the provisions of Act 1 of 1869, " list 2, section 8 and section 22, that it was the intention of the " Legislature that the estate should descend as an impartible estate."

The only question which remains as regards the succession therefore is whether the original plaintiff as son of the first wife of his father was either by custom or by the common law entitled to succeed in perference to his elder brother born of a junior wife. Evidence was taken by the District Judge on the claim by custom, and that learned Judge, after an exhaustive [380] review of the evidence, came to the conclusion that the alleged custom was not proved, and that decision was affirmed in the Court of the Judicial Commissioner. There being thus two concurrent judgments on a question of fact, their Lordships are relieved from examining the evidence, and were not asked by counsel to do so.

The question involved in the claim of the plaintiff by law apart from custom has been considered by this Board in two cases. In *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2) this Board decided that the son of a junior wife was entitled to succeed to an impartible zamindari in preference to the later born son of a senior wife. It is true that in that case the mother of the younger son, although

(1) (1890) L. R. 17 I. A. 173. (2) (1872) 14 Moo. I. A., 570.

tions that they should not partition and that a manager appointed by the award should not be displaced

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The award was sent by the arbitrator to the Sub Registrar of the district for registration It was returned for a specification of the property The arbitrator then added thereto a decision that part of the estate dealt with belonged exclusively to one of the daughters in virtue of a gift from their father to her

This suit, which was based on the award, was filed by the other daughter, and claimed partition the removal of the manager and an account from him On the death of the plaintiff the suit was revived on behalf of her son

The defence was that the claim was barred by Article 91 of Schedule II, Limitation Act (XV of 1877)

brought to cancel, or it so far as it was in restraint of partition he course of the legal devolution of the estate in a mode at variance with the ordinary principles of law A family custom, which had been alleged to disentitle daughters to found proved by the award that had been added by the ...out legal effect, as his powers were ended before the addition

The valid objection taken to this part of the award did not bring the case within the operation of Article 91, any more than the other matters

[Fol 26 Bom 577 Ref 33 Cal 498 881]

APPEAL from a decree (29th January 1897) of the Court of the Judicial Commissioner varying a decree (21st April 1892) of the District Judge of Sitapur, and decreeing the respondent s suit

The first question on this appeal was whether objections to matters in an arbitrator s award went so far towards impugning its general effect as to bring this suit which raised those objections within the meaning of Article 91, Schedule II, Limitation Act, 1877, as being a suit to cancel or set aside an award, thereby occasioning the bar of this suit by time

[384] The plaintiff respondent, Syed Ali Raza, was the son of Abbasi Begam, who died after filing this suit on the 20th March, 1890 She was one of the two daughters of the Nawab Syed Ashiq Ali who died on the 15th June, 1883 His other daughter was the defendant appellant, Jafri Begam, wife of Tasadduq Husain co defendant and appellant with her Two widows of Ashiq Ali survived him The family were of the Shiah sect On the death of Ashiq Ali questions arose as to the rights of the sisters to inherit, and a reference, to which they and their husbands, with the widows, were parties, was made to the arbitration of Mahfuz Ali, a brother of the deceased Ashiq

The award was made on the 19th January 1885, containing the following —(1) that the two sisters should be absolute owners of the whole estate in equal shares, (2) that neither should have the right to claim partition, (3) that Tasadduq Husain should be manager of the entire property, that he should render half yearly accounts to each sister, and that he should not be dismissed

Tasadduq Husain accordingly began the management, causing entry of names in place of Ashiq Ali as to the lands forming the inheritance Among these were included at one time 5 biswas 5 biswansis in a village named Kukargoti afterwards claimed to have been given to Jafri Begam by her father on her marriage Disputes arose resulting in this suit, which, after having been filed by Abbasi Begam against her sister and

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of the previous verses is at the best ambiguous and doubtful. The plain language of the one ought not to be overridden or controlled by the obscure utterances in the other. They therefore think that no sufficient reason is shown why [382] they should not follow the two previous decisions of this Board, and that they ought to do so. They therefore hold that according to Hindu law the respondent, who represents the eldest son of his father, is entitled to succeed in preference to the appellant, who represents the younger son, though born of the first wife. Their Lordships will only add that this decision appears to them as it did to their predecessors to be in accordance with the religious tenets of Hindus. It is by the brith of his first-born son that a Hindu discharges the duty which he owes to his ancestors and obtains spiritual benefits for himself, and therefore it is to that son that pre-eminence should be given.

A subsidiary point was raised by the appellant's counsel, *viz.*, whether any difference is to be made in the succession to the moveable property of Janki. No such point was raised by the plaint, in which the moveable and other immoveable property is treated in the same category with the taluq itself, and the same considerations are treated as applicable to the whole property as one corpus. The fifth issue is whether the plaintiff is by law or custom entitled to the whole of the taluqa with other property pertaining to it. And no issue is directed to any distinction between different portions of the property claimed. The District Judge held that the question did not arise, and if it did there was no evidence to show that such property was subject to a different rule of devolution. He also referred to the case of *Thakur Ishri Singh* v. *Baldeo Singh* (1) before this Board.

The Judicial Commissioner took the same view and their Lordships entirely agree.

They will therefore humbly advise His Majesty that the appeal be dismissed and the appellant must pay the costs of it.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitors for the respondent—Messrs. *T. L. Wilson* and *Co.*

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23 A. 383 (=28 I. A. 111=5 C. W. N. 585=11 M. L. J. 149=3 Bom. L. R. 311=8 Sar. 27.)

[383] PRIVY COUNCIL.

PRESENT:

Lords Macnaghten, Davey, and Lindley, and Sir Richard Couch.

JAFRI BEGAM AND ANOTHER, (*Defendants, Appellants*) *v.* SYED ALI RAZA, (*Plaintiff, Respondent*). [19th February and 9th March, 1901.]

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

Powers of arbitrator—Suit upon an award—Award partly inoperative—Limitation—Act No. XV of 1877, *Schedule II, Article* 91.

An arbitrator's award that two daughters of a Shiah Muhammadan should inherit in equal shares the estate of their deceased father contained direc-

(1) (1884) L. R. 11 I. A. 135; at p. 148.

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On this appeal Mr *J H A Branson*, for the appellant, argued that the suit, being in effect one to set aside an award made and acted upon more than three years before the suit was brought, was barred by limitation under the provisions of Article 91, Schedule II, of the Limitation Act, 1877 The object of the plaint was to alter the conditions on which the award was based to an extent that in effect would be to set it aside It was also contended that the arbitrator had not exceeded his powers, as the Appellate Court below had held, in his reply to the Sub Registrar as to the properties with which his award dealt The Sub Registrar was entitled to have the list of the properties awarded supplied to him in conformity with section 21 of Act No III of 1877 The arbitrator rightly complied in specifying what was comprised in his award, and the specification was accepted by the parties and acted on by the Revenue Court in granting mutation On the evidence the arbitrator was right in finding that the 5 biswas of Kukargoti had been given to Jafri as her dowry by her father at her marriage, and on this there was error in the appellate Court in reversing the decision of the first Court This reversal had been arrived at by the appellate Court on insufficient grounds, as also had been their decision in regard to Ludhai The question of evidence that had arisen as to the property therein, the 2½ biswas share of that mauza, should have been decided in favour of Tasadduq, the second appellant

Mr *L DeGruyther*, for the respondent, argued that the Judicial Commissioners had rightly decreed to the plaintiff the separate possession on partition of a one half share in the whole estate of the deceased The suit was not barred by limitation, not having been brought for the cancellation, or setting aside, of the award within the meaning of Article 91 It was rightly brought to enforce the award as dealing with specified interests So far as the award might operate in restraint of partition, and to prevent the [387] discharge of the manager on good grounds, the directions were not a part of the award essential to its due operation as declaring title For the latter purpose the award remained valid The arbitrator having awarded definite interests, as empowered by the terms of the reference, had erroneously made the directions against partition and against the displacing the manager These should be taken as having no operation The addition attempted by the arbitrator after the return of the award by the Sub Registrar for the specification of the properties was not binding, as it was in excess of his powers It was correctly decided below that the arbitrator's authority having once been completely exercised, according to the terms of the reference, was at an end He was not at liberty after executing the award to alter it in any particular. As a matter of evidence the Court below had rightly found that the 5 biswas of mauza Kukargoti had not been proved to have been made over to Jafri Begam by a completed gift from her father Also Tasadduq's alleged purchase had been rightly disallowed Both these properties were part of the entire succession

Mr *J H A Branson* replied

Afterwards, on the 9th March, 1901, their Lordships' judgment was delivered by LORD LINDLEY —

This is a family dispute between a daughter and a grandson of a Shiah Muhammadan named Syed Ashiq Ali, who died on the 15th June 1883 He left two widows, Musammats Ajab un nissa and Najb-un-nissa, and two daughters by the former, *viz.*, Jafri Begam, the appellant,

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the husband of the latter, who was the manager, was revived, on the death of Abbasi, on behalf of her son, Ali Raza, then a minor, suing through his father, Syed Muhammad Raza, in May 1890. The suit was upon the award for separate possession, upon partition, of a one-half share of the whole inheritance with mesne profits. This was alleged to include a share of village Kukargoti which had been irregularly attempted to be entered in the award after it had been completed, as being exclusively the property of Jafri Begam. Also was claimed to be part of the divisible inheritance a share of a village, Ludhai, to which Tasadduq had wrongly asserted a title by purchase on his own account. The validity of clauses against partition, and against the removal of the manager, was denied

[385] The principal points in the defence were (1) that the suit was barred by limitation under Article 91 of schedule II of Act No. XV of 1877, (2) that by special family custom the daughters could not inherit during the lives of the widows, (3) that the plaintiff could not claim any title under the award giving a daughter a right to partition, and a title, independent of the retention of Tasadduq Husain as manager, (4) that a 5 biswa share in Kukargoti constituted the separate property of Jafri Begam, and (5) that the share claimed in Ludhai was acquired by Tasadduq Husain from his own separate funds.

The District Judge fixed issues raising the questions indicated by the above; and on the 21st April 1892 decided that the plaintiff was entitled to a half share in the estate; that it was inadvisable to partition; that sufficient cause had not been shown for the removal of Tasadduq Husain for his position as manager: and the Judge decreed to the plaintiff one half of the profits, the amount being determinable in execution.

On an appeal by the plaintiff the Judicial Commissioners remanded the case for the disposal of questions raised and not decided. The District Judge then found—

(1) that the suit was not barred by limitation;

(2) that the custom alleged by the defendants had not been established;

(3) that the 5 biswas Kukargoti had been given by Ashiq Ali to Jafri Begam as dowry, but that the award in reference thereto had been an attempted addition after the completion of the award;

(4) that Tasadduq Husain had purchased the share in Ludhai from his own resources.

Return having been made to the remand, the Judicial Commissioners confirmed the judgment of the first Court on the question of limitation, and the finding that the alleged custom of the family had not been proved to exist. They agreed with the District Judge that the arbitrator had exhausted his powers before deciding that Jafri Begam had received the gift of the 5 biswas. They came to the conclusion, however, that this gift had not been established as having taken effect. Also they decided that the evidence was that the share in Ludhai, claimed by the manager, [386] had been purchased from the profits of Ashiq Ali's estate. They also held that the clause in the award in restraint of partition was invalid, and that Tasadduq Husain could, and should, be removed from the office of manager. In the result a decree for separate possession of one-half of the estate in suit was made in favour of the plaintiff, together with mesne profits.

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"remaining 3 biswas 5 biswansis should be entered in the names of both "the daughters in equal shares"

On the 26th January, 1885, the said document with the said specification of property was registered and the appellant Tasadduq took upon himself the management of the said estate under the said award

On the 18th August, 1885, the names of the two daughters were substituted for the name of their father in the Revenue registers, and *later, in pursuance of an order*, dated *the 28th September* 1885, the entry of the name of Jafri Begam alone was sanctioned in respect of 20 biswas These 20 biswas represented the 5 biswa share of Kukargoti *already mentioned This change in the register appears to* have been procured by Tasadduq Husain as manager of the property and without the knowledge of the plaintiff's mother

Tasadduq Husain's management gave rise to disputes The right of his wife to the 5 biswas in Kukargoti was denied by her sister, and some land in Ludhai, which Tasadduq Husain said he had bought with his own money, was claimed by his sister in law as part of Syed Ashiq Ali's estate on the ground that it had been paid for out of income of such estate

On the 20th March, 1890, the present suit was instituted by the plaintiff's mother Abbasi Begam against Jafri Begam and her husband, Tasadduq Husain The plaintiff's mother died shortly after the suit was instituted, indeed on the same day, but it was revived in May 1890 by her son, Ali Raza, the present plaintiff and respondent For all practical purposes, therefore, the suit may be regarded as an original suit by him, and it has been so treated in the Indian Courts The suit is for partition and for the removal of Tasadduq Husain as manager and for an account of his receipts and payments The suit is based upon the award of Mahfuz Ali, but the plaintiff disputes the validity of the *5th clause, prohibiting partition, so far at any rate as it applies to him*, he also disputes the title of Jafri Begam to the › biswa share of Kukargoti, and he claims the land in Ludhai as joint [390] property The defendants filed a long written statement of defence. The material defences are—

(1) that the suit was in effect to set aside the award and was barred by limitation,

(2) that by special family custom, the widows of the deceased excluded the daughters from inheritance,

(3) that the award prohibited partition and the removal of Tasadduq Husain as manager,

(4) that 5 biswas in Kukargoti constituted the separate property of Jafri Begam, both by the award and by reason of a gift made to her on her marriage,

(5) that the share in Ludhai was acquired by Tasadduq Husain from his separate funds

The *District Judge* fixed 18 *issues, raising* those and a *number of* other questions

On the 21st April 1892 he delivered judgment, and decided that the plaintiff was entitled to a half share in the estate, but not to partition, that sufficient cause had not been shown to remove Tasadduq Husain from his position as manager, and decreed plaintiff one-half of the profits,

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and Abbasi Begam, the mother of the respondent. In or about the year 1881, Jafri Begam married Tasadduq Husain, the other appellant, and about three years later Syed Muhammad Raza married Abbasi Begam. At the time of Ashiq Ali's death, Tasadduq Husain and Muhammad Raza were respectively about 25 and 18 years of age. Ashiq Ali had no children by his second wife.

After the death of Ashiq Ali disputes arose between his daughters, and on the 19th January, 1885, they agreed to refer these disputes to the arbitration of a friend of the family named Syed Mahfuz Ali; and on the same day he made his award.

[388] His decisions were, so far as is material, as follows :—

(1) That mutation of names of all the property left by the deceased should be effected in the names of the two daughters of the deceased in equal shares, and that the management of the said estate should be entrusted to the appellant, Syed Tasadduq Husain, who was to manage the said estate, and render to the two daughters half-yearly accounts of such management.

(2) That the said Tasadduq should look after the education of the said Syed Muhammed Raza, and support and maintain him.

(3) That the two widows of the said Syed Ashiq Ali should be treated with due respect, and properly provided for.

(4) That the two daughters were the owners of, and had full authority over, all the property left by the deceased, except that which was in possession of the widows, which would be theirs for their lives, and that the two daughters were to see to proper provision being made for the said widows.

The 5th clause of the said award was as follows :—

(5) That since the partition and sub-division of an integral estate belonging to a well known gentleman, is calculated to lead to its ruin and destruction, the principle of partition should not be considered legal (*i.e.*, eligible) in this estate, so that the constitution of the estate should continue as usual, and there may be no occassion for the mischief-monger to raise troubles.

This award was signed by the arbitrator, the two widows, and by both the daughters and their husbands.

The said award was presented to the Sub-Registrar of the district for registration on the said 19th January, 1885, and he sent the said award back to the arbitrator to specify the property dealt with by such award.

The arbitrator accordingly drew up a list of the property, and the award and the list were afterwards registered.

One of the properties which had belonged to the said Syed Ashiq Ali, was a share in the village Kukargoti ; of this share it was stated in the said specification of the property (column 3), that its extent was 8 biswas 5 biswansis, and in the 4th column, under the heading "remarks" was the following note :—

"Out of 8 biswas 5 biswansis of village Kukargoti entered in "this list, 5 biswas was given by the ancestor as dower to his "[389] elder daughter, Musammat Jafri Begam, in respect of which "mutation of names should be effected in favour of the said lady. The

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As regards the effect of the 5th clause, their Lordships agree with [392] the Judicial Commissioners that it affords no defence to the present action It may have bound the parties who agreed amongst themselves to abide by it But as against the present plaintiff the clause has no effect whatever The arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Muhammadan Law in the absence of a special custom prevailing in the family He had no power to make property which was divisible by law, indivisible for ever

As regards the alleged family custom by which the widows of Syed Ashiq Ali excluded his daughters from the inheritance, it is sufficient to say that the award excludes its application, and that even if it did not, the alleged custom is not proved Both Courts below have found against the existence of the custom, and the evidence in support of it is far too inconclusive to induce their Lordships to differ from the Courts below on this matter and to depart from their general rule not to disturb a finding of fact concurred in by two Courts who have investigated it

The claim of Jafri Begam to a 5 biswas share of Kukargoti rests upon an alleged gift to her by her father, Syed Ashiq Ali, on her marriage

It is for the defendants to prove that this gift was made, and they called several witnesses who say that many years ago Ashiq Ali gave her this property as her dowry But no entry of the gift was made in his lifetime, no change of possession is proved, no separate receipt of rents is proved Nothing in fact is proved sufficient to turn a loose verbal expression of a gift actual or intended into a completed gift or into a clear and distinct trust in favour of the daughter Having carefully considered the evidence upon this part of the case, their Lordships have come to the conclusion that the alleged gift is not proved It is hardly necessary to add that the entry made by the arbitrator in the schedule of property after he had made his award is no part of his award, and cannot confer any title on the defendants

There remains the share of *Ludhai*, purchased by the defendant, Tasadduq Husain, in September 1885, for Rs 4,000 If the [393] defendant bought this out of his own money, he of course will not be entitled to credit in respect of it on taking the accounts of Ashiq Ali's estate On the other hand, if he paid for this share out of money for which he has to account, he will get credit for the amount so paid, but *then the share of Ludhai will belong to that estate* *Until* the accounts of Ashiq Ali s estate are taken, and the application by the defendant of the moneys he has received from it has been ascertained, it is difficult, indeed it is impossible, to determine out of what funds the purchase money of the Ludhai share was paid At present the case stands thus, there is no direct proof that Tasadduq Husain in fact bought the Ludhai *share out of moneys* which *came to his hands* as *manager of Ashiq Ali's* estate He has given no account of the application of his receipts He has adduced evidence in order to show that he had in September 1885 means of his own sufficient to pay for the Ludhai share, but there is no satisfactory proof that he had, and no evidence that he did in fact pay for the share out of his own money The District Judge thought that he had means to pay for it and found the share to be his The Judicial Commissioners took a different view, they were not satisfied that in

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the amount to be determined at the time of execution of the decree. The Judge said nothing about the 5 biswa share of Kukargoti, nor about the Ludhai property.

From this decree the plaintiff appealed, and the Judicial Commissioners remanded the case for another trial and the determination of the other issues.

Further evidence was taken, and the District Judge found—

(1) that the suit was not barred by limitation;

(2) that the custom relied on by defendants had not been established;

(3) that the 5 biswas in dispute in Kukargoti had been given by Ashiq Ali to Jafri Begam as dowry, but that the award in regard thereto was not binding, because the arbitrator was *functus officio* at the time of expressing his opinion;

(4) that Tasadduq Husain had purchased the share in Ludhai from his private funds.

[391] On these findings, the Judicial Commissioners passed final judgment. They confirmed the findings that the suit was not barred by limitation, and that the alleged custom had not been proved. They also agreed with the District Judge that the arbitrator had exceeded his powers in attempting to decide that Jafri Begam was the owner of 5 biswas in Kukargoti, but came to the conclusion that the gift of this property to Jafri Begam had not been established, and that Ludhai had been purchased from the profits of Ashiq Ali's estate. They also held that the clause in the award in restraint of partition was invalid, and that Tasadduq Husain could be removed from the post of manager. In the result the plaintiff obtained a decree for everything he claimed with costs.

From this judgment the present appeal is brought by Jafri Begam and her husband, Tasadduq Husain.

As regards the defence that the suit is barred by limitation of time, their Lordships are of opinion that the suit is based on the award and is not a suit to set it aside. No doubt the plaintiff contends that the 5th clause prohibiting partition is invalid or at any rate is not binding upon him; and that the arbitrator having made his award was then *functus officio* and had no jurisdiction to make the entry which he afterwards did make respecting the 5 biswa share of Kukargoti. But these contentions do not bring the case within Article 91, Schedule II of the Indian Limitation Act, 1877. Under that Act a suit to cancel or set aside an award must be brought within three years from the time when the facts entitling the plaintiff to have it cancelled or set aside became known to him. It is obvious that this limitation has no application to the controversy respecting the 5 biswas of Kukargoti. A plaintiff who contends that an arbitrator has no power to make an unauthorized addition to an award already made and sought to be enforced by him is not in any sense seeking to cancel or set aside the award. Neither does the contention that the 5th clause is *ultra vires* and invalid bring the case within the Act. The plaintiff disputes the legal effect of that particular clause, but does not seek to cancel or set aside the award. On the contrary he seeks to enforce it so far as it is operative in point of law.

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stipend after the deduction therefrom of Government revenue" The Deputy Commissioner, in December 1865, adopted the award as to the succession to the estate, and as to the maintenance, but not the portion of the award which related to matters not referred to arbitration His decision was affirmed by the Commissioner of Fyzabad in 1866, and by the Judicial Commissioner of Oudh in 1867. In 1883 the respondents, who had then attained their majority, claimed arrears of maintenance from the then Deputy Commissioner representing the Court of Wards (in whose charge the estate had been since 1865), and the Deputy Commissioner, whilst allowing the claim, proposed that in future, in lieu of the cash allowance, a village should be assigned to each of the respondents for their maintenance [3.5] This proposal was sanctioned by the Chief Commissioner and by the Lieutenant-Governor who ordered that villages yielding a profit of Rs 600 and Rs. 400 per annum, respectively, after payment of the Government jama, should be given to the respondents, who were accordingly put into possession of the villages, though no deeds of conveyance were executed as directed by the Deputy Commissioner In suits instituted by the appellant on attaining his majority in 1886 to recover the villages with mesne profits, the defence was that the suits were not maintainable with reference to section 172 of the Oudh Land Revenue Act (XVII of 1876,) which enacts that "the Court of Wards shall have power to lease or farm any part of the immoveable property under its charge and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors"

[illegible]

and the finding of the award on the subject was not within the reference to arbitration and was not adopted by the Court.

Nor was the allotment justified under section 172 of Act XVII of 1876. It was not for the benefit of the estate, and there was nothing to show that the question of benefit to the appellant or his estate had been considered in the allotment of the villages to the respondents, for which the only apparent ground was the *ultra vires* award.

[illegible]

[Ref. 36 Cal. 675=9 C L J 523; 13 C. L. J 277=3 I C 377, 62 I C 1 8, Dist. 6 O. L. J. 727 (power to alienate ward's property) Rel 19 I. C 311= 21 O. L. J. 218]

CONSOLIDATED appeals from the judgment and decree (19th May, 1898) of the Court of the Judicial Commissioner of Oudh reversing the decree of the Additional Civil Judge of Lucknow (13th July, 1895) and dismissing two suits brought by the appellant.

Raja Riasat Ali Khan, taluqdar of Utraula in Oudh, died in 1865 leaving him surviving a widow, Mussammat Dan Bibi Muhammad Mumtaz Ali Khan, the appellant, is the son of Riasat Ali Khan by Dan Bibi, and was born on the 6th of October 1865 after his father's death. On the Raja's death, his widow, Dan Bibi, obtained possession of the estate, but on the 23rd of August, 1865, a suit was instituted in the Court of the Deputy Commissioner of Gonda against her by Mussammat Madaro Bibi as guardian of her two sons, Farhat Ali Khan and Sakhawat Ali Khan, the respondents, claiming the estate for them as legitimate sons of Riasat Ali, on the allegation that the Raja had married her. In that litigation a reference was made on the 27th of October, 1865, to arbitrators to [396] decide the following issue: "whether the son born of Dan Bibi can be the sole heir to the entire property left, under the custom of the country or Farhat Ali Khan and Sakhawat Ali Khan, the two sons born

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September, 1885, Tasadduq Husain had means of his own sufficient to enable him to pay Rs. 4,000, and in the absence of any statement by him of the application of the revenues of Ashiq Ali's estate, they held the Ludhai share to belong to that estate. Their Lordships consider the evidence insufficient to come to any satisfactory decision on this point one way or the other; and they are of opinion that its decision should be postponed until the accounts are taken.

The result, therefore, will be that they will humbly advise His Majesty that the decree appealed from, should be varied by inserting a declaration that if on taking the accounts under the decree it shall appear that the whole or any part of the Ludhai share was paid for by the defendant, Tasadduq Husain, out of his own separate property, then such share or such part thereof as may be found to have been so paid for is to be treated as his separate property.

Their Lordships are of opinion that in substance the appeal has failed, and that notwithstanding the modification in the [394] decree as regards the share of Ludhai, the costs of the appeal must be borne by the appellants.

Decree modified.

Solicitors for the appellants—Messrs. *Barrow, Rogers and Nevill.*
Solicitors for the respondent—Messrs. *T. L. Wilson and Co.*

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch and Sir Ford North.

MUHAMMAD MUMTAZ ALI KHAN (*Plaintiff*) *v.* FARHAT ALI KHAN (*Defendant*) AND MUHAMMAD MUMTAZ ALI KHAN (*Plaintiff*) *v.* SAKHAWAT ALI KHAN (*Defendant*).
[1st May, and 13th June, 1901.]

[*Appeal from the Court of the Judicial Commissioner of Oudh.*]

Act No. XVII of 1876 (*Oudh Land Revenue Act*), *section* 172—*Power of Court of Wards—Assignment by Court of Wards of villages without consideration—Award in excess of question referred to arbitration—Right of suit by minor on attaining majority to recover villages* (*part of his estate*) *so assigned.*

In a suit in 1865 in the Court of the Deputy Commissioner of Gonda, between persons representing the appellant and respondents (then all minors) in which those representing the latter claimed title on their behalf to succeed to an estate, an issue was referred to arbitrators, "whether the appellant could be the sole heir to the estate under the custom of the country, or whether respondents could also be successors to it; if they can, what is the portion to which they would be entitled?" The arbitration resulted in the right of succession to the whole estate being awarded to the appellant. The award, however, gave the respondents maintenance of Rs. 30 and Rs. 20 a month, respectively, and then, going beyond the terms of the reference, awarded that "the monthly stipend should continue for six years, after which time, when the children became capable of receiving education in a Government school, the Government would then propose what they should get for their support; that when both children are grown up and attain the age of discretion, they shall have villages separated for them according to their

are six years of age, after which, when they are fit to be educated, a suitable allow retion of Government. (vii) when the children, up, the allowance of Rs 10 per mensem to Bibi , and the two lads should receive as subsistence the lease of some village, only paying the Government *jama* (ix) detail of Rs 60, subsistence —Bibi Madaro Rs 10, Farhat Ali Rs 30, Sakhawat Ali Rs 20 This decision was founded on the award of arbitrators, who were the taluqdars of Kamiar and Singha Chanda, and a third gentleman But for some reason or other, which I have been unable to discover, this arrangement has not been observed and the deducting a be still enti to me for the early payment of such arrears Their claim appears to me to be perfectly correct, and with your sanction I propose to make the payment at an early date I also pro pose, in accordance with the decree of 1866, to put an end to the cash allowances for choose for Rs 500 or ng Rs 350 ie was the lawfully married wife of the late taluqdar by *nikah* ceremony, and it is most un becoming and inequitable that her sons should be excluded from their rights as decreed by the Civil Court '

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The Lieutenant Governer and Chief Commissioner, on the 7th of July, 1883, sanctioned these proposals and ordered that Farhat Ali and Sakhawat Ali " be given in lieu of the present monthly allowance two villages yielding a profit of Rs 600 and Rs 400 per annum, respectively, after the payment of the Government jama "

Therefore on the 6th of August 1883 the Deputy Commissioner passed the following order in the matter —

" The tahsildar of Utraula should be informed of the issue of this order that a village, the income of which would amount to Rs 600, is to be given to Farhat Ali Khan instead of maintenance allowance, and a village, the income whereof would be Rs 400, is to be given for maintenance to Sakhawat Ali Khan As to Govern ment revenue, I think it would be proper to keep the taluqdar responsible It appears from the perusal of the Annual Report that the above mentioned villages are nearly of the same income there might be others also he should consult the Manager, summon the maintenance holders, and, after hearing them should soon come to the conclusion and report for sanction The delivery of possession will be made from the beginning of 1291 Fasli, and the cash payment of maintenance allowance has been stopped from the 1st of July It should be known to him that in the case of there being no such village, any two villages, the total income of which would be equal to the same amount, can be given, but care should be taken that no village is to be given which is apparently capable of yielding much profit the village to be bestowed must be of the nature as not to yield much profit

The manager of the estate, on the 19th of August, 1883, sug gested the villages of Kasmara, yielding an income of about Rs 640 and Pura Mirza, yielding about Rs 400 as being suitable for the purpose And on the 27th of November, 1883, the Deputy Commis sioner sanctioned the proposal and ordered " that delivery of posses sion ' of the two villages be immediately made in accordance there with ' He also directed that " conveyance deeds ' should be executed No deeds were ever executed, but possession of the villages was given to Farhat Ali and Sakhawat Ali, and they had since been receiving the incomes from them Muhammad Mumtaz Ali Khan attained his majo rity in October, 1886, and the estate was made over to him by the Court of Wards He refused to recognize the possession of Farhat Ali [399] and Sakhawat Ali, but offered to allow them maintenance of Rs 30 and Rs 20 per month, as has been decreed to them respectively On their refusal to give up possession of the villages the plaintiff

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of Madaro Bibi, can also be successors to the property? If they can, what is the portion to which they and Madaro Bibi would be entitled?

An award, which however went beyond the terms of the reference, was made on the 18th of November 1865, the arbitrators deciding—

"That the son born of Dan Bibi, and Dan Bibi herself, are, according to the custom of the country, proprietors and heirs of the entire estate and property, moveable and immoveable, left by Raja Riasat Ali Khan, deceased; that Farhat Ali Khan and Sakhawat Ali Khan, born of Madaro Bibi, and Madaro Bibi herself, cannot share in the inheritance; that it is proper that Madaro Bibi should receive Rs. 60 per month in cash from Dan Bibi for maintenance and support during her life, on the proviso of her keeping herself in the house with honour and good conduct; that the monthly stipend just proposed for the maintenance and support of children should continue for six years, after which time, when the children became capable of receiving education in a Government school, the Government would then propose what they should get for their support; that when both these children are grown up and attain the age of discretion they shall have villages separated for them, according to their stipend, after deduction therefrom of Government revenue; that the monthly stipend will be given as follows:—Rs. 10 per month to Madaro Bibi, Rs. 30 per month to Farhat Ali Khan, and Rs. 20 per month to Sakhawat Ali Khan."

The case came on again before Major Ross, the Deputy Commissioner of Gonda, and he, on the 21st of December 1865, dismissed the claim to the estate, but decreed maintenance to Madaro Bibi and her two sons, Farhat Ali and Sakhawat Ali, in terms of the award, namely, Madaro Bibi, Rs. 10, Farhat Ali Rs. 30 and Sakhawat Ali, Rs. 20. His decree was on appeal confirmed by Mr. Reid, the Commissioner of Fyzabad, on the 11th of August 1866. He said—

"The lower Court has rejected so much of the award as related to matters not referred to arbitration. The proper course would have been to remit the award to the arbitrators; but the irregularity affected neither the merits of the case nor the jurisdiction of the Court. The order of the lower Court is affirmed and the appeal dismissed."

There was no reference in his judgment to the allotment of any villages to Farhat and Sakhawat Ali. Madaro Bibi preferred a further appeal to Mr. Tucker, the Judicial Commissioner of [397] Oudh, who, on the 2nd of January, 1867, rejected it, affirming the decision of the Commissioner.

The estate had been since the birth of Muhammad Mumtaz Ali Khan under the management of the Court of Wards and payments were made by way of maintenance, but not of the precise amounts decreed, the result being that in 1883 Farhat Ali and Sakhawat Ali claimed from the then Deputy Commissioner, Mr. White, as representing the Court of Wards, a sum of Rs. 3,271 as arrears due to them. On the 25th of May the Deputy Commissioner asked for orders and wrote as follows:—

"I have the honour to submit to you a proposal to pay to Farhat Ali and Sakhawat Ali, sons of the late taluqdar of Utraula, the sum of Rs. 3,271, arrears of maintenance, and to allot to each of them, instead of the cash allowances they have hitherto received, a village apiece as *guzara*. You will perhaps remember the circumstances of the case. On the death of the late taluqdar, one Bibi Madaro sued the Rani, Dan Bibi, for the estate, on the ground that having legitimate male issue by the taluqdar, and Musammat Dan Bibi being childless, she was entitled to the possession. The latter was, however, successful in asserting herself to be with child, and in due course the present taluqdar, Raja Mumtaz Ali Khan, was born. The result of the litigation was that the Rani's boy was declared to be the heir and successor to the *taluqa*, and that Bibi Madaro was declared to be entitled to suitable maintenance. I extract as follows from the decision of Mr. Reid, Commissioner, dated the 19th of March 1866:—'(*iv.*) As regards the allowances, so much as refers to the two boys, namely, Farhat Ali and Sakhawat Ali, should be paid until they

estate and its owner that a reasonable and suitable provision should be made for them in accordance with the custom of the family

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The plaintiff appealed in both suits, and the appeals were consolidated

Mr *Leslie DeGruyther* for the appellant The Court of Wards in assigning the villages, as they have done, to the respondents have exceeded their powers under section 172 of Act No XVII of 1876 Under section 161 of the Act the Court of Wards consisted of a combination of the Commissioner and the Deputy Commissioner, and not only one of them The words "and to do all such other acts, &c in section 172, mean all such other acts as are for the benefit of the property, they do not enable the Court of Wards to give away the property to the detriment of the minor and the estate In exercising discretion as to what is beneficial there must be some conscientious act of judgment on the part of the Court of Wards, and anything done without such exercise of judgment is invalid The case of *Ram Autar* v *Muhammad Mumtaz Ali* (1) was referred to

[401] The respondents did not appear

On the 13th of June, 1901, the judgment of their Lordships was delivered by SIR FORD NORTH —

The appellant in these consolidated appeals is the taluqdar of Utraula, or Bilaspur, a posthumous son of the Raja Riasat Ali Khan, who died in the year 1865 Before the appellant was born Musammat Madaro, as guardian of her two sons, the respondents, took proceedings on their behalf to recover the estate of the late Raja, alleging that her sons were his legitimate children After the appellant appeared upon the scene an agreement was drawn up, with the consent of the Court, by which it was left to arbitrators to decide an issue whether the appellant could be the sole heir to the late Raja s entire property under the custom of the country, or whether the respondents could also be successors to it, and, if so, what was the portion to which they and their mother would be entitled?

The arbitrators made an award, dated the 17th of December 1865, whereby they found that the appellant and his mother, Dan Bibi, were according to the custom of the country proprietors and heirs of the entire estate and property of the late Raja, and the respondents and their mother, Bibi Madaro, could not share in the inheritance, that the respondents mother should receive Rs 60 per month for maintenance, to be allocated thus —

Rs 10 per month to Bibi Madaro

Rs 30 per month to Farhat Ali Khan, and

Rs 20 per month to Sakhawat Ali Khan,

and that such payment should continue for six years, after which time the Government should propose what they should have for their support And the arbitrators also awarded that when both the respondents were grown up and attained the age of discretion they should have villages separated for them according to their stipend, after deduction therefrom of the Government revenue

(1) (1897) L R. 24 I A 107 I L R 24 Cal 853

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brought the suit, out of which these appeals arose, to recover possession of the two villages with mesne profits. The plaint stated that the villages were of greater value than had been sanctioned. The income of Kasmara village being about Rs. 900 per annum and of Pura Mirza about Rs. 600 per annum; that the benefit to him has not been considered in the bestowal of them on the defendants; that neither the Deputy Commissioner nor the Local Government had any power to give the villages in lieu of Rs. 30 and Rs. 20 a month respectively; and that their action gave no title in the villages to the defendants.

The defendants filed written statements in which they contested the plaintiff's allegations. The following paragraph of the written statements raised the main plea in the cases, and the only material question in this appeal—

"The defendant is the legitimate son of the real proprietor, Raja Riasat Ali Khan. The arrangement under which the Deputy Commissioner of Gonda, as Superintendent of the Court of Wards, granted to defendant the village in dispute (then yielding about Rs. 600 per annum) in lieu of the proper maintenance allowance, was in accordance with the arbitration award and decree of 1866, and was made in good faith, and for the benefit of the estate, and when the Local Government, as head of the Court of Wards, has confirmed this arrangement, the plaintiff has no right to institute such a suit, *vide* section 172 of Act XVII of 1876."

The suits were tried together by consent.

For the plaintiff a qabuliat was put in (dated the 18th of June 1887) which showed that the defendant, Farhat Ali, had on that date leased village Kasmara for Rs. 800 and odd per annum.

The defendant, Farhat Ali, stated in his evidence that when he and the defendant, Sakhawat, "applied to get our money, we told the Deputy Commissioner, on his inquiry, that we were going to sue for the maintenance on the basis of the *faisla panchayat*, dated the 21st of December, 1865. The Deputy Commissioner told us it was no use suing. He would give villages in lieu of maintenance, according to the award of the *panchayat*."

The Additional Civil Judge of Lucknow, on the 18th of July, 1895, decided the suits in favour of the plaintiff and gave him [400] decrees for possession of the villages with mesne profits to be assessed in execution.

On appeal, the Judicial Commissioners, on the 9th of May 1898, reversed that decision and dismissed the suits with costs.

The material portion of their judgment was as follows :—

"The only question to be decided in these appeals is whether or not the Deputy Commissioner was acting within his powers as representing the Court of Wards in making over the villages to the defendants. The defendants had certainly a claim to maintenance when the villages were made over to them, and it was for the benefit of the minor that such claims should be settled. Section 172 of Act XVII of 1876 provided that 'the Court of Wards shall have power to give such leases or farms of the whole or parts of the immoveable property under its charge, and to mortgage or sell any part of such property, and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors.' If the Court of Wards, therefore, honestly thought it was for the advantage of the estate that the defendant's claims should be settled by making over the villages to them, the Deputy Commissioner acted within his authority when he did so. Had there been no award or decree,—as the estate is one of considerable importance and the defendants, as brothers of the taluqdar, had a claim on him for maintenance,—I do not think it could be held that the grant of the villages to them, in lieu of their claims, was not proper, or that it was not for the advantage of the

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generation, in their possession and occupation The same order provided for payment of the arrears of maintenance, and immediate delivery of possession of the villages This was done, and the respondents have ever since been in receipt of the income therefrom, and from a qabuliat dated the 18th of June 1887 it appears that Farhat Ali Khan succeeded in leasing the mauza Kasmara for five years at Rs 800 a year, and the income has since further increased The conveyances directed have not yet been executed but this cannot prejudice the rights of the parties

In October 1886 the appellant attained 21, and in 1889 he commenced an action against each of the respondents to recover possession of the village allotted to him The two actions were tried together by consent, and the appeals have been consolidated, so the existence of separate actions need not again be referred to The principal question in the Courts below was, and the only question here is, whether the allotment of the two villages to the respondents was within the powers of the Deputy Commissioner or the Court of Wards, and is binding upon the appellant The Civil Judge at Lucknow, on the 18th of July 1895, decided in his favour, *viz*, that he was entitled to recover possession, and to mesne profits, but this decree was on the 19th of May 1898 reversed in the Court of the Judicial Commissioner of Oudh, where the appellant's claim was dismissed

[404] The Court of Wards has of course all the ordinary powers of a guardian over a ward's property, supplemented by certain additional powers given by statute By section 161 of the Oudh Land Revenue Act, 1876, it is provided that the Deputy Commissioners shall, subject to the control of the Commissioner and the Chief Commissioner, have the powers of a Court of Wards within their respective districts, for the superintendence of the persons and property of all persons who may become entitled as proprietors or under proprietors, and who are disqualified for the management of their own estates, within which class minors are, by section 162, expressly included Section 166 provides that the jurisdiction of the Court of Wards shall refer to the care and education of and management of the property, of persons subject thereto, and section 172 provides that "The Court "of Wards shall have power to give such leases or farms of the whole or "parts of the immoveable property under its charge and to mortgage or "sell any part of such property and to do all such other acts as it may "judge to be most for the benefit of the property, and the advantage of "the disqualified proprietors"

Their Lordships are of opinion that the allotment of the two vallages to the respondents cannot be supported It is not authorised by any of the orders of Court made in the years 1865, 1866 and 1867, and the finding of the award on the subject was not within the reference to arbitration and was not adopted by the Court It is not within the power of a guardian to make a voluntary alienation in perpetuity of his ward's real estate and it is open to the ward on attaining 21 to challenge the validity of such a transaction The letter of the 5th of May, 1883 upon which the order of the 7th of July was based, contains a very misleading and incorrect account of what had taken place, and even that letter only proposed to provide the respondents with "subsistence" or "maintenance", not to hand over to them part of the appellant's real estate that should remain theirs from generation to generation Nor can the assignment of the villages to the respondents to be justified under section 172 of

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On the 21st of December, 1865, the action came on again before Major Ross, the Deputy Commissioner of Gonda; and he, stating that the award appeared to him fair and equitable, dismissed the claim for the estate, but decreed maintenance to Bibi Madaro and the respondents on the terms of the award, *viz.*, Bibi Madaro Rs. 10, Farhat Ali Rs. 30, and Sakhawat Ali Rs. 20, total Rs. 60. [402] This order was affirmed by the Commissioner of the Fyzabad Division on the 11th of August 1866, and by the Judicial Commissioner, of Oudh on the 2nd of January 1867.

It will be observed that the award went beyond the reference, so far as relates to the allotment of two villages to the respondents. That portion of the award was not dealt with by the order of the 21st of December 1865; and the Commissioner, on the appeal, pointed out that the lower Court had rejected so much of the award as related to matters not referred to arbitration. This, however, cannot apply to the allowance of Rs. 60 per month for maintenance, which was expressly decreed by the order of the 21st of December 1865.

By reason of the infancy of the appellant his estates were from the first under the management of the Court of Wards; and on the 25th of May 1883, while he was still a minor, but after the death of Bibi Madaro, and the attainment of 21 by both the respondents, the then Deputy Commissioner of Gonda, Mr. White, wrote to the Commissioner of the Fyzabad Division, pointing out that certain arrears of maintenance were due to the respondents. He also proposed to put an end to the cash allowances they had theretofore received, and to assign to them each a village for maintenance; choosing for the elder, Farhat Ali, one which would give him Rs. 500 or 600 per annum, and for the younger, Sakhawat Ali, a village producing Rs. 350 or 400 per annum. The writer stated that this would be in accordance with the decree of Mr. Reid, the Commissioner, dated the 19th of March 1866, an extract from which he professed to give. There is not, however, any trace of such decision to be found; and the passage quoted is from the award itself. Mr. Reid was the Commissioner of the Fyzabad Division who, on the 11th of August 1866, affirmed the decision of Major Ross of the 21st of December 1865; and the reference to his reasons and his formal judgment (both set out in the record) show that the allotment of villages to the repondents was not referred to.

By a Government order dated the 7th of July 1883 the sanction of the Lieutenant-Governor and Chief Commissioner was given to the proposal that the respondents should be paid the arrears of maintenance due to them, and that they should be given [403] in lieu of the present monthly allowance two villages yielding a profit of Rs. 600 and 400 per annum, respectively, after the payment of the Government jama.

Further proceedings ensued before the Deputy Commissioner, which resulted in the village Kasmara, the income of which was about Rs. 640, being allotted to Farhat Ali Khan, and the village Pura Mirza, the income of which was about Rs. 400, to Sakhawat Ali Khan. The appellant's liability for the duty due to the Government in respect of those villages was, however, kept alive. By an order of the Deputy Commissioner, dated the 27th of November 1883, conveyances were directed which were to contain provisions that the respondents were always to remain well-wishers and obedient to the head of the family; and so long as they did not fail in their duty the property would remain, generation after

generation, in their possession and occupation. The same order provided for payment of the arrears of maintenance, and immediate delivery of possession of the villages. This was done, and the respondents have ever since been in receipt of the income therefrom; and from a qabuliat dated the 18th of June 1887 it appears that Farhat Ali Khan succeeded in leasing the mauza Kasmara for five years at Rs. 800 a year, and the income has since further increased. The conveyances directed have not yet been executed: but this cannot prejudice the rights of the parties.

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to hearing to explain the the will give rise to any not bound to cross examine the witnesses which they could not have done without permission of the Court but were perfectly justified in waiting until evidence in support of the will was produced at the trial

[Fol 34 Mad 329=21 M L J 445=9 I C 342 (onus suit to set aside adoption) Ref 59 I C 535]

CONSOLIDATED appeals from the judgment and decrees (5th March, 1898) of the Judicial Commissioners of Oudh varying the judgment and decrees (26th November, 1894) of the Subordinate Judge of Unao, by which three suits, brought by the three respondents, or by persons whom they represented, were partly decreed and partly dismissed

The facts which led to the litigation out of which the appeals arose, are that one Ram Sahai, a taluqdar of Oudh, in possession of very considerable separate estates, both taluqdari and non taluqdari, died on the 5th of July 1890, leaving a widow, Krishna Dei, and two sisters in law, Ram Dei and Sukh Dei (the present appellants) widows of his deceased brothers Sheo Prasad and Ram Prasad

In the course of mutation proceedings on Ram Sahai's death Krishna Dei filed a petition, dated the 30th of July 1890, in which she alleged that her late husband had left a will, executed on the 4th of June, 1890, and registered on the 27th of June, 1890, under which she was constituted his heir and owner of all his property, and prayed to have mutation of names effected in respect of the property into her own name On the 12th of September, 1890, Krishna Dei, through her vakil in the same proceedings, stated that her husband had made a will on the 26th of July, 1876, under which she was also the sole heir and owner of all his property and claimed to have it entered in her own name An order for such mutation of names was made by the Deputy Commissioner on the 25th of October, 1890 Subsequently, on the 10th of Decem [407] ber 1890, Krishna Dei obtained, on the strength of the will of 1890, a certificate to collect debts due to the deceased

Thereupon the three plaintiffs Ram Charan Bisheshar Prasad and Madho Prasad, the next reversionary heirs of Ram Sahai, instituted three separate suits, to each of which they made Krishna Dei, Ram Dei and Sukh Dei defendants, for a declaration that Ram Sahai had died intestate, and that the interest of Krishna Dei in his estate was only that of a Hindu widow Madho Prasad afterwards died and was represented by his son Kedar Nath, who, however, being a more remote reversioner than the other respondents, ceased to have any substantial interest in the result of the appeal Ram Charan and Bisheshar [illegible] impeached the alleged will of 1890 as not having been executed by [illegible] Sahai, or, if in fact executed, as being invalid (having been made [illegible] three months of his death) under the provisions of the Oudh [illegible] 1869, at all events with respect to the taluqdari property [illegible] Prasad also impeached the will of 1876 as not having been [illegible] Ram Sahai, or, if executed, as having been revoked by him, [illegible] being invalid under the Oudh Estates Act

Krishna Dei in her written statement denied tha[illegible] died intestate, or that he was a taluqdar, or that the [illegible]

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the Act. Clearly it cannot, unless it comes within the final words, that the Court may do all such acts as it may judge to be most for the benefit of the property and the advantage of the infant. It was [405] not for the advantage of the appellant, or the benefit of his property, that two considerable portions of his estate should be disposed of without consideration. And there is not any trace throughout the proceedings of any thought having been taken as to what was beneficial to him or his estate. The respondent, Farhat Ali, gave evidence that he and his brother were going to sue for maintenance on the basis of the award of December, 1865, and that the Deputy Commissioner replied that it was no use suing, as he would give them villages in lieu of maintenance according to that award. So that this *ultra vires* award was apparently the sole ground for the appropriation of these villages, if that evidence can be trusted.

No question was raised here or in the Courts below as to any right of the respondents to maintenance out of the taluqdari estate independently of their claims to the absolute ownership of the two villages, and their Lordships abstain from expressing any opinion upon it. If any such right exists, effect can be given to it by way of set-off against the liability in the execution proceedings in respect of mesne profits, and, as regards maintenance after the delivery of possession, by a suit.

Their Lordships will therefore humbly advise His Majesty that the judgment of the 19th of May, 1898, should be reversed, and that of the 18th of July, 1895, should be restored, and that the respondents should be ordered to pay the costs of the appeal to the Judicial Commissioner. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant.—Messrs. *T. L. Wilson and Co.*

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PRESENT :

Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch and Sir Ford North.

SUKH DEI (*Defendant*) *v.* KEDAR NATH, REPRESENTATIVE OF MADHO PRASAD (*Plaintiff*); SUKH DEI (*Defendant*) *v.* RAM CHARAN (*Plaintiff*) AND SUKH DEI (*Defendant*) *v.* BISHESHAR PRASAD (*Plaintiff*).

[3rd May and 22nd June, 1901.]

[*On Appeal from the Court of the Judicial Commissioner of Oudh.*]

Will—Evidence and proof of will—Burden of proof—Suit for declaration that will is not genuine—Omission by party impeaching will to give evidence or cross-examine witnesses.

The defendants (widow and sister-in-law of a deceased taluqdar) set up a will under which they alleged they took all the property of the testator [406] absolutely, whereupon the plaintiffs, the next reversioners, sued for a declaration that the will was not genuine and that the alleged testator died intestate.

Held by the Judicial Committee that the onus was on the defendants, who set it up, to prove that the will was genuine, and not on the plaintiffs, who impeached it, to show it was a forgery. The fact that the plaintiffs omitted

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[409] view to ascertain how the original was lost, took down the statements of Sheoraj Bali, the scribe, and of Beni Prasad, the marginal witnesses of the document in question It was for the plaintiff, then, to ask the permission of the Court to be allowed to inquire into the circumstances under which the will in question was executed, or, having produced them as adverse witnesses, to have put cross questions to them for the purpose of elucidation The plaintiff having called it a false document, it was for him to elicit the circumstances how it was brought about, to enable the Court to draw its inferences from the facts disclosed, to enquire about them from Beni Prasad and Sheoraj Bali

"The finding of the Court, therefore, is that neither the plaintiff has proved the will in question to be a forged one, nor the Court, for the reasons given above, has any suspicion of this kind Its registration is no doubt suspicious, but being a will, registration is not compulsory for it

"For the above reasons, the Court cannot hold that the deceased has died intestate, nor can it hold the will in question to be void, or that the defendant Sukh Dei has no title whatever by virtue of it This finding of the Court about the will refers to the estate other than the taluqdari estate As to the taluqdari estate the said will is no doubt void, as it was not executed three months before the death of the deceased, as required by S 13, Taluqdari Act The said will does not create any title for the defendant Sukh Dei as far as the taluqdari estate is concerned, but it remains operative as to the estate other than that of taluqdari, *and is not* proved to be spurious"

From this decision separate appeals were filed by the plaintiffs, and by Krishna Dei and Ram Dei To all of them Sukh Dei was made a respondent Krishna Dei died in 1897 and was represented on the record by her brother Gopal Das

The Judicial Commissioners, on the 5th of March, 1898, gave judgment in all the appeals, which were heard together

They affirmed the finding of the Subordinate Judge that the will of 1876 was not genuine. As to the will of 1890, they reversed the decision of the Subordinate Judge and found that the will was a forgery They were of opinion that the onus had been wrongly placed on the plaintiff to show that the will was a forgery and that it lay on the defendants to prove the will to be genuine, which they had not done The result was that they dismissed the appeals of the defendants Krishna Dei and Ram Dei, allowed the plaintiff s appeals, and, in modification of the decree of the Subordinate Judge, decreed the suits with costs On the issue respecting the will of 1890, they observed—

"On the question of the genuineness of the will of the 4th of June 1890, the Subordinate Judge placed the *onus* of proof that it was forged on the plaintiffs, and decided it against them I am of opinion that the lower Court erred in this respect

[410] "The plaintiff sued as reversioners, and challenged the genuineness and validity of the will Two of the defendants abandoned the will entirely The third defendant put in no appearance The plaintiffs called for the will from the defendant, it was not produced, nor was satisfactory evidence of its loss furnished It was shown that the defendants might have reasons for concealing it No witness to its execution was produced by any defendant, and the plaintiffs showed that the registration of the will was both irregular, and accompanied by suspicious circumstances I do not see that the plaintiffs could reasonably be expected to prove more than these facts

"The plaintiffs sought declarations that they were entitled to succeed Ram Sahai on the death of Krishna Dei They are undoubtedly the nearest reversioners It was for those who sought to set aside that right by propounding a certain will or wills to prove to the Court the genuineness of these wills. There has been no attempt either to plead or prove the will of the 4th of June 1890, and I find that the will is not genuine"

From this decision Sukh Dei alone appealed She brought a separate appeal against each of the plaintiffs and the appeals were consolidated.

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governed him or his property; set up the two wills, but alleged that the will of 1890 was not necessary to establish her rights; denied any title in the plaintiffs to any interest in the estate; claimed to be entitled to the whole of the estate absolutely; alleged the adoption by her of a son in 1897; gave up entirely the will of 1890 as "a useless document," and as being "inoperative, null and void;" and contended that even if the will of 1876 was inoperative as to the taluqdari property, it was valid and effectual as to the non-taluqdari property.

The written statements of Ram Dei in effect supported those of Krishna Dei. Sukh Dei, though served with summonses, did not file a written statement, nor did she appear in the suits, which, so far as she was concerned, were heard *ex parte.*

The plaintiffs filed replications to those written statements in which, with regard to Krishna Dei and Ram Dei, they sought judgment against them in respect of the will of 1890 on their [408] admission in the pleadings. With regard to Sukh Dei they stated that "the plaintiffs will prove the spurious character of the said document and the circumstances attending its preparation and registration as against Sukh Dei, if necessary."

The three suits were tried together.

The will of 1890 purported to give all Ram Sahai's property to Krishna Dei, with powers of alienation over it for an endowment and for other purposes, and on her death it was bequeathed to Ram Dei and Sukh Dei with life powers of alienation. The original will was never produced in Court in the suits; when its production was called for it was stated to have been lost: no witness was called to prove its execution. Some persons were called who said they had seen it. It was not registered at Unao, where there was a registry office and where it should have been registered, but it was registered by the Registrar at Harha, who was sent for that purpose. Some evidence was given of the intention of Ram Sahai to make such a will. Mr. Hoey, the then Assistant Commissioner, stated that from what Ram Sahai had told him, he inferred it was Ram Sahai's intention to make a will, and that he gathered the impression it would be one in favour of his wife, giving her powers to endow some charitable institution. This was done by Krishna Dei purporting to act under the alleged will; for on the 13th of October, 1892, she executed a deed of endowment of a portion of the property and placed the management of the endowment and the control of the funds in the hands of (amongst others) Beni Prasad and Sheoraj Bali, two servants identified with the making of the will.

The Subordinate Judge, on the 26th of November, 1894, gave judgment in the three suits. He found that the will of 1876 was a forgery; as to the will of 1890 he found that there was no evidence of its execution; that the original had been suppressed; and that other facts creating grave suspicion had been proved; but he placed the onus on the plaintiffs to show that the will was not genuine, and as they did not do so, he held that the will was established except as to the taluqdari estate. On this point he observed—

"Besides the above facts, the pretermission of the plaintiff is an evident ground for the document in question being genuine. While he is prepared to call it a forged document, he does not dare to prove his assertions, nor does he intend to do so. On the day the issues were framed, the Court, with a

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Mr *Misra* was heard in reply

On the 22nd of June the judgment of their Lordships was delivered by LORD MACNAGHTEN —

This is a consolidate appeal from the decision of the Court of the Judicial Commissioner of Oudh setting aside three decrees of the Subordinate Judge of Unao

The appeal comes before their Lordships under somewhat singular circumstances

[412] One Babu Ram Sahai, a wealthy taluqdar owning non taluqdari as well as taluqdari property, died on the 5th of July 1890 He left a widow, Krishna Dei, who is now dead, and two sisters in law, Ram Dei and the appellant Sukh Dei, widows of two deceased brothers

On his death his widow Krishna Dei took possession of his entire estate

In the course of mutation proceedings consequent on the death of Ram Sahai, Krishna Dei filed a petition alleging that her husband had left a will, dated the 4th of June 1890, and registered on the 27th of that month, under which she was solely entitled to all her husband s estate Afterwards through her vakil she stated that her husband had on the 26th of July 1876 made a will in her favour and that she as owner and possessor of the said property under that will claimed to have the property entered in her name An order in accordance with her claim was made by the Deputy Commissioner on the 25th of October 1890

Thereupon three persons, who claimed to be the reversionary heirs of Ram Sahai, and who were or are represented by the three respondents, brought three suits to establish their title against Krishna Dei, Ram Dei and the appellant Sukh Dei, alleging that Ram Sahai had died intestate.

Krishna Dei, in her written statement, denied that Ram Sahai died intestate She set up both wills, but she rested her title on the alleged will of 1876 and declared that the will of 1890 was a "useless" document "inoperative, null and void" The written statement of Ram Dei in effect supported the statement of Krishna Dei The appellant Sukh Dei filed no written statement Against her the suits proceeded *ex parte*

The plaintiffs in their replication impeached the alleged will of 1876 as a forgery They claimed judgment against Krishna Dei and Ram Dei as to the alleged will of 1890 on their own admissions in the pleadings As against the appellant Sukh Dei in regard to the alleged will of the 4th of June 1890 they asserted that they would prove 'the spurious character of the said document" and the circumstances attending its 'preparation and registration if necessary

[413] In the result the Subordinate Judge found that the alleged will of 1876 was a forgery But as regards the alleged will of 1890 which was said to have been lost, he came to a different conclusion He held that that will was established, not upon the ground that the defendant or any of them had proved its due execution, for no proof of that sort was tendered at the trial, but upon the ground that the plaintiffs had declared that they would prove it to be spurious if necessary and that they had produced no evidence on the point While they were "prepared to call it a forged document" they 'did not dare" he said "to

1901 MAY 8. JUNE 22.

PRIVY COUNCIL.

23 A. 408=3 Bom. L. R. 704=5 C. W. N. 895=28 I. A. 186=8 Sar. 109.

The only question on this appeal was as to the genuineness or otherwise of the will of the 4th of June, 1890.

The appeal was heard on 1st May, 1901.

Mr. *Asquith, K. C.* and Mr. *T. S. Misra* for the appellant.

Mr. *J. H. A. Branson* for the respondent Bisheshar Prasad.

Mr. *Leslie DeGruyther* for the respondents Ram Charan and Kedar Nath.

Mr. *Asquith, K. C.* contended that the evidence in favour of the will, namely, as to the expressed intention of the testator to make a will, as to its execution and attestation, its registration, the admission by the testator of its execution certified to by the registrar, the mutation of names effected, and the certificate to collect debts granted to Krishna Dei on the strength of it, constituted, taken together, sufficient *primâ facie* proof of its validity to throw the onus on the plaintiffs to give some evidence that it was not genuine. Had the will been really a forgery, the defect in the registration and other circumstances looked upon by the Courts below with suspicion would have been avoided by those setting it up. The plaintiffs might and should have given evidence that the will was a forgery, especially as they asserted that they could, and would, do so, if necessary; they might have cross-examined the witnesses called by the Subordinate Judge on [411] the enquiry as to the loss of the will, but they did not do so. It is submitted that the loss of the will is proved.

Mr. *Misra* referred, as to the onus of proof, to the case of *Joy Chunder Tuppadar* v. *Ram Chunder Doss* (1) in which it was held that in a suit for a declaration that a document was forged the burden of proof was on the plaintiff.

Mr. *Leslie DeGruyther* for the respondents Ram Charan and Kedar Nath :—There is no evidence of the execution of the will : mere evidence of registration is never in India accepted as evidence of execution—*Barry* v. *Butlin* (2) was referred to as to the extent of proof required in such cases as this. The publicity of the will carries no weight one way or the other. If it was a genuine will, why was it abandoned? The Judicial Commissioners had rightly placed the onus on the defendants. If neither party had given evidence, the Court must have found in the plaintiffs' favour as to the will. The plaintiffs had no right to cross-examine the witnesses called by the Court on the inquiry as to the loss of the will ; they could only have done so by leave of the Court : see the Evidence Act (I of 1872) section 165, and the Civil Procedure Code (Act XIV of 1882), section 171.

Mr. *J. H. A. Branson*, for the respondent Bisheshar Prasad, contended that the onus was on the defendants, who set up the will, to prove it to be genuine, and not on the plaintiffs, whose rights it purported to defeat, to show it was a forged document. The will had been rightly held to be invalid. In the absence of both wills, and on the death of Krishna Dei, the respondents Ram Charan and Bisheshar Prasad as the nearest reversioners became entitled to the estate, subject to the right of the widows Ram Dei and Sukh Dei (the appellants) to maintenance out of it.

(1) (1871) 15 W. R. 117. (2) (1838) 2 Moo. P. C. 480.

23 A 415 (=5 C W N 689=28 I A 182=3 Bom L R 469)

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PRIVY COUNCIL

23 A 415= 5 C W N 689=28 I A 182= 3 Bom L R 469

[415] PRIVY COUNCIL

PRESENT

Lord Hobhouse, Lord Davey, Lord Robertson, and Sir Richard Couch

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RADHA KRISHN DAS (*Plaintiff*) v RAI KRISHN CHAND (*minor, through his guardian,* MATHI KUNWAR, *Representative of Defendant*) [18th June, 1901]

[*Appeal from the High Court, North-Western Provinces, Allahabad*]

Appeal to Privy Council—Appeal below appealable value—Form of certificate of leave to appeal—Civil Procedure Code, sections 595, 596

To give the Court jurisdiction to grant leave to appeal to the Privy Council under section 596 of the Civil Procedure Code, it is essential that there should be in dispute, either directly or in . .
Rs 10,000 The mere existence of . .
amount in dispute is less than Rs
jurisdiction to grant such leave to ap
Narain (1) referred to

The certificate of leave to appeal, and not the order for such certificate, is the document which the Judicial Committee are bound to consider and act . . . .
been given

Where the order for a certificate was "let a certificate issue that the case is a fit one for appeal to Her Majesty in Council," but the certificate granting leave stated "it is certified that though the valuation of the case is below Rs 10 000, yet as regards the value and nature of the case it fulfils the requirements of section 596 of Act XIV of 1882 *Held* that such a certificate was not a proper foundation for the leave to appeal, and that no proper leave had been given

Even assuming that the order for the certificate might be looked at the Judicial Committee would require to be satisfied that the Court had exercised its judicial discretion upon the matter in deciding whether, in order to comply with section 595 and section 600 of the Code, the case was a fit one for appeal to Her Majesty in Council, and in this case they were not satisfied (there being no reasons given and no grounds stated for the form of the certificate) that the judicial mind of the Court had ever been applied to that question . . . .
for special leave to appeal

[Ref 24 All 236=A W N 1902, 46, 44 Mad 293=23 Bom L R 718=19 A L J 161=40 M L J 229=(1921) M W N 119=33 C L J 277=25 C W N 630=60 I C 85 41 M. L. J 547, Fol 5 O C 168]

APPEAL from a decree (17th May, 1897) of the High Court at Allahabad, which reversed a decree (22nd August, 1895,) of the Subordinate Judge of Benares in a suit in which the present [416] appellant was plaintiff, and Rai Bishn Chand (now represented by his adopted son, Rai Krishn Chand, the respondent) was the defendant

The suit was brought to recover Rs 6,500, being part payment made in respect of a contract by the plaintiff to purchase from the defendant a decree for Rs 13,000 It was admitted that the contract was never carried out, and that the defendant realized the amount of the

(1) (1900) L R 28 I A 11 I L R 23 All 227

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23 A. 405= 3 Bom. L. R. 704=5 C. W. N. 895=28 I. A. 186= 8 Sar. 109.

prove " that " assertion." The " pretermission " of the plaintiffs was, he held, " an evident ground for the document in question being genuine."

On appeal to the Judical Commissioner the Court agreed with the Subordinate Judge in thinking that the alleged will of 1876 was not a genuine will, but differed from him as rgards the alleged will of 1890. The Court held that the learned Subordinate Judge was wrong in placing upon the plaintiffs the onus of proving the will of the 4th of June 1890 to be a forgery, and held further that no attempt had been made to prove the genuineness of the said alleged will and that the same was a forgery.

From the decree of the Court of the Judicial Commissioner the appellant Sukh Dei alone has appealed.

In the opinion of their Lordships the conclusion of the Court below that the alleged will of the 4th of June 1890 was not proved is perfectly correct, and it was not necessary for the Court to go so far as to declare that the document was a forgery. The story of the registration of the alleged will and its subsequent loss is most suspicious, as the Subordinate Judge himself held, but it would have been quite enough for the Court of appeal to say that the alleged will was not proved. The burden of proof of course lies upon the person who sets up a will, not upon the person who is prepared to impeach it. Now, Krishna Dei and Ram Dei threw over the alleged will of 1890 in favour of the alleged will of 1876, which has been pronounced by both Courts to be a forgery. The appellant Sukh Dei took no part in the trial and of course offered no evidence in support of the alleged will of 1890.

[414] On the appeal to their Lordships the learned Counsel for the appellant said everything that could be said in support of the appeal, but there were no materials on which even a plausible argument could be based. The deceased it seems some four years before his death had a conversation with the Assistant Commissioner of the district, from which it might be inferred that he contemplated making a will some day or other; and then when the Subordinate Judge, for his own satisfaction, inquired into the alleged loss of the alleged will, some persons came forward and said that they had seen the will somewhere, and it was argued by the learned Counsel for the appellant that the plaintiffs might have corss-examined these witnesses. So they might, with the leave of the Subordinate Judge. But they were not bound to do so. Nor would they have been well advised to have taken such a course. They were perfectly justified in waiting until evidence in support of the will was produced at the trial.

In their Lordship's opinion it is idle to discuss such flimsy evidence as that upon which the appeal was based. They will humbly advise His Majesty that the appeal must be dismissed.

The appellants must pay one set of costs of the consolidated appeal, to be apportioned between the respondents in the discretion of the Registrar in the event of their not agreeing.

Appeal dismissed.

Solicitors for the appellant—Messrs. *T. L. Wilson* and *Co.*

Solicitors for the respondents Kedar Nath and Ram Charan—Messrs. *Lawford, Waterhouse and Lawford.*

Solicitors for the respondent Bisheshar Prasad—Messrs. *Young, Jackson, Beard and King.*

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596 of the Civil Procedure Code when certified as a fit case for appeal it does not come under section 596 at all There is no sufficient ground for dismissing the appeal

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PRIVY COUNCIL

23 A 415= 5 C W N 689=28 I A 182= 3 Bom L R 469

The Judgment of their Lordships was then delivered by LORD DAVEY —

IN this case their Lordships think that they cannot but give effect to the preliminary objection which has been made The objection is that there is no proper certificate accompanying the leave to appeal, or forming a proper foundation for the leave to appeal

[418] The circumstances may be stated very shortly The petitioner, the present appellant, states in his petition that the valuation in the appeal is below Rs 10,000, but that it involves substantial questions of law and fact Then he goes on "The petitioner, being desirous to appeal to Her Majesty in Council humbly prays that this Honourable Court may be pleased to grant certificate under section 596 of the Code of Civil Procedure ' and then he sets out certain grounds Then an order is said to have been passed in these terms by Mr Justice Knox and Mr Justice Banerji " Let certificate issue, that the case is a fit one for appeal to Her Majesty in Council That was on the 20th of January, 1898, and apparently on the same day the following certificate is made — " The Court having had before it an application for leave to appeal to Her Imperial Majesty the Queen in Her Privy Council presented on behalf of the appellant aforesaid, it is certified that though the valuation of the case is below Rs 10 000, yet as regards the value and nature of the case it fulfils the requirements of section 596 of Act No XIV of 1882 That is signed by the same two learned Judges—Mr Justice Knox and Mr Justice Banerji

Their Lordships think that the certificate, and not the order for the certificate, is the document which they are bound to consider and act upon , and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, they ought to hold that leave has not properly been given

Now the question arises under section 596 of the Civil Procedure Code That section says — ' In each of the cases mentioned in clauses (a) and (b) of section 595, the amount or value of the subject matter of the suit in the Court of first instance must be Rs 10,000 or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum, or upwards Or the decree must involve, directly or indirectly, some claim, or question to, or respecting property of like amount or value There is no difficulty in interpreting that and it does not admit of any qualification If any less value than Rs 10,000 is directly, or indirectly, involved, it will not give the Court jurisdiction to grant leave to appeal In a certain event, as was recently pointed out in the case of *Banarsi* [419] *Parshad* v *Kashi Krishna Narain* (1) which was recently before this Board, there is an additional requirement, namely, that where the decree appealed from affirms the decision of the Court, the appeal must involve some substantial question of law It is noticed, in the judgment of this Board, in the case to which their Lordships have just referred, that there was a prevailing impression in the High Court that the mere existence of a substantial question of law was sufficient to give the Court jurisdiction to give leave to appeal to Her Majesty in Council Lord

(1) (1900) L R. 28 I A 11 I L. R. 23 All 227

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decree himself. The only question was whether the contract was broken by the plaintiff or the defendant. Besides the principal sum the plaintiff claimed Rs. 418-5-3 as interest at the rate of 1 rupee per cent. per mensem from the 5th of February, 1894, to the 17th of August, 1894, the date of the institution of the suit; making the whole amount in suit Rs. 6,918-5-3.

The Subordinate Judge decreed the claim in full with interest and costs.

On appeal by the defendant to the High Court, a Division Bench (KNOX and BURKITT, JJ.) reversed the decree of the Subordinate Judge, but gave the plaintiff a decree for Rs. 4,500 which the defendant admitted to be due (and as to which he had not appealed) without interest or costs.

The High Court found that the contract had been broken by the plaintiff, and held as a matter of law on the authority of *Ex parte Barrell, In re Parnell* (1) and *Howe* v. *Smith* (2) that the breach of contract having been on the part of the plaintiff, he was not entitled to a refund of any portion of the purchase-money paid by him to the defendant.

From that decision the plaintiff petitioned the High Court for leave to appeal to the Privy Council.

In the petition he set out the facts as above, and stated that " though the valuation of the appeal is below Rs. 10,000 it involved substantial questions of law and fact"; and prayed the Court to grant a certificate under section 596 of the Code of Civil Procedure.

On the 20th of January, 1898, the High Court made the following order: " let a certificate issue that the case is a fit one for appeal to Her Majesty in Council"; and on the same day [417] the following certificate was issued: "The Court having had before it an application for leave to appeal to Her Imperial Majesty the Queen in Her Privy Council, presented on behalf of the appellant aforesaid, it is certified, that though the valuation of the case is below Rs. 10,000 yet, as regards the value and nature of the case, it fulfils the requirements of section 596 of Act XIV of 1882."

At the hearing of the appeal—

Mr. *A. J. Wallach*, for the respondent, took a preliminary objection that the appeal was not properly before the Committee. The certificate granting leave to appeal is not in proper form. The amount in dispute is less than Rs. 10,000. One of the requirements of section 596 of the Civil Procedure Code is therefore not satisfied, and the High Court had no jurisdiction to certify that the case fulfils the requirements of that section. The fact that there is a substantial question of law is not sufficient, where the appeal is of a value less than Rs. 10,000, to make the case a fit one for leave to appeal; *Banarsi Parshad* v. *Kashi Krishna Narain* (3). Leave should not have been granted, and the appeal should be dismissed.

Mr. *J. D. Mayne*, for the appellant, contended that an order having been made for the issue of a certificate that the case was a fit one for appeal to Her Majesty in Council the fact that the form of the certificate actually issued was defective was not material. The leave to appeal was granted by the order for a certificate of fitness to issue, and nothing else need be looked at. The case does not come under any clause of section

(1) (1875) L. R. 10 Ch. App. 512.
(2) (1884) L. R. 27 Ch. D. 89.
(3) (1900) L. R. 28 I. A. 11; I. L. R. 23 All. 227.

23 A 420 (=A. W N 1901, 116)

1901
MAY 14

APPELLATE CRIMINAL

23 A 420=
A W N
1901, 116

APPELLATE CRIMINAL

Before Mr Justice Knox

KING EMPEROR v MUHAMMAD HUSAIN* [14th May, 1901]

Act No XLV of 1860 (*Indian Penal Code*) *section* 232—*Counterfeiting Queen s coin—Removing rings from coins used as ornaments, and restoring the same to circulation*

It is not an offence under section 232 of the Indian Penal Code to remove the ring from a coin which has been used to form part of a necklace or other ornament, and to work up the face of the coin where the ring has been, it not being shown that any material part of the coin has at any time been removed.

THE facts of this case sufficiently appear from the judgment of the Court

Mr S *Sarbadhicary*, for the appellant

The Government Advocate (Mr *E Chamier*), for the Crown

[421] KNOX, J —The appellant has been convicted of two separate offences under the Indian Penal Code, the first an offence under section 235, the second, an offence under section 232 of the same Code The evidence which relates to the offence under section 235 has been believed by the Judge, and after hearing the whole of the evidence, I too have come to the conclusion that it satisfactorily establishes the following facts The accused was found after search made in his house to be in possession of instruments which are and can be used for the conterfeiting of Queen s coins Those instruments were found inside a box, and that box hidden away in a cellar When it was produced the appellant appears to have suggested that the box was introduced into the cellar by the agency of the police Even now it is contended on his behalf that the box and the articles in the box are not his, and that they were introduced by police agency In appeal the following reasons are put before me as reasons why the evidence should be considered doubtful It is contended that the appellant is a watch maker and a carpenter, and that these materials are for the legitimate uses of his trade, and not for the counterfeiting of coin This plea might have been entitled to some weight, and probably would have had great weight, if upon the discovery of the box this explanation of it and of its doubtful contents had been given, but, as I have said, it is even now denied that this box and these materials have anything to do with the appellant The second ground is that the police ought to have brought search witnesses from the neighbourhood The law requires that search witnesses should, when possible, be respectable inhabitants of the locality in which the place to be searched is situate The place searched was in the town of Moradabad, the search witnesses are also residents of Moradabad, and the evidence is to the effect that they live within 500 paces of the place which was searched, but the important point is that there is nothing to show that these witnesses are not respectable men, or that their evidence is open to doubt for any reasonable cause Then it is further urged that the story told is in places *contradictory* I do not see that any contradictions of sufficient moment have been established Therefore as regards the offence under section 235, I see no cause to interfere with the conviction or sentence

* Criminal Appeal No 247 of 1901

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23 A. 415= 5 C. W. N. 689=28 I. A. 182= 3 Bom. L. R. 469.

Hobhouse says :—"Their Lordships have found on previous occasions that the existence of a point of law has been supposed to give a right of appeal in the ordinary course of procedure under the Code. That is a mistake. Section 596 of the Code requires that in order to give such a right there must be in dispute, either directly or indirectly, an amount of Rs. 10,000. If the decree affirms the Court below another condition is affixed, namely, that the appeal must involve some substantial question of law. The presence of such a question does not give a right when the value is below the mark. The requirement *of it restricts the right* when the higher decree affirms the lower." It is only upon the assumption that there was such an impression in the minds of the learned Judges that this certificate can have any meaning attached to it at all, because it is difficult to understand how, if valuation is an essential part of the requirement under section 596, it can be said that though the valuation of the case is below the amount, yet it fulfils the requirement. It would be a contradiction in terms.

There is this further: Mr. Mayne pressed us to disregard the language of the certificate, and to look at the order directing the certificate to be made. Their Lordships do not feel satisfied that they are entitled to take that liberty; but assuming that they may do so, they would at least require to be satisfied that the Judges had exercised their judicial discretion upon the matter in deciding whether, in order to comply with section 595 (*c*) and section 600, the case was a fit one for appeal to Her Majesty in Council. Now their Lordships are not by any means satisfied that the learned Judges were either asked, or did direct their [420] minds judicially to that question. The petition asks, as has already been said, that the Court should grant the certificate under section 596, *treating it as part of the ordinary ministerial jurisdiction* of the Court; and no reasons are given, and no grounds are stated by the learned Judges, for holding that, although it did not comply with section 596, it was still a fit case to appeal to Her Majesty in Council.

Their Lordships, therefore, are not satisfied that the judicial mind of the Court has ever been applied to that question; still less that the certificate, which was signed by the learned Judges, does not carry out what they intended to order and direct.

They will only add that, if Mr. Mayne had been in a position, which he very fairly admitted he was not, to say that he could with any hope of success ask for special leave to appeal, their Lordships would not have shut out the appellant from stating his case to the Board; but as it is their Lordships will humbly advise His Majesty that the appeal be dismissed, and they will direct that the appellant pays the costs of the appeal.

Appeal dismissed.

Solicitor for the appellant :—Mr. *T. C. Summerhays.*

Solicitors for the respondent :—Messrs. *Pyke and Parrott.*

The following order was passed — 1901 MAY 30

BLAIR and BURKITT, JJ —We are not prepared at this moment to put a construction upon the words of section 123 of the Code of Criminal Procedure, to which our attention has been called, namely, the words 'may pass such order on the case as it thinks fit But it is, in our opinion, absurd for a Court to order the detention of a person bound over under section 123 for a period less than that for which he is called upon to give security Acting upon that view we enhance the period of rigorous imprisonment in this case from eighteen months to three years

REVISIONAL CRIMINAL

23 A 422= A W N 1901, 114.

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23 A 423 (=A W N 1901, 118)

APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Aikman

MUHAMMAD AHMAD (*Defendant*) v MUHAMMAD SIRAJUDDIN (*Plaintiff*) * [5th June, 1901]

Act No VII *of* 1870 (*Court Fees Act*) *section* 7, *cls* 5 *and* 6 (c) 28—*Suit undervalued—Power to extend time for payment of deficiency in Court fee—Civil Procedure Code, section* 54—*Limitation*

A suit for pre emption of zamindari property was filed one day before the expiry of the prescribed period of limitation The plaint stated the profits of the property to be Rs 8 4 0 and should therefore have borne Court fee stamps to the amount of the proper Court fee on Rs 123 12-0

Held that this was not a case falling within section 28 of the Court Fees Act 1870 but one to which section 54 of the Code of Civil Procedure applied The Court had no power to extend the time for making up the deficiency in the Court fee beyond the expiry of the prescribed period of limitation, and the plaint was rightly rejected

[Fol A W N 1904 133 27 I A 411=A W N 1905 12=2 A L J 55 28 All 310=A W N 1906 21=3 A L J 838 Ref 34 Cal 20 (F B)=11 C W N 38 =4 C L J 421=1 M L T 355 78 P R 1909=144 P L R 1909=3 I C 605 2 I C 1 Diss 29 All 749=A W N 1907 253=4 A L J 636= 2 M L T 375 3 M L T 63 123 P R 1907=82 P W R 1907 Not Fol 74 P R 1903 N=173 P L R 1903]

THE facts of this case sufficiently appear from the judgment of the Court

Maulvi *Ghulam Mujtaba*, for the appellant

Mr *Muhammad Raoof*, for the respondent

BLAIR and AIKMAN, JJ —This is an appeal from an order of the Subordinate Judge of Shahjahanpur remanding a case to the lower Court under section 562 of the Code of Civil Procedure The suit was one for pre emption It was instituted on the 14th of January 1899, one day before the expiry of the period of limitation prescribed for such a suit The amount of Court fee payable on the plaint was under clauses 5 and 6 (c) of section 7 of the Court Fees Act, to be calculated on fifteen times

* First Appeal No 117 of 1900 from an order of Babu Nihal Chandra Subordinate Judge of Shahjahanpur dated the 13th June 1900

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[422] As regards the offence under section 232, the point is a more difficult one. So far as the evidence goes, it would appear that the appellant has been in the habit of receiving what are called "kundedar" rupees. There is nothing to show on the record that any material part of the rupees has at any time been removed. For aught that appears, all that may have been done by the appellant is to remove the "kunda" and work up the face of the coin where the "kunda' had been. If this was all that he did, I am not prepared to hold without better evidence than there is in this case that any offence has been committed under section 232 of the Indian Penal Code. There is certainly room for doubt here as regards this portion of the case. I allow the appeal, find the appellant not guilty of any offence under section 232 of the Indian Penal Code, and set aside the sentence.

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23 A. 422 (= A. W. N. 1901, 114.)

REVISIONAL CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

KING-EMPEROR *v.* KARIM-UD-DIN BEG.* [30th May, 1901.]

Criminal Procedure Code, sections 110, 123—Security for good behaviour—Term for which imprisonment in default of finding security should be ordered.

Although it is within the competence of a Sessions Judge, acting under section 123 (3) of the Code of Criminal Procedure, to direct that a person who has been ordered to give security shall, on failure to give security, be imprisoned for any term not exceeding three years, yet it is advisable that the term of imprisonment in default ordered under that section should always be the same as the period for which the security is directed to be given.

IN this case Karim-ud-din Beg was ordered, under section 110, of the Code of Criminal Procedure, to find security for a term of three years. On the proceedings coming before the Sessions Judge for orders under section 123 of the Code, the Sessions Judge reduced the amount of security required, but not the term, and in default ordered that Karim-ud-din Beg should be rigorously imprisoned for eighteen months.

Against this order an application for revision was filed on behalf of Government, the objection urged being that the Sessions Judge having directed Karim-ud-din Beg to furnish security for [423] a term of three years, should have directed that in default of furnishing security he should suffer imprisonment for the same period.

The Sessions Judge in answer to a notice issued by the High Court sent up a report, in which he submitted that there was nothing contrary to law in the order which he had passed, it being within his power to direct a person making default in finding security to suffer imprisonment for any period not exceeding three years. The learned Sessions Judge referred in support of his position to the case of *Queen-Empress* v. *Jafar* (1).

The Government Advocate (Mr. *E. Chamier*) appeared in support of the application.

Munshi *Haribans Sahai* for the opposite party.

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* Criminal Revision No. 256 of 1901.

(1) Weekly Notes, 1899, page 151.

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this to be brought up in the presence of the other side, and on the 8th December passed an order rejecting the plaint The learned Subordinate Judge, as regards this plea, says, "as the deficiency had been made good before the plaint was rejected, and as the lower Court could have extended the time, I am of opinion that the lower Court, instead of rejecting the plaint, ought to have extended the time I therefore allow the appeal, and for the second time send back the case under section 562 of the Code of Civil Procedure" It is against this order that the present appeal has been filed

We are of opinion that this appeal should succeed The case was clearly one falling within section 54 of the Code of Civil Procedure The stamp affixed on the plaint was correct on the plaintiff's valuation, and that valuation was an under valuation of the relief which was sought The learned counsel for the respondent argues that the case comes within section 28 of the Court Fees Act But we cannot agree with this contention The plaint was properly stamped according to the plaintiff's own valuation . The mistake or inadvertence referred to in section 28 of the Court Fees Act is the mistake or inadvertence of the Court, or its officer In this case the officer of the Court, having reference to the valuation given by the plaintiff, rightly reported that the plaint was properly stamped It may be that had he gone over the plaintiff's calculation he would have discovered the mistake We are not prepared to hold, and no authority has been cited to us for holding, that it was the officer's duty to check the plaintiff's calculation Being of opinion then that the case falls within section 54 of the Code of Civil Procedure, the Court could not fix a time either under cl (a) or cl (b) of that section, so as to extend the prescribed period for limitation of suits Moreover we cannot agree with the learned Subordinate Judge in his view that the Munsif ought, in the circumstances of this case, to have extended the time Even if he had power to do so, the [427] conduct of the plaintiff throughout was such as to disentitle him to any indulgence For the above reasons we allow the appeal with costs, and, setting aside the order of the lower appellate Court, restore that of the Court of first instance

Appeal decreed.

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23 A 427 (=A W N 1901, 120)

APPELLATE CIVIL

Before Mr. Justice Knox and Mr Justice Burkitt

SHEOBALAK SINGH (*Plaintiff*) v LACHMIDHAR AND ANOTHER (*Defendants*) * [5th June, 1901]

Pre-emption—Wajib-ul arz—Interpretation of document

The clause in the wajib-ul arz of a village relating to pre-emption gave a right of pre emption against a stranger and at the price paid by the stranger, firstly, to a 'hissadar ek jaddi, secondly to a "hissadar patti," and, thirdly, to a 'hissadar deh' *Held* that, in the absence of specific words to that effect, the clause above referred to could not be construed so as to give a right of pre emption to a hissadar of a superior class upon a sale to a hissadar of an

* Second Appeal No 247 of 1899, from a decree of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Jaunpur, dated the 17th December 1898, reversing a decree of Moulvi Mubarak Husain, Munsif of Jaunpur, dated the 11th August 1898

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23 A. 423= A. W. N. 1901. 118.

the net profits of the property. The amount of the profits as entered in the plaint was Rs. 8-4-0, fifteen times of which sum is equal to Rs. 123-12-0. The plaint, however, gave the valuation of the property at Rs. 108-12-0. The plaint was properly stamped on this valuation, and the officer whose duty it was to examine the plaint reported that it was properly stamped. When the case came on for trial the defendant objected that the relief had been undervalued. Thereupon the plaintiff asked to be allowed to amend his plaint by reducing the sum stated as the annual profits from Rs. 8-4-0 to Rs. 6-14-10. If this had been granted the stamp would have been sufficient. The Munsif held that Rs. 8-4-0 was the correct amount of the profits and rejected this application. On the same day the Munsif rejected the plaint, professing to act under clause (*c*) of section 54 of the Code of Civil Procedure. The Munsif held that he could not, with [425] reference to the ruling of this Court in *Jainti Prasad* v. *Bachu Singh* (1), grant the plaintiff an extension of time for correcting the valuation and stamping his plaint accordingly. The plaintiff appealed. In his appeal he impugned both the order refusing amendment of the plaint and the order rejecting the plaint. On his memorandum of appeal he affixed a Court fee stamp calculated on the reduced amount which he wished to have entered in his plaint. As to this the Subordinate Judge held in concurrence with the Munsiff that the proper valuation was Rs. 123-12-0, and that the memorandum of appeal was undervalued. He gave the plaintiff time to pay up the deficiency on the memorandum of appeal. This was done, and thereupon the Subordinate Judge allowed the appeal and sent the case back to the Munsif with direction to return the plaint for amendment of valuation and stamp. On the 20th of November, 1899, the Munsif allowed the plaintiff one week's time within which to pay in the deficiency in Court fee. This order was signed by the plaintiff's pleader. On the 4th of December, 1899, that is, fourteen day afters the order of the 20th of November had been passed, the plaintiff's pleader presented an application saying that he had not received information of the order of the 20th of November until the 27th of November, and with this application tendered the Court fee. The Munsif called on the pleader to prove that he had not received information of the order of the 20th until the day mentioned by him. The pleader failed to give any evidence whatever, either by affidavit or other wise, in support of his assertion. The Munsif, after examining one of his clerks, held that the pleader had information of the order either on the 20th or at latest on the 21st of November. It seems to us that if the pleader had not got imformation of the order allowing a week for the payment of the deficient Court fee until the last day of that period, he would have noted this when he signed the order. The Munsif, on the 8th of December, rejected the plaint for the second time. The plaintiff again appealed to the Subordinate Judge. He renewed the plea that his pleader had not been informed of the order of the 20th of November until the 27th idem. The Subordinate Judge overruled this plea, agreeing with the Munsiff on the [426] point. The plaintiff further pleaded that the plaint should not have been rejected after the deficiency in Court fee had been made good. What happened was this, that on the 4th of December 1899, the plaintiff's pleader filed a petition bearing a stamp of Re. 1-8, that is, the amount by which the stamp on the plaint was deficient. The Munsif ordered

(1) (1893) I. L. R. 15 All. 65.

construction of the wajib ul-arz we find ourselves unable to hold that it lays down the further (and we must say unreasonable) restraint on an owner's right to sell his property for which [429] the appellant here contends. Before we could hold that such a restraint was intended among the members of the co-parcenery body *inter se*, we should require very explicit and unmistakeable language in the wajib ul-arz. Such language is not, in our opinion, to be found in the wajib ul arz of Sandhi. This is the conclusion at which the lower appellate Court arrived We think it is right. We dismiss this appeal with costs

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Appeal dismissed.

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23 A. 429 (=A. W. N. 1901, 121.)

APPELLATE CIVIL

Before Mr. Justice Burkitt and Mr. Justice Aikman.

BHAGWAN DAS AND OTHERS (*Plaintiffs*) v. SHAM DAS AND OTHERS (*Defendants*).* [6th June, 1901.]

after ... *kan* ... 30

A mortgagor who has sold the equity of redemption in property mortgaged by him cannot afterwards charge such property with a further debt so as to render the purchaser of the equity of redemption liable to pay such debt before he can redeem *Allu Khan* v. *Roshan Khan* (1) distinguished.

[Fol. 3 I. C 44.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants

Babu *Jogindro Nath Chaudhri*, for the respondents.

BURKITT and AIKMAN, JJ.—This is a suit for redemption of a mortgage executed on the 28th of February, 1893.

It appears that one condition of the mortgage was that the mortgage money, Rs. 500, was to be paid off by a certain day, and on failure to pay the mortgagees were to be put in possession. Accordingly, there having been a failure to pay, the mortgagees were put in possession on January 4th, 1894. But meanwhile, in June and August, 1893, the plaintiff's appellants Bhagwan Das and others, had purchased from the mortgagor the equity of redemption of two portions of the mortgaged property. They have now instituted this suit on the strength of those purchases to redeem the whole of the property mortgaged under the deed of [430] February 28th, 1893. We should further add that these plaintiffs deposited in Court of June 6th, 1895, under section 83 of the Transfer of Property Act, the sum of Rs. 529 6 0, which was sufficient to discharge the mortgage of February 1893. The mortgagees have refused to accept that sum in full payment of their demand, alleging that a further sum of Rs. 1,000 should be paid before the plaintiff could have redemption. This sum of Rs. 1,000 represents a further loan which the mortgagees advanced to the mortgagor on the 18th of March, 1895.

* Second Appeal No 203 of 1900, from a decree of E J Knitts, Esq, District Judge of Gorakhpur, dated the 5th December 1899, confirming a decree of Pundit Guru Prasad Dube, Munsif of Deoria, dated the 13th January 1899

(1) (1881) I. L. R. 4 All. 85.

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inferior class. *Ali Jan* v. *Pheku* (1) and *Ilahi Bakhsh* v. *Ghulam Abbas* (2) referred to.

[Fol. 4 A. L. J. 211 (Note); Ref. 26 All. 514; 26 All. 516 (Note); 27 All. 457 = A. W. N. 1905, 45=2 A. L. J. 689.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Kalindi Prasad*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

KNOX and BURKITT, JJ.—The question we have to decide in this case is one as to which there has been some conflict of judicial authority in this Court. It was considered in the case of *Ali Jan* v. *Pheku* (1) to which one of us was a party, in *Ilahi Bakhsh* v. *Ghulam Abbas* (2) and in the unreported case Second Appeal No. 775 of 1892, *Kamaluddin* v. *Syed Ata Husain*, to which also one of us was a party. The position in the last cited case was exactly the same as in the case now under appeal.

We have here a sale-deed purporting to convey to the vendee Lachmidhar a share in two villages Sandhi and Rahmanpur. The wajib-ul-arz of the former gives a right of pre-emption against a stranger, and at the price paid by the stranger, firstly, to the " hissadars ek jaddi " (*i.e.*, those descended with the vendor [428] from one common ancestor); secondly, to the hissadars of the same patti ; and thirdly, to the hissadars of the village (deh). The appellant is admittedly a " hissadar ek jaddi " of the vendor, while the vendee respondent is a " hissadar deh ". In the other village there are two categories, namely, firstly, the " hissadars ek jaddi" owning property in the same thok or patti as the vendor, and secondly, the other co-sharers of the thok or patti. Here the appellant is a " hissadar ek jaddi " of the vendor, but does not own land in the same thok or patti. He therefore does not come within the first category, and can have no pre-emptive rights superior to those of the vendee who is a co-sharer of the thok or patti.

As regards the first-named village, it is claimed on behalf of the appellant that the terms of the wajib-ul-arz give him a pre-emptive right as against all persons in the other categories. His claim is that under the wajib-ul-arz he enjoys not only a right to pre-empt a sale made to a stranger, but also a sale made to any other member of the co-parcenary body who may not be " ek jaddi " of the vendor. We are quite willing to allow that if the sale had been made to a stranger, and if the present pre-emptor and the present vendee had each instituted a pre-emption suit against the stranger vendee, the present appellant would under the term of the wajib-ul-arz be entitled to a decree in preference to the present vendee. But the reason of that is because *ex hypothesi* the sale had been made to a vendee who was a stranger to the village co-parcenary body.

A right to pre-empt being in derogation of a full owner's power of transfer is admittedly but a weak right, and the principle on which it is founded is that it is advisable that the village co-parcenary body should be empowered to prevent the intrusion of a stranger among them. This principle, however, is not applicable to the case before us, in which the vendee is already a member of that body. In our opinion the pre-emptive right given by the wajib-ul-arz is a right against a vendee who is a stranger to that body, and not against one of its members. On the true

(1) Weekly Notes, 1895, p. 9. (2) Weekly Notes, 1898, p. 15.

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taneously with, the redemption of the mortgage of February 28th, 1893 To hold otherwise would, in our opinion, be grossly inequitable to the appellants, and would violate the principle laid down in section 80 of the Transfer of Property Act We think the plaintiffs appellants are entitled to the decree for redemption as prayed for, given them by the Court of first instance Briefly our decision amounts to this, that the appellants, when suing to redeem the mortgage of February 1893, cannot be called on by the respondents to pay the Rs 1,000 Whether the respondent can, in their turn, redeem the appellants, is a matter as to which [432] we need not say anything For the above reasons we allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance on the question of redemption and possession

Appeal decreed

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23 All 432 (= A W N 1901, 124)

APPELLATE CIVIL

Before Mr. Justice Banerji and Mr Justice Chamier

GHULAM ALI (*Defendant*) v SAGIR UL NISSA BIBI (*Plaintiff*) *
[7th June, 1901]

Muhammadan Law—Dower—Widow in possession in lieu of dower—Widow not precluded from suing to recover her dower

Held that there was nothing to prevent a Muhammadan widow who was in possession of property of her late husband in lieu of dower from suing to recover her dower from the heirs of the deceased husband *Aziz-ullah Khan* v *Ahmad Ali Khan* (1), referred to

[Fol 19 C W N 502=21 C L J 319=28 I C 191 Ref 17 A L J 629=51 I C 242=41 All 538 53 I C 905=37 M L J 627=26 M L T 419=43 M 214]

THE facts of this case sufficiently appear from the judgment of the Court

Mr *Abdul Raoof*, for the appellant

Mr *Abdul Majid* (for whom Mr *Muhammad Ishaq Khan*), for the respondent

BANERJI and CHAMIER, JJ —This appeal arises out of a suit brought by a Muhammadan lady to recover her dower from one of the heirs of her deceased husband She alleges that the amount of her dower was Rs 2,100, that in lieu of the said dower her husband had put her in possession of his property, that she is in possession, and that upon her husband s death she is entitled to recover three fourths of the amount of her dower from the defendant who has inherited a three fourths' share of her husband s property The suit was resisted on various grounds, the main ground being that the plaintiff being in possession could not sue for her dower This contention found favour with the Court of first instance On appeal to the lower appellate Court the learned Judge held that there was nothing in the law to prevent the plaintiff from claiming her dower, and that although her possession might be analogous to that of a mortgagee, that analogy was not so complete as to bar her right to claim her dower He

*First Appeal from order No 135 of 1900 from an order of J L Gill, Esq, District Judge of Allahabad, dated the 24th June, 1900

(1) (1885) I. L. R. 7 All. 353

1901 JUNE 6. — APPELLATE CIVIL. — 23 A. 429= A. W. N. 1901, 121.

The mortgagor, when borrowing the sum, made a covenant with the mortgagees to repay it when redeeming the mortgage of February 28th, 1893. The lower appellate Court sustained the plea of the mortgagees, which had not found favour in the sight of the Court of first instance. In our opinion the decision of the lower appellate Court cannot be supported.

When the appellants purchased the two portions of the mortgaged property, they acquired an interest in that property, by virtue of which, under the provisions of section 91 of the Transfer of Property Act, they became entitled to redeem the mortgage. The contention of the respondents is that the plaintiffs-appellants when seeking to enforce their legal right to redeem the incumbrance which existed at the time when they acquired the equity of redemption of a portion of the mortgaged property. must also pay off that which the respondents call "a further charge" subsequently imposed by the mortgagor on the mortgaged property, Their argument amounts to this—that if, at the time when the appellants acquired the equity of redemption, the incumbrance on the property was only Rs. 500, and if, subsequent to their purchase, the mortgagor had been pleased to impose on it a further burden of (say) ten lakhs of rupees, the vendees could not redeem the mortgage unless they also paid off the ten lakhs. Such a proposition is a startling one, which requires only to be broadly stated in order to show its absurdity. In our opinion there is no authority for it anywhere, either in the Transfer of *Property Act* or in the reported cases.

We are of opinion that it was not, as in this case, in the power of the mortgagor to derogate from the title which his vendees had acquired by their purchase. He could not by creating, subsequent [431] to that purchase, any further charge or mortgage, impose any additional burden on them. By their purchase they acquired a title which, under the provisions of section 91 of the Transfer of Property Act, gave them a right to redeem the whole of the mortgaged property by paying off the mortgage in existence at the time of their purchase, and in that way to acquire full proprietary possession of the portion of it as to which they had acquired the equity of redemption. Several cases have been cited to us, both of this and of other Courts; but, in our opinion, none of them is in point.

The case on which most stress was laid was *Allu Khan* v. *Roshan Khan* (1). There is, however, this essential difference between that case and this. In that case all the bonds, for which it was sought to make the vendee liable, were bonds anterior to the vendee's purchase. In this case, however, the debt, which the respondents call "a charge" came into existence more than a year after the plaintiffs' purchase, and more than a year after the plaintiffs were entitled to redeem the mortgage of February 1893. No case has been cited to us in which a litigant, in the position of the appellants here, has been held liable to discharge a subsequently created incumbrance. We think it unnecessary to express any opinion as to whether this Rs. 1,000 is or is not "a charge," or is or is not a further mortgage. In the view we take of this case, that question is quite immaterial. Assuming, for the sake of argument, that it amounted to a further mortgage of the strictest kind, we are of opinion that the vendees were not bound to pay it off either before, or simul-

(1) (1881) I. L. R. 4 All. 85.

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23 A 434= A. W N.1901, 123.

and others did not appeal to the Collector, but when C s appeal was dismissed, appealed to the District Judge The District Judge on the 28th March 1898, dismissed this appeal holding that no appeal lay to him B and others then brought a suit in the Civil Court for declaration of their title The suit was filed on the 3rd August, 1898

Held that the suit was barred by limitation Whatever might have been the case with C, B and others, though perhaps acting in good faith did not prosecute the former proceedings in the Court of Revenue with due diligence within the meaning of section 14 of the Indian Limitation Act 1877 *Muhammad Salim* v *Abdul Rahim* (1) and *Ganga Prasad* v *Baldeo Ram* (2) referred to

[Overruled 25 All 83 (F B)]

THE facts of this case sufficiently appear from the judgment of the Court

Munshi *Haribans Sahai*, for the appellant

Munshi *Gobind Prasad*, for the respondents

KNOX and BURKITT, JJ —The suit out of which this second appeal has arisen was instituted under the following circumstances

The defendant appellant Dasrath Rai brought a suit in the Revenue Court against one Chandan, an occupancy tenant, to recover from the said Chandan the rent of certain land which Dasrath Rai alleged was held by the tenant under him In his written statement in the suit the tenant pleaded that he had always been in the habit of paying his rent to Bhirgu Rai and others as his zamindars Thereupon, under the provisions of section 148 of the Rent Act, No XII of 1881, Bhirgu Rai and his co zamindars were made parties to the suit

The question so raised was decided by the Rent Court adversely to Bhirgu Rai and others, who were referred to a Civil Court to [435] establish their right The decision of the Rent Court was passed on September 30th, 1895, by a Tahsildar as Assistant Collector, 2nd class Appeals were taken in succession to the Collector and to the District Judge The case was finally decided by the District Judge on March 25th, 1898, who held that no appeal lay to him, and accordingly dismissed it The present suit was instituted on August 3rd, 1898, well within one year from the date of the dismissal of the second appeal by the District Judge

It is contended, however, that this suit is barred by the limitation rule laid down in the last clause of section 148 of the Rent Act

In our opinion that contention is sound and must be sustained Section 14 of the Limitation Act cannot be called in aid by the respondents For though it may well be that the parties who appealed successively to the Collector and to the District Judge from the decision of the 2nd class Assistant Collector did, in good faith, believe that they had a right to appeal from that decision, nevertheless the respondents did not (as required by section 14 of the Limitation Act) prosecute that appeal " with due diligence For, as a matter of fact, the respondents did not appeal to the Collector They left that to the tenant Chandan, and it was only when Chandan s appeal to the Collector failed that the respondents instituted a second appeal to the District Judge They therefore do not come within the purview of section 14 of the Limitation Act

In support of the contention that the suit was not time barred by the last clause of section 148 of the Rent Act, two cases in this Court

(1) Weekly Notes, 1885, p 261 (2) (1888) I L R 10 All 347

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set aside the decree of the Court of first instance, and remanded the [433] case to that Court under section 562 of the Code of Civil Procedure. From this order of remand the present appeal has been preferred.

In our opinion the view of the learned Judge is correct. Under the Muhammadan law a woman to whom dower is due is entitled to claim it whenever the right to recover it has accrued to her. It is conceded that upon the death of her husband the dower due to the wife becomes payable. It is also conceded that even when the wife has been placed in possession of her husband's property in lieu of her dower, there is nothing in the Muhammadan law which precludes her from claiming her dower. It has, no doubt, been held that if a Muhammadan woman entitled to dower has obtained possession of her husband's estate lawfully and without force or fraud in lieu of her dower, such possession cannot be disturbed by her husband's heirs until the dower-debt is discharged; but from this it does not follow that she cannot claim her dower if she chooses to do so. It has also been held in the case of *Azizulla Khan* v. *Ahmad Ali Khan* (1) that a Muhammadan widow lawfully in possession of her husband's estate in lieu of dower occupies a position analogous to that of a mortgagee; but it has never been held—and in our opinion it is not the law—that the possession of a Muhammadan woman under such circumstances is, in all respects, that of a usufructuary mortgagee. We think the learned Judge has rightly observed that the analogy is not complete. If the position of the plaintiff had been that of a usufructuary mortgagee, section 67 of the Transfer of Property Act would have precluded her from suing to recover her dower, but as she is not a usufructuary mortgagee that section has no application to her case. We have not been referred to any authority under which we could hold that a Muhammadan woman in possession of her husband's estate in lieu of dower cannot claim her dower, though she offers to surrender possession. We think the Court below was right, and dismiss the appeal with costs.

Appeal dismissed,

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23 A. 434 (=A. W. N. 1901, 123.)

[434] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

DASRATH RAI (*Defendant*) *v.* BHIRGU RAI AND OTHERS (*Plaintiffs*) AND CHANDAN (*Defendant*).* [7th June, 1901.]

Act No. XII of 1881 (*North-Western Provinces Rent Act,*) *section* 148—*Suit by intervenor to establish his title in a Civil Court—Limitation Act No. XV of* 1877 (*Indian Limitation Act*), *section* 14.

D sued *C* for rent of agricultural land, alleging *C* to be his occupancy tenant. *C* pleaded that he was not the tenant of *D*, but was the tenant of *B* and others. *B* and others were accordingly added as defendants to the suit. The suit was decided by the Rent Court of first instance on the 30th September 1895 against *B* and others. *C*, the tenant, appealed to the Collector. *B*

* Second Appeal No. 330 of 1899, from a decree of Munshi Achal Behari, Officiating Additional Subordinate Judge of Ghazipur, dated the 16th March 1899, reversing a decree of Munshi Ganga Prasad, Munsif of Muhammadabad, dated the 6th December 1898.

(1) (1885) I. L. R. 7 All. 353.

23 A 437 (=A W N 1901, 128)

REVISIONAL CIVIL

Before Mr Justice Burkitt and Mr Justice Chamier

1901 JUNE 12 — REVISIONAL CIVIL — 23 A 437= A W N 1901 128

RAMESHAR SINGH (*Defendant*) v DURGA DAS (*Plaintiff*) *
[12th June, 1901]

Act No IX of 1887 (*Provincial Small Cause Courts Act*), *Sch* 11, *cls* 13 *and* 31—*Jurisdiction—Small Cause Court*

The plaintiff claimed as land-owner to be entitled to receive the rents or fees paid by shop-keepers for the temporary occupation during a fair of a piece of land, which, the plaintiff alleged, belonged to his mahal He further alleged that the defendant claiming that the land was his, had wrongfully received those dues or rents

Held that this was a suit which fell within the provisions of the latter part
Act No IX of 1887, and was not
. Causes *Damodar Gopal Dikshit* v
to

[Fol 16 C P L R 1 Appl 27 All 463 Ref 31 Cal 797]

THE facts of this case sufficiently appear from the judgment of the Court

Munshi *Gulzari Lal*, for the applicant

BURKITT and CHAMIER, JJ —In this matter we regret that the respondent was not represented, as the question involved in the reference by the learned District Judge is one of some importance

The suit was one by a person claiming as land owner to be entitled to receive the rents or fees paid by shop-keepers for the temporary occupation during a fair of a piece of land which, the plaintiff alleged, belonged to his mahal He further alleged that the defendant claiming that the land was his, had wrongly received those dues or rents, or whatever they may be called

The suit was instituted on the Small Cause Court side of the Court of a Munsif invested with Small Cause Court powers

[438] The first plea raised by the defendant was that the suit was one which was excluded from the cognizance of a Court of Small Causes The defendant relied on clause 13 of the second schedule of Act No IX of 1887 The Judge of the Court of Small Causes overruled that plea, and we think rightly

In our opinion the suit as framed is one by the plaintiff to recover from the defendant money paid to, and received by, the defendant to the plaintiff s use, and wrongly retained by the defendant Such a suit does not come within the purview of clause 13 of the second schedule But there is another clause in that schedule to which neither the Judge of the Small Cause Court nor the District Judge has referred, and that clause, in our opinion, excludes the suit from the cognizance of the Court of Small Causes We refer to the latter portion of clause 31 in which, among the suits excluded from the cognizance of a Court of Small Causes, we find "a suit for the profits of immoveable property belonging to plaintiff which have been wrongfully received by the defendant" These words, we think, cover the present suit, it is one undoubtedly for profits of immoveable property which plaintiff says belongs to him, and which profits, he says were wrongly received by the defendant In this opinion

* Miscellaneous No 75 of 1901

(1) (1892) I L R 17 Bom 42

1901 JUNE 7. — APPELLATE CIVIL. — 23 A. 434=A.W.N. 1901, 123.

were cited to us. They are *Muhammad Salim* v. *Abdul Rahim* (1) and *Ganga Prasad* v. *Baldeo Ram* (2). The former of those cases was one in some respects resembling the case now under appeal. It was held in that case that section 148 "applies to suits to recover rent which a tenant had pleaded to have paid over to the intervenor. The present suit is one for ejectment of the defendant from land which was in the use and occupation of the plaintiff, and is governed by the longer term of limitation provided in the Statute of 1877." The first sentence of the extract just cited is, in our opinion, merely *obiter* [436] *dictum*, it being an expression of opinion which was not necessary for the decision of the appeal then before the learned Judge. We are therefore not bound by it. It seems to us totally to disregard the words "to establish his title by suit" in the last clause of section 148. The suit to which that clause refers is, in our opinion, not a suit to recover the rent which the Rent Court found the plaintiff had not been receiving or enjoying, but is a suit by an unsuccessful plaintiff or intervenor to establish his title to receive the rent which the Rent Court had decided he had not actually and in good faith been receiving and enjoying at the time when the right to sue for that rent accrued. The Legislature may well have thought it advisable for the protection of tenants to establish a short period of limitation for suits by rival zamindars quarrelling over the right to receive the rent of a particular tenant. If therefore the learned Judges in *Muhammad Salim* v. *Abdul Rahim* (1) meant that the last clause of section 148 applies only to suits to recover rent, which the tenant pleaded he had paid to another, we find ourselves unable to agree with them. As to the second sentence of the extract quoted above, it is clear that the present case is distinguishable. In the reported case the relief prayed for was the "ejectment of the defendant from land." In the case now before us the plaintiffs asserted that they were at date of suit in possession of the land, the rent of which had been the subject-matter of the suit in the Rent Court, and their prayer is for maintenance of that possession and for a declaration that the land just mentioned belonged to them, that it is their property, and that they are entitled to receive the rent of it. In our opinion, by the relief just mentioned, the plaintiffs seek to establish their title to the rent of the lands in dispute. We, therefore, are of opinion that the suit was time-barred when it was instituted.

The second case mentioned above, *Ganga Prasad* v. *Baldeo Ram*, (2) is a case which was decided by a Judge sitting alone, and is therefore not binding on us. But it also is distinguishable from the present case, for in it the relief sought by the plaintiffs was to recover possession of land from which the defendant had ejected them. As already pointed out, the reliefs sought in the case now before us are very different.

[437] For the above reasons we allow this appeal. We dismiss the plaintiffs' appeal to the lower appellate Court. We restore (though not for the reasons given by the Munsif) the decree of the Court of first instance, and we direct that the plaintiffs-respondents' suit do stand dismissed with costs in all Courts.

Appeal decreed.

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(1) Weekly Notes, 1885, p. 261. (2) (1888) I. L. R. 10 All. 347.

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Ram Lal For some reason or other unknown to us the Court omitted to comply with their request, and gave an ordinary decree for sale under section 88 of the [440] Transfer of Property Act The amount for which the property was to be sold included principal, interest, and costs of the suit then pending An opportunity of redeeming within six months was provided for Ram Lal, but, it is to be especially remarked, no separate decree for costs was given against him On appeal some modification as to the amount was made, but otherwise the first decree remained untouched On that decree a sale has taken place, of which the proceeds have not been sufficient to discharge the amount decreed The present application has been made against Ram Lal It is an application under section 90 of the Transfer of Property Act, and it alleges that the proceeds of the sale being insufficient to discharge the amount decreed, the respondents are entitled against Ram Lal to the decree provided for by section 90 of the Act The application is not to recover the whole of the balance remaining due after the sale, but is to recover the amount of costs for which the respondents allege Ram Lal to be liable

It is contended, and we think rightly, that Ram Lal, under the circumstances of this case, is not a person against whom a decree under section 90 of the Act can be passed In the first place (as is admitted for the respondents), the money which it is sought to recover from Ram Lal, by a decree under section 90 of the Act, is not money which was due upon the mortgage It is not any sum for which the mortgagor or the mortgaged property is liable, but merely costs against Ram Lal, alleged to have been adjudged against him as one of the defendants in the suit

Secondly, it is perfectly clear that the word "defendant' in section 90 of the Transfer of Property Act must mean the mortgagor defendant and that the money recoverable under this section is money recoverable, by reason of the proceeds of the mortgaged property proving insufficient to pay off the decree passed under section 89, from the person whose property had been mortgaged and sold, if legally recoverable from him

The whole tenor and wording of section 90 abundantly show, in our opinion, that the persons affected by it are the mortgagee who has brought the property to sale, and mortgagor whose property on being sold has not sufficed to satisfy the [441] decree Now here Ram Lal was not the mortgagor, he was a mortgagee—a puisne mortgagee who was impleaded to give him an opportunity of redeeming a prior incumbrance

It cannot be said of him that any property of his was sold, or was, when sold, insufficient to discharge the decree, and that, in our opinion, is a necessary condition before a decree can be passed under section 90 Moreover, there is another matter to which we ought to refer Costs, as a rule, are in the discretion of the Court No order was made in the mortgage suit to the effect that Ram Lal personally should pay any costs, and yet the applicants here pick out from the decree under section 89 a certain specified sum which they allege to be costs recoverable from Ram Lal personally, and ask for a decree against him under section 90 We fail to see how we can say that the amount which respondents here desire to recover from Ram Lal was legally recoverable from him under section 90 Respondents ask us to follow them in picking out of the general decree for sale a certain sum, to ear mark that sum as costs payable by Ram Lal, alone, and then to pass a decree against him under section 90 for that amount We are unable to adopt such a course

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we are supported by a decision of the Bombay High Court in *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve* (1). From the judgment in that case it is clear that the learned Chief Justice of that Court would have held this suit to be excluded from the cognizance of a Court of Small Causes.

The question in that case was, to some extent, the converse of this, but the principle applied in that case would exclude this case.

For the above reasons we set aside the decision and decree of the Court of Small Causes in this matter. We annul all proceedings taken in it before that Court, and we direct that the plaint be returned to the plaintiff for presentation to the proper Court. We make no order as to costs.

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23 A. 439=(A. W. N. 1901, 13.)

[439] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

RAM LAL (*Judgment-debtor*) *v.* SIL CHAND AND OTHERS (*Decree-holders*).*
[13th June, 1901].

Mortgage—Prior and Subsequent mortgagees—Costs recoverable from puisne mortgagees —Act No. IV of 1882 (*Transfer of Property Act*), *section* 90.

A prior mortgagee in a suit upon his mortgage prayed for an order for costs against a puisne mortgagee personally. No such order was contained in the decree passed under section 88 of Act No. IV of 1882. *Held* that the prior mortgagee was not entitled to a decree under section 90 of the Act against the puisne mortgagee for the amount of the costs.

[Fol. 26 All. 507=A. W. N. 1904, 73; 3 I. C. 33; Ref. 6 A. L. J. 427; 7 I. C. 784; 29 M. L. J. 120=30 I. C. 188; Fol. 2 Lah. 239.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

BURKITT and CHAMIER, JJ.—This is an appeal against an order in execution allowing plaintiff's application to be granted decree under section 90 of the Transfer of Property Act. The facts of the case are somewhat involved. They are as follows:—

Certain property was mortgaged to one Gopal Das, now represented by the respondents. The same property was afterwards mortgaged to one Ram Lal, the defendant appellant here. Subsequently both mortgagees sued the mortgagor for sale on their mortgages, but neither of them made the other mortgagee a party to his suit. Ram Lal put his decree into execution, had the mortgaged property put up for sale, purchased it himself, and got possession. Subsequently Gopal Das attempted to do the same, but, on the objection of Ram Lal, the attempt failed. Thereupon the respondents, the representatives of Gopal Das, brought a suit, in which they impleaded Ram Lal. That suit was one for sale of the mortgaged property, and the plaintiffs in it, the respondents here, asked that a separate decree for costs might be given against

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* Second Appeal No. 834 of 1899 from an order of F. E. Taylor, Esq., District Judge of Shahjahanpur, dated the 25th August 1899, confirming, an order of Babu Nihal Chundra, Officiating Subordinate Judge of Shahjahanpur, dated the 28th January 1899.

(1) (1892) I. L. R. 17 Bom. 42.

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APPELLATE CIVIL

23 A 442= A W N 1901, 137

KNOX and AIKMAN, JJ —This appeal arises out of a suit brought by Musammat Saiyida Bibi, the respondent here, against certain defendants, to recover possession of shares in zamindari property and mesne profits thereon

The Court of first instance decreed a portion of the plaintiff s claim The plaintiff appealed in regard to that portion of her claim which had been dismissed, and one of the defendants, [443] Rai Partap Chand Bahadur, filed objections under section 561 of the Code of Civil Procedure The learned District Judge dismissed the objections, but allowed the plaintiff s appeal to a certain extent This second appeal is filed by Rai Pertap Chand Bahadur against the decree of the lower appellate Court For the proper understanding of this case, it is necessary to set forth the following facts —One Mir Madad Ali Khan was a tahsildar in the district of Allahabad He died on the 24th of December, 1894 He had three wives one of these was Musammat Khatun Bibi, another was Musammat Najmunnissa Bibi, the name of the third wife is immaterial By Musammant Najmunnissa Bibi he had four sons, namely, Syed Mohsin Ali, Syed Hamid Ali, Syed Kazim Ali and Syed Sher Ali, all defendants to the suit out of which this appeal arises, and a daughter Musammat Anwari By his wife Musammat Khatun Bibi he had two daughters, Musammat Jafri Begam and Musammat Inayat Begam, the latter of whom is a defendant to this suit The plaintiff is the daughter of Musammat Jafri Begam She claims under a deed of sale executed in her favour by her mother and her mother s half sister, Musammat Anwari, on the 18th of August, 1895 Musammat Najmunnissa died in 1881 Her heirs were her husband, Mir Madad Ali Khan, who was entitled to $\frac{3}{12}$ ths of her property, her sons Mohsin Ali, Hamid Ali, Kazim Ali and Sher Ali, each of whom was entitled to $\frac{2}{12}$ ths of their mother's property, and her daughter Musammat Anwari, who was entitled to the remaining $\frac{1}{12}$ th of Musammat Najmunissa s property This $\frac{1}{12}$ th share Musammat Anwari professed to transfer to the plaintiff by the sale deed of the 18th of August, 1895 On Mir Madad Ali Khan s death his property was divisible into 11 sihams Of these, his four sons abovenamed were entitled each to sihams and his three daughters, Musammat Jafri, Musammat Inayat and Musammat Anwari to 1 siham each By the sale deed of the 18th of August, 1895, Musammat Jafri and Musammat Anwari transferred to the plaintiff the share which they respectively inherited of their father Madad Ali Khan's property It will thus be seen that the property claimed falls under two heads—first the share of the estate of Musammat Najmunnissa, inherited by Musammat Anwari, and second, the shares of the estate of Mir Madad Ali [444] Khan, inherited by Musammat Jafri and Musammat Anwari The properties under the first head are set forth in list A, and the properties under the second head in list C appended to the plaint Here it may be stated that the appellant Rai Partab Chand Bahadur, is vendee of the shares of three of the four brothers, Hamid Ali, Mohsin Ali and Kazim Ali in one village Panwar, and mortgagee of their shares in the villages Daryabad Atarsuiya and Bagh Miranpur He is also the mortgagee of the share of the fourth brother Sher Ali in mauza Panwar

Different defences and different considerations arise in regard to each head of the property First, as to the share inherited by Musammat

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It seems to us that the blunder which vitiated the respondents' case took place when the first decree in the case was given. The plaintiffs then, by their prayer for relief, asked for a separate decree for costs against Ram Lal. No such decree was given. It was clearly their duty then to have asked the Court to amend its decree and to give them the decree they had prayed for. This they did not do, nor did they appeal; they have only their own laches to thank for the result. We must decline to help them to get rid of the effect of their carelessness by giving them a decree to which they are not entitled under section 90 of the Transfer of Property Act against Ram Lal. For the above reasons we allow this appeal. We set aside with costs the concurrent decisions of the two lower Courts, and direct that respondents' application for a decree under section 90 of the Transfer of Property Act be dismissed.

Appellant to have costs in all Courts.

Appeal decreed.

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23 A. 442 (=A. W. N. 1901, 137.)

[442] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

PARTAP CHAND (*Defendant*) v. SAIYIDA BIBI (*Plaintiff*).*
[14th June, 1901.]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II*, *article* 136—*Limitation—Title of vendor not extinct at the time the vendee's suit is brought—Act No. IV of* 1882 (*Transfer of Property Act*), *section* 41—*Transfer by ostensible owners—Inquiry by transferee as to title of transferors—Reasonable care.*

In Article 136 of the second schedule to the Indian Limitation Act, 1877, the words in the third column relate to the beginning of the dispossession referred to in the first column, and the meaning of the article is that if, supposing no sale had taken place, the vendor's title would have been alive at the time the vendee's suit is brought, such suit is not barred: but on the other hand, if the vendor had been for twelve years out of possession at the date of the vendee's suit, such a suit would be too late. In a suit such as is contemplated by Article 136 when the purchaser succeeds in showing that the exclusion of his vendor from possession took place within twelve years of the institution of the suit, he succeeds in showing that his suit is within time.

A Government official owning zamindari property in the district in which he was employed, caused that property to be recorded in the revenue papers in the names of his young sons. The sons sold portions of the property and mortgaged others. The vendee and mortgagee satisfied himself that the property had been recorded for some years in the names of the sons, but there stopped, and made no further inquiries as to whether the property really belonged to the sons, who were the ostensible owners, or not. *Held* that the transferor, though acting in good faith, had not taken reasonable care to ascertain that the transferor had power to make the transfer.

[Ref. 1 L. B. R. 196; Expl. 57 I. C. 353=5 P. L. J. 521=(1920) Pat. 305.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Datti Lal*, Munshi *Gulzari Lal*, Pandit *Madan Mohan Malaviya* and Babu *Devendra Nath Ohdedar*, for the appellant.

Mr. *Amir-ud-din* and Maulvi *Ghulam Mujtaba*, for the respondent.

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* Second Appeal No. 802 of 1898 from a decree of J. Denman, Esq., District Judge of Allahabad, dated the 30th June 1898, modifying a decree of Rai Pyare Lal, Judge of the Court of Small Causes of Allahabad, exercising powers of a Subordinate Judge, dated the 25th May 1897.

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so taken shall be deemed to have been waived by the defendants There is no doubt that the appellant in his written statement did take the objection that there was a misjoinder of parties as defendants on the ground that the defendant No 6 had nothing to do with any of the other defendants On this objection being taken, the Court might under section 32 have ordered the names of any [446] defendants improperly joined to be struck out The Court, however, did not sustain the objection, and did not act under the last mentioned section If we were of opinion that there had been a misjoinder of defendants that would be no ground for upsetting the decree of the Court below, inasmuch as section 31 of the Code provides that no suit shall be defeated by reason of misjoinder of parties The cases relied on by the learned vakil for the appellant are cases in which there was a misjoinder of plaintiffs suing on distinct causes of action—a state of *things to which the provision quoted from section 31 has no reference*, as will be seen from the last paragraph of that section But we are of opinion that inasmuch as the suit was for the possession of property *which had formed part of* Mir Madad Ali Khan's estate, all the *defendants* were necessary parties to that part of the claim, inasmuch as all the defendants are heirs or representatives of the heirs of Mir Madad Ali Khan It may be that all the defendants were not interested in the whole of the property in suit, but we hold that that would not make the plaintiff's suit a bad one In any case we are of opinion that the action of the Court in not giving effect to the defendant's preliminary objection, even if erroneous, was not an error which affected either the merits of the case or the jurisdiction of the Court, and on that ground we should, with reference to the provision of section 578 of the Code, decline to interfere with the decree of the Court below

The third plea raised on behalf of the appellant relates to that part of Najmunnissa's estate which passed on her death to Mir Madad Ali Khan and on his death to his heirs It is contended that his acts and statements amounted to a relinquishment of his right in Musammat Najmunnissa's estate That plea was given effect to by the Court of first instance, but on appeal the decision of the Subordinate Judge on this point was reversed by the learned District Judge His conclusion after a review of the evidence is as follows —"On this evidence there is only one finding possible, namely, that Madad Ali Khan did not relinquish this property in 1885 but continued to hold it till his death" That is a finding of fact, and there is evidence to support it We cannot therefore interfere with it in second appeal

[447] The fourth and last plea urged before us on behalf of the appellant is based upon the fact that the property transferred to the appellant, Rai Partap Chand Bahadur, by the sons of Mir Madad Ali Khan was property which had for many years stood in their names in the Government books, and that they therefore were the ostensible owners It has been found as a fact by the lower Appellate Court that they were not the real owners, and that the property, though standing in their names, belonged to Mir Madad Ali Khan That it stood in their names with the express consent of their father, Mir Madad Ali Khan, is undoubted It is also not disputed that the sons transferred the property to the appellant for consideration, and there is no suggestion that the appellant acted otherwise than in good faith But the lower Appellate Court has refused to give the appellant the benefit of section 41 of the

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Anwari in the property of her mother Musammat Najmunnissa. As to this, the defence was that the plaintiff's suit is barred by limitation under Article 136 of the second schedule of the Indian Limitation Act. That article provides a period of twelve years' limitation for a suit by a purchaser at a private sale for possession of immoveable property sold when the vendor was out of possession at the date of sale and adds that the time from which the period begins to run will be the time when the vendor is first entitled to possession. It is admitted that the plaintiff's vendor was out of possession on the 18th of August, 1895, the date of the sale to the plaintiff. It is contented on behalf of the defendant appellant, that as Musammat Najmunnissa died in 1881, and as her daughter Musammat Anwari became entitled to possession of her mother's property immediately upon her mother's death, the suit, which was instituted on the 11th of May, 1896, is barred by the twelve years' rule of limitation cited above, inasmuch as upwards of twelve years had expired from the time when the plaintiff's vendor was first entitled to possession. As to this plea, we think it sufficient to say that the learned District Judge finds that Musammat Anwari Begam did get possession on her mother's death, and held possession up to the 13th of January, 1885, from which date she lost possession and was first entitled to recover possession. The learned Judge held that the suit being within 12 years from the abovementioned daté, was within time. We are of opinion that the decision of the learned Judge on this point is right. The contention on behalf of the defendant appellant would have us ignore the finding by the lower appellate Court that the [445] plaintiff's vendor did get possession on her mother's death, and held possession for four years, and would make the date from which time begins to run the date of the mother's death. We are satisfied that is not the meaning of the article. Suppose that a vendor succeeds to property on his father's death, remains in possession thereof for twenty years, is then ousted by a trespasser, and two years after this sells his rights; we think that it could not be contended in a suit brought by the vendee against the trespasser that, inasmuch as the plaintiff's vendor was first entitled to possession on his father's death, twenty-two years before, the suit was out of time. We hold that the words in the third column relate to the beginning of the dispossession referred to in the first column of the article, and that the meaning of the article is that if supposing no sale had taken place, the vendor's title would have been alive at the time the vendee's suit is brought, such suit is not barred : but that, on the other hand, when the vendor has been for twelve years out of possession at the date of the vendee's suit, such a suit would be too late. In a suit such as the present when the purchaser succeeds in showing that the exclusion of his vendor from possession took place within twelve years of the institution of the suit, he succeeds in showing that his suit is within time. We therefore reject the plea of limitation in regard to the property inherited by Musammat Anwari Begam from her mother.

The next plea raised on behalf of the defendant appellant is that the suit was bad for the multifariousness. We would observe that the expression multifariousness is not used in the Code of Civil Procedure. But what is meant apparently is, that the suit was bad for misjoinder of parties and of causes of action. With regard to misjoinder of parties, section 34 of the Code provides that all objections for misjoinder of parties as co-defendants shall be taken at the earliest opportunity, and in all cases before the first hearing, and that any such objection not

Under article 141 of the second schedule to the Indian Limitation Act, 177, a suit can be brought by a reversioner for possession of immoveable property, to the possession of which a female heir had been entitled, within 12 years from the date of the death of the female heir, although she may have been

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23 A 448= A W N 1901, 133.

[Fol 25 All 435, 18 I C 959, 918, Ref 6 C L J 490 2 L W 751=18 M L T 226=30 I C 991, 3 N L R. 35, Diss 61 P W R 1903, Dist 11 A L J 179=18 I C 811, Appl 23 I C 519=28 M L J 669]

[449] THE facts of this case sufficiently appear from the judgment of Chamier, J

Mr *Sarbadhicary*, for the appellant

Munshi *Gobind Prasad*, for the respondents

CHAMIER, J —This is an appeal from a decree of the District Judge of Gorakhpur confirming a decree of the Subordinate Judge of Gorakhpur by which the plaintiff's suit was dismissed with costs

The facts are as follows —One Jaggannath Dube, the owner of the entire village Sakhra Jot, died many years ago, leaving three daughters —then childless widows—named Jai Kunwari, Sanjhari and Amirta, who each obtained possession of a one third share in the village On the death of Amirta in 1875, the defendant, a cousin of her husband, took possession of her share to the exclusion of the rightful heirs, Jai Kunwar and Sanjhari More than twelve years after the death of Amirta, her sister, Jai Kunwar, sued the defendant for possession of the share formerly held by Amirta, but that suit was dismissed Sanjhari died in July, 1887, and Jai Kunwar in January, 1897 Thereupon the plaintiff sued for, and obtained possession of, the shares that had been of Sanjhari and Jai Kunwar He now sues for possession of the share formerly held by Amirta His case is, that he is the nearest reversionary heir of Jaggannath Dube, and that his right to sue accrued upon the death of Jai Kunwar, the last surviving daughter of Jaggannath Dube, he also alleges that the suit brought by Jai Kunwar against the defendant was a collusive suit, and that he is not bound by the decree passed therein The defendant admits that the plaintiff is the nearest reversioner to Jaggannath, but pleads that the claim is barred by the rule of *res judicata* by reason of the dismissal of Jai Kunwar s suit, and also that it is barred by limitation under article 144 of schedule 2 of the Limitation Act, inasmuch as he has held adverse possession for more than twelve years

The Subordinate Judge dismissed the suit as being barred by the decree in the previous suit On appeal the District Judge held that if the plaintiff's right to sue accrued upon the death of Amirta, the suit was barred by limitation under Article 144 of Schedule II of the Limitation Act, and that if his right to sue [450] accrued upon the death of Jai Kunwar, the suit was barred by the decree in Jai Kunwar's suit

As regards the plea of *res judicata*, I think it is quite clear that the dismissal of Jai Kunwar's suit does not, under the circumstances, bar the present suit The judgment of this Court in that suit is on the record of the present suit It shows that that suit was dismissed only upon the ground that the defendant had held possession adversely to Jai Kunwar for more than twelve years There was no trial of any

(1) (1899) I L R 23 Bom 725
(2) (1894) I L R 22 Cal 445
(3) (1892) I L. R. 14 All 156
(4) (1897) I L R 19 All 357
(5) (1897) I L R 20 All 42

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23 A. 442= A. W. N. 1901, 137.

Transfer of Property Act upon the ground that the appellant, the transferee, had not taken reasonable care to ascertain that his transferors had power to make the transfer. It is contended in appeal before us that the precautions taken by the appellant at the time of the transfers to him did amount to his taking reasonable care within the meaning of the section just referred to. What is to be deemed "reasonable care" depends upon the circumstances of each case. Of course when the transferee from one who is an ostensible, and not the real, owner has notice of the defect in title of his transferor, the transferee is not entitled to protection. So far as appears from the record of the present case, the only precaution taken by the transferee was that he satisfied himself that the names of his transferors were, and had been for many years, recorded in the Government papers as in possession of the property transferred. We are of opinion that the learned Judge is right in holding that this did not, under the circumstances, amount, on appellant's part, to taking reasonable care to ascertain that his transferors had power to make the transfers. The appellant, had he inquired into his transferor's title, would have ascertained that the property which they professed to transfer was acquired in their names when they were children of tender years. It must also have been known to him that the father of his transferors was a Government employee in the district in which the property [448] was situated. In our judgment these circumstances are such as would render it incumbent on a prudent man not to rest satisfied with merely seeing that his transferor's names were entered in the Government registers, but to go on to inquire whether the property was really theirs. Had the appellant inquired from Mir Madad Ali Khan how it was that the property was acquired in the names of young children, he might have ascertained that the children were mere *benamidars* for their father, who did not wish himself to be recorded as acquiring property in the district in which he was employed. Had such an inquiry been made and had Mir Madad Ali Khan informed the appellant that his sons were the real owners, there is no doubt that the appellant would be deemed to have taken all reasonable precautions necessary under the circumstances, and that in that case even if the information given by Madad Ali were shown to be false, neither Mir Madad Ali Khan nor his successors in title could be heard to assert that it was false. We are of opinion that none of the grounds urged before us can be sustained. We therefore dismiss the appeal, but, under the circumstances set forth above, we make no order as to costs.

Appeal dismissed.

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23 A. 448 (=A. W. N. 1901, 133.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Chamier.

AMRIT DHAR (*Plaintiff*). *v.* BINDESRI PRASAD AND OTHERS (*Defendants*).* [25th June, 1901.]

Hindu law—Adverse possession—Suit by reversioner to estate held by a Hindu female—Limitation—Act No. XV of 1877—(Indian Limitation Act), Sch. II. Art. 141.

* Second Appeal No. 896 of 1899 from a decree of Rai Bahadur Lala Baij Nath, District Judge of Gorakhpur, dated the 5th September 1899, confirming a decree of Syed Jafar Husain, Subordinate Judge of Gorakhpur, dated the 13th January 1899.

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Appellate Civil.

23 A 443= A W N 1901, 133.

barred by limitation In this case it was quite clear that the trustees had held possession of the residuary estate adversely to the widows for more than twelve years It will be seen that the facts were very much like those of the case decided by the Full Bench of this Court.

If the decision of their Lordships in *Lachhan Kunwar's* case was correctly interpreted in the cases in the 19th and 20th volumes of the Allahabad reports to which I have referred, then the decision of their Lordships in the Bombay case must be [452] taken to be in conflict with their decision in *Lachhan Kunwar's* case Their Lordships do not refer to *Lachhan Kunwar's* case in their judgment in the Bombay case, although, as the report shows, that case was cited during the argument From this it may be inferred that their Lordships did not consider that the decision in *Lachhan Kunwar's* case governed the case then before them.

In *Lachhan Kunwar's* case the facts were these: Jit Kunwar took possession of her son Pahlad's estate on his death, asserting an absolute title in herself to the exclusion of the rightful heir his widow Lachhan Kunwar, and held possession for twenty-five years (there was some doubt whether Jit Kunwar had not taken possession at an earlier date, but for the purposes of the decision it seems to have been assumed that she had taken possession on Pahlad's death) Jit Kunwar died in 1887 Thereupon two suits were instituted for the recovery of possession of two portions of the property which had been transferred to the defendants by Jit Kunwar Their Lordships held that the suits were barred by limitation. It is important to notice that these suits were instituted by Lachhan Kunwar *along with other persons* who claimed to be the reversionary heirs of Pahlad Singh As such, those persons would have been entitled to the property on the death of Lachhan Kunwar, but not before Lachhan Kunwar had been defeated in an attempt to get possession of the property of her husband during the lifetime of Jit Kunwar, her suit against Jit Kunwar being held to be barred by limitation, but setting aside that circumstance, their Lordships held that the suit of Lachhan Kunwar with which they were then dealing was barred by limitation, because Jit Kunwar and her transferees had held possession of the property in dispute for more than twelve years adversely to Lachhan Kunwar Article 141 of Schedule II to the Limitation Act had no application to the suit as far as Lachhan Kunwar was concerned, for she was not, in the words of that article "a person entitled to possession on the death of a Hindu female" *Prima facie* the other plaintiffs in the suit had no right to claim possession during the lifetime of Lachhan Kunwar, but they seem to have contended that they had such a right It appears to me that, as regards the male plaintiffs, all that their [453] Lordships decided was that the circumstance that Lachhan Kunwar's rights were extinguished did not let in the rights of the reversioners. This is what I understand by the following passage in their judgment —"The contention that although it (i e, the suit) might be barred as against the son Pahlad and all persons claiming under him, the effect was only to extinguish those rights, and to let in the rights of any persons who would claim as reversionary heirs, does not appear to their Lordships to be supported by authority." Possibly the word "against" in this passage is a misprint for "regards," but whether that is so or not their Lordships did not in this case rule that adverse possession against Lachhan Kunwar barred the rights of the male plaintiffs.

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right within the meaning of the rule laid down by their Lordships of the Privy Council in the *Shivagunga* case (1). It is therefore unnecessary to inquire whether that was a collusive suit. The proceedings in it have no effect upon the present case and may be dismissed from consideration.

23 A. 448= A. W. N. 1901, 133.

Upon the question of limitation it is obvious that the present case cannot be distinguished in principle from the case of *Ram Kali* v. *Kedar Nath* (2). There, as here, a female heir was kept out of possession by a trespasser for more than twelve years, and on the death of the female, the reversionary heir sued the trespasser for the property. It was held by the Full Bench that Article 141 of Schedule II to the Limitation Act applied, and that therefore the suit was within time, having been brought within twelve years of the death of the female.

It would have been sufficient to say that the present case is governed by the decision of the Full Bench, but in two later cases in this Court doubts have been expressed as to the correctness of that decision. The first of these cases is that of *Hanuman Prasad Singh* v. *Bhagauti Prasad* (3). The point actually decided in that case was that an alienation made by a female heir in possession is good against her for her life, but if it is not binding on the reversioner a cause of action accrues to him on the death of the female, and that Article 141 of Schedule II to the Limitation Act provides the period of limitation for a suit by the reversioner in such a case; but in the course of his judgment in that case, Burkitt, J., suggested that the decision of their Lordships of the Privy Council in the case of *Lachhan Kunwar* v. *Manorath Ram* [451] (4) was inconsistent with the decision of the Full Bench in the case cited above. The second case in this Court is that of *Tika Ram* v. *Shama Charan* (5) in which the same view was taken. In both these cases it was considered that the decision of their Lordships in *Lachhan Kunwar's* case was an authority for the proposition that twelve years' adverse possession against a female heir bars not only the rights of the female, but also those of the reversionary heir entitled to the property on her death.

The latest pronouncement on this subject by their Lordships of the Privy Council is in the case of *Runchordas Vandravandas* v. *Parvatibai* (6). In that case the facts were that a separated Hindu died in 1869, leaving two widows, the survivor of whom died in 1888. He had made a will by which he left certain specific property to his widows for their lives, and bequeathed the residue of his property to trustees upon certain trusts. On his death the widows took possession of the property bequeathed to them, and the trustees took the residue and applied it in the manner directed in the will. On the death of the survivor of the two widows, the plaintiff, who was the nephew of the testator, sued to have the trusts of the residue declared void, and, in effect, for possession of the entire property of the testator. The defence was that the trusts were valid, and even if they were invalid the suit was barred by limitation, inasmuch as the property had been held by the trustees for more than twelve years adversely to the persons entitled, *viz.*, the widows. Their Lordships held that the trusts were void, that article 144 of schedule II to the Limitation Act did not apply to the suit, but that article 141 applied, and therefore the suit was not

(1) (1863) 9 Moo I. A. 539, at p. 608.
(2) (1892) I. L. R. 14 All. 156.
(3) (1897) I. L. R. 19 All. 357.
(4) (1894) I. L. R. 22 Cal. 445.
(5) (1897) I. L. R. 20 All. 42.
(6) (1899) I. L. R. 23 Bom 725.

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23 A 448= A. W. N 1901, 133

succession to her share devolved upon her death on her surviving sisters and not on the reversioner.

The decree in the suit brought by Jai Kunwar in 1889 would, in the absence of fraud and collusion, have operated as *res judicata* had there been any adjudication in that suit upon the question of title But no such adjudication was made, [455] and the suit was dismissed only on the ground of limitation, that is, on the ground that Jai Kunwar's right to bring the suit was barred by lapse of time

For the above reasons I concur with my learned colleague in making the decree proposed by him

Appeal decreed.

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23 A. 455 (=A. W N. 1901, 129)

FULL BENCH.

Before Mr. Justice Knox, Acting Chief Justice, Mr Justice Blair and Mr Justice Burkitt

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RAHMAT ALI KHAN (*Defendant*) v ABDULLAH (*Plaintiffs*).*
[20th May, 1901]

Act [illegible]

and decide Revenue Court appeals which may be pending on the file of the District Judge

THE suit out of which this appeal arose was brought in the Court of an Assistant Collector under clause 2 of section 86 of the North-Western Provinces Rent Act for compensation on account of damage sustained by certain crops which had been distrained by the defendant The amount claimed as compensation was Rs 145 3-2 The Assistant Collector dismissed the suit. The plaintiff appealed to the District Judge. At the time that the appeal came on for hearing the District Judge was not at head-quarters (Saharanpur), but had gone to Dehra to hold Sessions Under these circumstances the Subordinate Judge of Saharanpur was, by virtue of section 10 of the Bengal Civil Courts' Act, in charge of the office of the District Judge The Subordinate Judge, finding the appeal on the District Judge's list for hearing, took it up and disposed of it, decreeing the appeal and allowing the plaintiff's claim to the extent of Rs 120 From this decree the defendant appealed to the High Court, and his principal ground of appeal was that the Subordinate Judge had no jurisdiction to decide the appeal

[456] Mr *Abdul Raoof* appeared in support of the appeal, and Mr *A. E Ryves* for the respondent. The arguments on both sides will be found set forth in the judgment of the Court

On the 20th May the judgment of the Full Bench was delivered by KNOX, ACTING CHIEF JUSTICE .—

This second appeal is from a decree passed by the Subordinate Judge of Saharanpur The case before the Subordinate Judge was itself an appeal from the Court of the Assistant Collector of Roorkee. It was an appeal under section 189 of Act No XII of 1881 Ordinarily

* Second Appeal No 553 of 1899, from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 8th May 1899, modifying a decree of A T. Holme, Esq , Assistant Collector of the 1st class, dated the 17th May 1898.

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On the contrary, what they decided was that the rights of those plaintiffs were not accelerated by the circumstance that Lachhan Kunwar's rights had been extinguished by the adverse possession of Jit Kunwar and her transferrees.

In my opinion the Full Bench decision of this Court is not touched by the decision in Lachhan Kunwar's case. The decision of the Full Bench, as also the decision of their Lordships of the Privy Council in the case of *Runchordas Vandravandas* v. *Parvatibai* (1) are clear authorities in favour of the plaintiff in the present case.

I would therefore accept this appeal, reverse the decree of both the Courts below, and decree the plaintiff's suit with costs in all Courts, and with mesne profits from the date of suit to the date of delivery of possession, or until the expiration of three years from the date of this decree, whichever event first occurs.

BANERJI, J.—I fully agree with my learned colleague on both the questions which arise in this case.

As regards the question of limitation, the ruling of their Lordships of the Privy Council in the recent case of *Runchordas Vandravandas* v. *Parvatibai* (1) is conclusive. In that case it was held that under article 141, Schedule II of the Limitation Act, a suit could be brought by a reversioner for possession of immoveable property within twelve years from the date of the death of the last female heir, although she may have been out of possession for more than twelve years. With reference to the contention in that case based on section 28 of the Limitation Act that adverse [454] possession against the female extinguished her right, and there was consequently no estate which could go to the reversioner, their Lordships said :—" The learned counsel for the appellant relied on section 28, which provides that at the determination of the period limited for instituting a suit for the possession of property, the right to the property shall be extinguished. The obvious answer to this argument is that in this case the period limited is not determined." That was a case in which the widows had been out of possession for a much longer period than 12 years. It was held that the suit of the reversioner, which had been brought within twelve years of the date of the death of the survivor of the two widows was not time-barred not-withstanding section 28. The decision of the Privy Council has the effect of affirming the view of the law held by the Full Bench of this Court in *Ram Kali* v. *Kedar Nath* (2), and the *dictum* of Burkitt, J., in *Hanuman Prasad Singh* v. *Bhagauti Prasad* (3), and the ruling in *Tika Ram* v. *Shama Charan* (4) cannot be followed. I agree with my brother Chamier that the case of *Lachhan Kunwar* v. *Manorath Ram* (5) is distinguishable. As my learned colleague has pointed out, all that their Lordships of the Privy Council held in that case in regard to the rights of reversioners was that the extinction of the rights of the widow by adverse possession did not let in the rights of any persons who could claim as reversionary heirs, so as to confer on them a right of suit to recover the property in the lifetime of the widow. As the present suit was brought within twelve years of the date of Jai Kunwar's death it was within time under Article 141. The learned Judge was clearly wrong in thinking that the plaintiff's right to obtain the property could accrue upon the death of Amirta. The right of

(1) (1899) I. L. R. 23 Bom. 725.
(2) (1892) I. L. R. 14 All. 156.
(3) (1897) I. L. R. 19 All. 357.
(4) (1897) I. L. R. 20 All. 42.
(5) (1894) I. L. R. 22 Cal. 445.

their intention, as evinced by the draft, was to diminish the limitation imposed by the existing Act, while by the Act which was passed all limitations were withdrawn and a full delegation of all powers, judicial or otherwise, of the District judge was substituted for the restricted powers up till then enjoyed by Subordinate Judges If any [458] limitation was to be imported, it was left to the High Court to take the necessary action The first line of argument fails

The second line of argument is still weaker If this argument were sound, we should have to hold that a District Judge, hearing an appeal under section 189 of Act No XII of 1881, is not a District Judge within the meaning of Act No XII of 1887, this we cannot do The hearing of such appeals is one of the powers of the District Judge, and, in our opinion, one of the powers which under section 10 of Act No XII of 1887, the Subordinate Judge may lawfully exercise under circumstances stated in that section It has been repeatedly held by this Court that the decisions of District Judges on appeals made to them under the Rent Act, and answers made by them on references under that Act are decisions of, and answers by, a Civil Court to a Revenue Court In our opinion the second line of argument also fails

There remains the second ground of appeal namely, that "the application to withdraw the previous suit under section 373 of the Code of Civil Procedure having been refused, the present suit is barred and cannot be entertained" As to this, it is sufficient to say that it should have been raised in the lower appellate Court as a bar to the hearing, it was not so raised, and we now decline to entertain it

We dismiss the appeal with costs In our opinion it would have been far better if the learned Subordinate Judge had abstained from exercising any sort of jurisdiction over the class of appeals which are not ordinarily cognizable by him and of which he has no experience · so far as we ascertain, there was no immediate urgency, and he would have done better if he had let it lie over until the District Judge's return

Appeal dismissed

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23 A. 459 (=A W N. 1901, 147)

[459] APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

SHAM LAL AND OTHERS (*Defendants*) v GHASITA AND ANOTHER (*Plaintiffs*) * [1st July, 1901]

Hindu law—Joint Hindu family—Suit by sons to obtain exemption of their shares from sale under a decree on a mortgage—Plaintiffs parties to the suit in which the decree was passed, but minors, and not properly represented—Guardian and minor—Res judicata—Civil Procedure Code, section 457

[illegible] imple mortgage of [illegible] family consisting [illegible] ns were minors and [illegible] t he refused to act and thereupon the mother of the minors was appointed their guardian *ad litem* The suit terminated in an *ex parte* decree for sale against all the defendants The minors thereupon sued to obtain a declaration that the

* Second Appeal No 636 of 1898 from a decree of Maulvi Muhammad Ismail, Subordinate Judge of Meerut, dated the 3rd September 1898, confirming a decree of Pandit Alopi Prasad, Munsif of Ghaziabad, dated the 18th February 1898

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such an appeal can never be heard by anyone but a District Judge; the uniform practice, as far as we know, for years has been that such an appeal is always heard and determined by the District Judge.

The Subordinate Judge felt it necessary to enter in his judgment some explanation as to why he was so eager to seize upon and to determine this appeal. The explanation he gives is as follows:—"I may add here that this rent appeal had been fixed by the District Judge for to-day. He is gone to Dehra to hold his Sessions. I am in charge of his office under section 10 of the Civil Courts Act, and the appeal came to me with the other work of the District Judge, and I have decided it."

The first plea taken in appeal before us is, that the learned Subordinate Judge had no jurisdiction to decide the appeal, and consequently the decree passed by him is illegal.

The decision of this plea rests upon the true intent and meaning of the words used in section 10, clause (2) of Act No. XII of 1887 (Bengal, N.-W. P., and Assam Civil Courts Act). It is provided in this section that in the event, amongst other things, of the absence of the District Judge from the place at which his Court is held, the senior Subordinate Judge present thereat shall, without relinquishing his ordinary duties, assume charge of the office of the District Judge. While in charge of the office of the District Judge he may, subject to any rules which the High Court may make in this behalf, exercise any of the powers of the District Judge. The plea before us was supported on two lines; the first being that the words of this section import no delegation of any judicial power to the Subordinate Judge under the circumstances mentioned; and secondly, that if those words did import [457] such delegation, they did not and could not refer to the hearing and determination of an appeal preferred under the special jurisdiction conferred on the District Judge by section 189 of the Rent Act.

As regards the first line of argument, it is, first, in conflict with the distinct words used in the paragraph of the section above quoted. Reference to the words used shows that they are words of the widest conceivable import, and they are used without any words of limitation whatever, and evidently in the expectation that any limitation necessary would be provided by rules framed by the High Court. Moreover, we have considered the whole of the Act, and fail to find in it, outside this section, any indication of any intention to place any limitation upon the ordinary meaning of the words above cited, *i.e.*, of the words "any of the powers of the District Judge." This view is further confirmed by a consideration of the corresponding section in Act No. VI of 1871, the Act which preceded and which is replaced in the Statute Book by Act No. XII of 1887. The corresponding section in Act No. VI of 1871 is section 8; it provided that upon a similar state of circumstances the senior Subordinate Judge should, without relinquishing his ordinary duties, assume the charge of the office of the District Judge, and discharge such of the current duties thereof as are connected with the filing of suits and appeals, the issue of processes, and the like functions. Before Act No. XII of 1887 found its place in the Statute Book, a draft Bill was published in the Gazette; that draft extended somewhat the very limited powers conferred by Act No. VI of 1871. For some reason, with which we are not acquainted, that draft, so far as this section is concerned, was not accepted by the Legislature, and the result was that the Act as it now appears found its way on to the Statute Book. From the facts above stated we infer that when the amendment of Act No. VI of 1871 was before the Select Committee,

after giving the matter our best consideration, we think that it is concluded by the ruling of their Lordships of the Privy Council in *Durga Persad* v *Kesho Persad Singh* (1) and inferentially by the ruling of their Lordships in *Mungniram Marwari* v *Mohunt Gursahai Nund* (2) In the former case the minors sued for [461] a declaration that a certain decree, which the appellants had obtained against their uncle Sheonandan Singh and another on his own behalf, and as guardian of those minors, ought not to be executed against them, on the ground that the debt contracted by the ancestor, for which the decree was obtained, had not been contracted for legal necessity and was not binding on them, that the uncle was not a properly constituted guardian, and that in the suit in which the decree was so obtained against them they were not properly represented The Privy Council held that the decree in the suit was not binding upon the infants, as Sheonandan, who was named as their guardian, was not the legal guardian, and had no right to defend the suit in their name In the latter of the two cases referred to above the suit was of a nature similar to the present The plaintiff sued for a declaration that the decree and auction sale under which the defendant became purchaser of the property in suit were not binding upon him as he was a minor, and was not properly represented in the suit in which the decree was obtained Their Lordships disposed of the suit on the ground that the plaintiff was properly represented in the previous suit against him, but they did not dismiss the suit on the ground that such a suit would not lie It was suggested in the course of the argument in that case that the plaintiff s remedy was by way of an appeal or an application to have the first decree set aside But their Lordships did not decide the case on that ground, as they could easily have done On the contrary, the judgment implies that a separate suit would lie The right of a minor to sue to set aside a decree on the ground that he was not properly represented in the previous suit was recognised in *Vishnu Keshav* v *Ramchandra Bhaskar* (3) and in *Daji Himat* v *Dhirajram Sadaram* (4) We may also refer to the case of *Nawab Mahomed Nooroollah Khan* v *Harcharan Rai* (5), upon which the lower appellate Court relies The learned vakil for the appellants has relied upon the case of *Daulat Singh* v *Ragnubir Singh* (6) In our opinion the judgment in that case, so far from supporting the appellants contention is against them In that case it was [462] found that the guardian was properly appointed, and was a person who could legally act as guardian and it was held that the minor having been represented by a lawfully constituted guardian, was as much bound by the decree in that suit as if he had been *sui juris* at the time and had represented himself From this it may be inferred that if the minor had not been represented by a lawfully appointed guardian the decision would have been different The ruling in *Raghubar Dyal Sahu* v *Bhikya Lal Misser* (7) to which reference was made on behalf of the appellants, does not, in our opinion, help the appellants In that case Field, J observed —" If it be a suit to set aside the decree obtained against an infant properly made a party and properly represented in the case, and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can succeed only upon proof of fraud or collusion ' This

(1) (1882) I L R 8 Cal 656.
(2) (1883) L R 16 I A 195
(3) (1886) I L R 11 Bom 130
(4) (1887) I L R 12 Bom 18.
(5) (1874) 6 N W P H C Rep. 98
(6) Weekly Notes 1891 p 141
(7) (1885) I L R 12 Cal. 69

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23 A. 459= A. W. N. 1901, 147.

decree for sale did not affect their interests in the joint family property, inasmuch as they had not been properly represented in the suit in which it was passed, their mother being, as a married woman, incapable in law of acting as their guardian. No question of fraud was shown to arise in the case. *Held* that the minors, on the facts stated above, were entitled to the decree asked for. *Durga Pershad* v. *Kesho Persad Singh* (1), *Mungniram Marwari* v. *Mohunt Gursahai Nund* (2), *Vishnu Keshav* v. *Ramchandra Bhaskar* (3), *Daji Himat* v. *Dhirajram Sadaram* (4), *Nawab Mahomed Nooroollah Khan* v. *Harcharan Rai* (5), *Daulat Singh* v. *Raghubir Singh* (6) and *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (7) referred to.

[Fol: 29 All. 728=A. W. N. 1907, 243=4 A. L. J. 698 ; 15 I. C. 611=10 A. L. J. 149 ; 6 C. L. J. 36 ; Ref ; 4 A. L. J. 103 N ; 32 All. 287 ; 10 O. C. 321 ; 14 A. L. J. 818 ; 19 M. L. T. 90=32 I. C. 391.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) for the appellants.

Pandit *Sundar Lal* for the respondents.

BANERJI and AIKMAN, JJ.—The plaintiffs in this case claim a declaration that their two-thirds share in certain zamindari property is not liable to sale in execution of a decree for sale obtained under section 88 of the Transfer of Property Act, and that they are not bound by the decree or by any proceedings in execution which may be taken hereafter. The suit for sale [460] was brought to enforce a simple mortgage of ancestral property executed by Kure, the father of the present plaintiffs, with whom they formed a joint Hindu family. The defendants to that suit were Kure and the present plaintiffs. The present plaintiffs were then minors, and the father was first named as their guardian *ad litem*, but he refused to act. Thereupon the plaintiffs' mother, Musammat Durga, was appointed their guardian *ad litem*. The suit ended in an *ex parte* decree for sale against all the defendants. No order absolute for sale has yet been passed under section 89 of the Act, or anything else done towards the execution of the decree. In this suit the plaintiffs sue virtually to set aside the decree, so far as it affects their rights, on the ground that their mother, Musammat Durga, being a married woman, her appointment as guardian *ad litem* was illegal with reference to section 457 of the Code of Civil Procedure, and that therefore they were not properly represented in the suit for sale, and are not bound by the decree passed in that suit. It has been found, and is not disputed, that Musammat Durga was a married woman, and therefore could not legally be appointed a guardian *ad litem* of the minors in the suit for sale. It has not been found that there was any fraud connected with her appointment, or with the conduct of the suit, or the passing of the decree. Both the Courts below have decreed the claim on the ground that the plaintiffs not having been properly represented in the suit for sale, the decree passed in that suit is not binding on them. It is urged in the appeal before us that the plaintiffs' suit is barred by the rule of *res judicata*. There can be no doubt that if the decree passed in the suit for sale is binding upon the plaintiffs, the present suit is barred by the rule of *res judicata*, no matter whether the decree was rightly or wrongly passed. The question is whether the decree is binding upon the plaintiffs. This question is by no means free from difficulty; but

(1) (1882) I. L. R. 8 Cal. 656.
(2) (1889) L. R. 16 I. A. 195.
(3) (1886) I. L. R. 11 Bom. 130.
(4) (1887) I. L. R. 12 Bom. 18.
(5) (1874) 6 N. W. P. H. C. Rep. 98.
(6) Weekly Notes, 1894, p. 111.
(7) (1885) I. L. R. 12 Cal. 69.

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section 158 of the Code of Civil Procedure If this section does not justify the Munsif's order, we know of no other section of the Code which would warrant it We have therefore to consider whether section 158 justified the action taken by the Munsif That section provides that "if any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith" In this case [464] the plaintiff was granted time to perform an act which the Munsif considered was necessary for the further progress of the suit The question is, whether the failure to perform that act entailed under the section a dismissal of the suit, or whether the Court ought to have proceeded to hear the suit in spite of the default In our opinion what the section provides is, that the mere fact of a party making default in the performance of what he was directed to do would not lead to the dismissal of the plaintiff's suit, if he was the party in default, or the decreeing of the claim against the defendant, if the defendant was the person who made the default We think that the words "notwithstanding such default" clearly imply that the Court is to proceed with the disposal of the suit, in spite of the default, upon such materials as are before it Had the intention of the Legislature been that such default would entail dismissal in the case of the plaintiff, or the striking out of the defence in the case of the defendant, we should have expected a provision similar to that contained in section 136 or section 120 of the Code If the Judge's view were correct, what would be the result if default was made by the defendant? Would the plaintiff's suit be decreed forthwith without taking any evidence, or without reference to the evidence which had already been adduced? Clearly not In our opinion the section had been misread and misinterpreted by both the Courts below The Munsif seems to have proceeded on the assumption that he could punish the plaintiff for disobedience to the order of the Court by dismissing the suit That he cannot do The Court was certainly not bound to adjourn the hearing of the suit, and it was for the plaintiff to establish her claim by such evidence as she was in a position to adduce on the date fixed If that evidence failed to substantiate the claim, it would, of course, be dismissed But the mere fact of her failure to comply with the order of the Court would not justify an order of dismissal We allow the appeal, set aside the decrees of the Courts below, and remand the case to the Court of first instance under section 562 of the Code of Civil Procedure, with directions to readmit it under its original number in the register, and deal with it according to law Costs here and hitherto will follow the result

Appeal decreed and cause remanded

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remark of the learned Judge, in our opinion, implied that he would not have held that the suit was not maintainable otherwise than on the ground of fraud or collusion, if the minor had not been properly represented in the suit in which the decree was passed. The result is, that this appeal fails and is dismissed with costs. We may mention that this case was heard by the late learned Chief Justice of this Court and one of us, and that the view which he took was the same as that now adopted by us.

Appeal dismissed.

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23 A. 462 (=A. W. N. 1901, 149.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SITARA BEGAM (*Plaintiff*) *v.* TULSHI SINGH AND OTHERS (*Defendants*).* [2nd July, 1901.]

Civil Procedure Code, section 158—Procedure—Order for plaintiff to pay the cost of preparation of a map—Non-compliance of plaintiff with order—Dismissal of suit.

A Court has no power to dismiss summarily a plaintiff's suit merely because the plaintiff has omitted to comply with an order of the Court directing him, within a certain time, to pay in a sum of money as the cost of preparing a map considered by the Court to be necessary to the decision of the suit. If an order of this kind is not complied with, it is the duty of the Court to go on and decide the suit on such materials as it has before it.

[Ref. 31 Cal. 235=5 C. L. J. 260 ; Dist. 36 Cal. 189=1 I. C. 741=12 A. L. J. 911=21 I. C. 480.]

[463] THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. *Abdul Majid* and *Abdul Raoof* for the appellant.

Mr. *S. S. Singh* for the respondents.

BANERJI and AIKMAN, JJ.—The plaintiff-appellant brought a suit on the 25th of April, 1899, for possession of certain land and for the issue of a mandatory injunction for the removal of a certain building and trees. The 27th of May, 1899, was fixed for the hearing of the case. On that date the defendants filed their written statement, and some documentary evidence was produced by the plaintiff. On the 5th June, 1899, the Court framed issues and made an order for the appointment of a Commissioner to prepare a map of the locality. It directed the plaintiff to pay the costs of the issue of the commission within four days. On the 23rd of June, 1899, which was the date fixed for the final disposal of the suit, the case came on for hearing, and it was discovered that the plaintiff had not paid the costs for the issue of the commission as directed by the order of the 5th June, 1899. Thereupon the Munsif recorded the following order:—"In this case the plaintiff was ordered to deposit costs for the amin to prepare the map. The plaintiff has not done so, nor has he explained why it was not done. Orders are passed to be obeyed and not to be disobeyed. The suit is dismissed for want of prosecution. The plaintiff can bring a fresh suit." The Munsif does not cite the authority under which he acted in dismissing the suit, nor does it appear that he was competent to make the order that the plaintiff can bring a fresh suit. The lower appellate Court was of opinion that the order of the Munsif had been made under

* Second Appeal No. 913 of 1899 from a decree of R. Greeven, Esq., District Judge of Benares, dated the 11th September 1899, confirming a decree of Babu Srish Chander Bose, Munsif of Benares, dated the 23rd June 1899.

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tiffs come here in second appeal, and the defendants have filed an objection under section 561 of the Code of Civil Procedure

The appeal of the plaintiffs relates merely to that part of the decree which refused their claim for a perpetual injunction It was held by the Courts below that the plaintiffs, having already obtained a perpetual injunction in the previous suit, were not entitled, with reference to the provisions of section 13 of the Code of Civil Procedure, to maintain a second suit for the same relief As to this we think that the Courts below were right The plaintiffs, having already obtained a decree for a perpetual injunction, cannot get another decree to the same effect against the same defendants The learned vakil for the appellants contended that notwithstanding the previous decree in their favour, they were entitled to maintain a suit for another injunction He argued that as upwards of three years had elapsed since the date of the first decree, it could no longer be enforced in execution and had become inoperative In our judgment this plea is without force When a Court issues an order to a party in a suit for abstention from any particular act, and when the person to whom the order has been issued disobeys that order, he is guilty of contempt of Court, and the Court can, in our opinion, take proceedings to enforce its authority, notwithstanding anything contained in art 179 of sch ii of the Indian Limitation Act No XV of 1877 The appeal therefore fails and is dismissed with costs

With regard to the objection, it is urged that, having regard to the finding of the lower appellate Court, it was not justified in passing a decree for possession The judgment of the learned [467] Additional Subordinate Judge is, we must say, a most peculiar one, and it is difficult to understand what exactly were the conclusions at which he arrived It is clear, however, that the Judge finds that the plot in question is the plaintiffs, and that the defendants are interfering with their possession by insisting upon a right to pass over it No adverse title was set up by the defendants, and upon the previous decision the right of passage claimed now could not be established Under the circumstances we think that the Court was justified in making the decree in the plaintiff's favour for possession We therefore dismiss the objection with costs

Appeal dismissed

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23 A 467 (=A W N 1901, 143)

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

GHULAM HUSAIN (*Plaintiff*) v DINA NATH AND ANOTHER (*Defendants*)* [4th July 1901]

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 91 (*f*) 85—*Decree for money—Mortgage by conditional sale—Suit on mortgage—Confession of judgment followed by decree for possession—Holder of the money decree not a party—Sale in execution of money decree—Rights of auction purchaser*

A judgment-debtor under a decree for money mortgaged certain property by a deed of conditional sale The property mortgaged was attached as the property of the judgment debtor, and an order for sale was passed Prior

* Second Appeal No 160 of 1899 from a decree of F W Fox Esq, District Judge of Jhansi, dated the 5th December 1898, reversing a decree of Maulvi Muhammad Abbas Ali, Munsif of Jhansi, dated the 28th April 1898

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APPELLATE CIVIL.

23 A. 465= A. W. N. 1901, 142.

23 A. 465 (=A. W. N. 1901, 142.)

[465] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

RAM SARAN AND OTHERS (*Plaintiffs*) *v.* CHATAR SINGH AND OTHERS (*Defendants*).* [3rd July, 1901.]

Perpetual injunction—Disobedience to order—Contempt of Court—Second suit for injunction—Res judicata—*Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Art. 179—Limitation.*

Where a plaintiff has once sued for and obtained a perpetual injunction directing the defendant to refrain from certain acts, it is not necessary for the plaintiff, if in future the defendant ignores such injunction, to sue again for a similar relief: in fact, such a suit would be barred by the principle of *res judicata*. When a Court issues an order to a party in a suit for abstention from any particular act, and when the person to whom the order has been issued disobeys that order, he is guilty of contempt of Court, and the Court can take proceedings to enforce its authority notwithstanding anything contained in article 179 of the second schedule to the Indian Limitation Act 1877.

[Fol. 28 All. 300=A. W. N. 1906, 10=3 A. L. J. 836; Ref. 66 I. C. 166; Dist. 15 I. C. 915.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gokul Prasad* for the appellants.

Babu *Sital Prasad Ghose* for the respondents.

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit brought by the plaintiffs, who are appellants here, in regard to a small plot of land in the village of Bhikampur, in the Meerut district. The plot in question was allotted to the plaintiffs in a partition which took place in 1882. It appears that after the partition the defendants began passing over the land. The plaintiffs, or their predecessor in title, instituted a suit in 1884 for a declaration of their title to this very plot, and for an order restraining the defendants from using the land. That suit was decreed. The plaintiffs now come into Court, alleging that, notwithstanding the proceedings in the former suit, the defendants still interfere with their possession. They alleged that they were prevented by the defendants from constructing a house which they wished to build on the plot. They further alleged that a thatch, which they had put up on the land in dispute, had been demolished by the defendants. They prayed, first, that the house which they wished to build should be constructed on the plot at the plaintiffs' expense "through the Court Amin," and that the obstruction offered by the defendants should be removed. Next, [466] they asked for a declaration of their right to the plot, and for the issue of a perpetual injunction forbidding the defendants to pass over the plot, and prohibiting their interference with the plaintiffs' enjoyment of it. In the alternative, the plaintiffs prayed that if the Court considered the plaintiffs to be out of possession, a decree for possession might be given.

The plaintiffs' suit was dismissed by the Munsif. On appeal the learned Additional Subordinate Judge gave the plaintiffs a decree for possession, but refused the prayer for a perpetual injunction. The plain-

* Second Appeal No. 960 of 1899 from a decree of Munshi Shiva Sahai, Additional Subordinate Judge of Meerut, dated the 9th September 1899 modifying a decree of Maulvi Muhammad Abbas Ali, Munsif of Meerut, dated the 17th April 1899.

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plaintiff for possession conditional on his redeeming the respondents mortgage On appeal by the defendants respondents the lower Appellate Court reversed the decree of the Court of first instance and dismissed the suit It held that the plaintiff had failed to prove that the proceedings in the foreclosure suit were fraudulent and collusive, and it was of opinion that at the date of the plaintiff's purchase Kalli s title to the property had become extinct, and that consequently the plaintiff acquired no interest in the property which afforded him a right to bring the present suit The correctness of this decision has been challenged in this second appeal The learned vakil for the respondents has conceded that Madho Rao, as the attaching creditor of the mortgaged property, had a right, under clause (*f*) section 91 of the Transfer of Property Act, to redeem the mortgage, and was therefore a necessary *party to the respondent's suit*, and that *the decree for foreclosure could* not affect his right of redemption But it was contended that the plaintiff auction purchaser did not acquire the right which existed in Madho Rao, and that consequently the decree which was granted to him by the Court of first instance was erroneous It cannot be denied that *had the decree for foreclosure obtained by the respondents been passed* in compliance with the provisions of the Transfer of Property Act, and had a date been fixed in it for payment of the mortgage amount as required by section 86 of that Act, and had the property been purchased by the present plaintiff before that date, he could have prevented fore closure by redeeming the property Can the fact of the decree being framed in violation of the law deprive him of that right? It is true that the mortgagor could have waived the requirements of the Transfer of Property Act so far as he himself was concerned, but those requirements are provided for the benefit, not only of the mortgagor, but of all persons entitled under section 91 to redeem the mortgaged property, and the mortgagor could not, in proceedings to which such persons were not parties, destroy their right of redemption It is urged **[470]** that as it has been found that the decree was not collusively and fraudulently obtained it had the effect of extinguishing Kalli s right, and that therefore at the date of the plaintiff's purchase no rights were in existence which could pass to the plaintiff This raises the question, whether or not the purchaser acquired by his purchase the rights which existed in the judgment debtor at the date of the attachment Having regard to the provisions of section 276 of the Code of Civil Procedure, it is clear that no private alienation made by the judgment debtor after the attachment of the property could be valid That section, it is true, does not apply to a transfer by operation of law, but, in my opinion, such a transfer would be equally invalid, although not under section 276 Further, it was held by their Lordships of the Privy Council in the well known case of *Suraj Bunsi Koer* v *Sheo Persad Singh* (1), that an attachment and order for sale of the undivided interest of a co parcener in a joint Hindu family creates in favour of the attaching creditor a charge which cannot be defeated on the judgment debtor's death before sale, by the application of the principle of survivorship, and that the attaching creditor is entitled to have that interest sold in execution It appears to me that the principle of this decision is not confined to the particular case of attachment and order for sale of the undivided interest of a member of a joint Hindu family, but is equally applicable to any

(1) (1879) I L R 5 Cal 148

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23 A. 467= A. W. N. 1901, 143.

to the sale, however, the mortgagees having put their mortgage into suit, the judgment-debtor confessed judgment, admitted the mortgage debt, stated that he had not means to pay it, and asked that a decree for possession of the property might be passed in favour of the mortgagees, and a decree was so passed. To this suit the mortgagees, who were found to have had notice of the interest of the attaching judgment-creditor, never made him a party. Subsequently to the passing of the decree in the mortgagees' suit the judgment-creditor under the money decree caused the property to be sold. The auction purchaser was resisted in obtaining possession by the mortgagees and thereupon sued them for possession.

Held that the auction purchaser was entitled to a decree for possession on redeeming the mortgage. *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), *Ponnappa Pillai* v. *Pappuvayyangar* (2) and *Anand Chandra Pal* v. *Panchilal Sarma* (3), referred to by Banerji, J.

[Not fol. 17 I. C. 132=17 C. W. N. 871; Ref. 37 Mad. 118; 15 I. C. 334; Expl. 61 I. C. 525.]

[468] THE facts of this case sufficiently appear from the judgment of Banerji, J.

Munshi *Jang Bahadur Lal* for the appellant.

Babu *Durga Charan Banerji* for the respondents.

BANERJI, J.—This appeal arises in a suit which was brought under the following circumstances:—One Madho Rao got a decree for money against Kalli on the 7th December, 1894. He applied for execution of that decree on the 15th August, 1895, and the property now in suit was attached as the property of Kalli. As the said property was ancestral the execution of the decree was, on the 22nd November, 1895, transferred to the Collector under section 320 of the Code of Civil Procedure. As that section presupposes the passing of an order for sale of the attached property, it must be presumed that an order for the sale of the property had been made. On the 20th July, 1896, the property was sold by auction and the plaintiff appellant purchased it. On the 25th January, 1895, however, Kalli had mortgaged the said property by a deed of conditional sale to the respondents. On the 29th June, 1896, the mortgagees brought a suit for foreclosure and made Kalli alone defendant to the suit. Madho Rao was not joined as a party. It has been found that the respondents had notice of the fact that Madho Rao had caused the property to be attached. On the 14th July, 1896, that is, six days before the date fixed for the sale of the property in execution of Madho Rao's decree, Kalli appeared in Court, confessed judgment, admitted his liability for the amount of the mortgage alleged that he had not the means to pay it, and prayed that a decree might be passed in favour of the mortgagees for possession of the property. The Court, instead of making a decree in compliance with the provisions of section 86 of the Transfer of Property Act, passed a decree in the terms of Kalli's application for possession of the property. When the plaintiff after his purchase attempted to take possession of the property, he was resisted by the respondents, and that led to the institution of the present suit, in which he seeks to recover possession by virtue of his purchase. He alleged in his plaint that the decree in the foreclosure suit, and the proceedings which led to it, were fraudulent and collusive and of no effect against him. The Court of first [469] instance was of opinion that the intention of the mortgagor and the mortgagees in the foreclosure suit "was to deceive the purchaser of the attached property sold in execution of Madho Rao's decree, and to make him unable to redeem the property." It granted a decree to the

(1) (1879) I. L. R. 5 Cal. 148.
(2) (1881) I. L. R. 4 Mad. 1, at p. 64.
(3) (1870) 5 B. L. R. 691.

23 A. 472 (=A W N 1901, 145)

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Chamier

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APPELLATE CIVIL
23 A 472= A W N 1901, 145.

LACHHO BIBI (*Defendant*) v GOPI NARAIN AND OTHERS (*Plaintiffs*) * [10th July 1901]

Will—Application for probate—Plea of unsoundness of mind on the part of the testator—Burden of proof

If a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved the contents of the will and it is only where this is done that the *onus* is thrown upon those who oppose the will to prove fraud, or undue influence, or whatever they rely on to displace the case for proving the will *Barry* v *Butlin* (1), *Fulton* v *Andrew* (2), *Tyrrell* v *Painton* (3) and *Farrelly* v *Corrigan* (4) referred to

[Ref 55 I C 798=1 Lah 173, 59 I C 535]

THE facts of this case sufficiently appear from the judgment of Chamier, J

Pandit *Moti Lal Nehru*, Babu *Durga Charan Banerji*, Pandit *Mohan Lal Nehru* and Babu *Lalit Mohan Banerji* for the appellant

Pandit *Sundar Lal*, Pandit *Madan Mohan Malaviya* and Dr *Satish Chandra Banerji* for the respondents

CHAMIER, J (BANERJI, J, concurring) —This is an appeal from an order of the District Judge of Cawnpore, granting probate of the will, dated July 13th, 1899, of Lala Gaya Prasad, who died at Cawnpore during the night of 15th 16th July, 1899

At the time of his death Gaya Prasad was about 52 years of age He was a member of the Municipal Board of Cawnpore, and one of the most prominent business men of the town By his own abilities or good fortune he had acquired property of the value of fifteen lakhs of rupees or more He had suffered for [473] many years from diabetes and spermatorrhœa, for which he had been treated by Dr Hem Chandra, and latterly by Dr Mahendra Nath Ganguli, but from the month of February, till the day before his death, he does not seem to have received a professional visit from any medical practitioner His only son, Beni Madho, died on March 1st, 1899, after which he seems to have somewhat curtailed his business Towards the end of March, 1899, he went to Benares to visit his *guru* or spiritual adviser—a celebrated ascetic named Swami Bhaskaranand—to whom he was much attached On or about July 5th he again went to Benares to see his *guru*, who was reported to be suffering from cholera At 9-10 A M on July 8th he telegraphed from Benares to Cawnpore to the witness Nanhe Mal—"Do not prepare will yet" At 1-37 P M on the same day he telegraphed to Nanhe Lal—"My previous telegram cancelled—prepare the will," and on the following morning at 6-53 A M he sent a third telegram to Nanhe Mal—"Do not prepare will yet, Swamiji in same state" He sent also other telegrams about the Swami's health and about some pomegranates which he required for the Swami The Swami died on July 9th, and on that or the following day Gaya Prasad

* First appeal No 44 of 1900, from an order of J Sanders, Esq, District Judge of Cawnpore, dated the 3rd April 1900

(1) (1838) 2 Moo P C 480
(2) (1875) L R 7 H L 448
(3) (1893) L R 1894 P D 151
(4) (1899) L R 1899 A C 563

should give certain security. The respondents have filed a cross-appeal against the order requiring security. 1901 JULY 10.

APPELLATE CIVIL.

23 A 472= A W N. 1901, 145.

Mr. *Moti Lal* on behalf of the appellant contended that the District Judge was wrong in throwing the *onus* of proof entirely upon the appellant. He contended that the *onus* lay, in the first place, upon the propounders of the will to prove that it was the last will of a free and capable testator, and that they had failed to discharge that *onus*. Next he contended that the appellant had proved that after the death of his son the testator had become subject to insane delusions, the chief of which was that the appellant had caused the son's death by witchcraft, and as those delusions affected the disposition of his property, the will could not stand; and that it was also proved that the testator was otherwise of unsound mind, but that if the appellant had not proved the existence of insane delusions on the part of the testator, or that he was of unsound mind, she had, at least, proved circumstances which should excite the suspicion of the Court, and shift the *onus* of proof again to the propounders of the will, who were then bound to prove affirmatively that the testator was competent in mind, and knew and approved the contents of the will. Mr. *Moti Lal* contended that the evidence adduced by the propounders of the will fell far short of this, and in particular that they had failed to show that the testator knew and approved of the bequests to Puttan Lal and Kunj Behari. As regards the *onus* of proof in cases of this kind the rules of law are quite clear. The first rule is, that "the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator." The second rule is that "if a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will, and it is only [476] where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the will." See *Barry* v. *Butlin* (1), *Fulton* v. *Andrew* (2), *Tyrrell* v. *Painton* (3) and *Farrelly* v. *Corrigan* (4). With regard to the nature of the evidence required in such cases to establish knowledge of, or assent to, the contents of a will, Parke, B., in the case first cited, said :—"In all cases the *onus* is imposed on the party propounding the will, it is in general discharged by proof of capacity, and the fact of execution, from which knowledge of, and assent to, the contents are assumed * * * * Nor can it be necessary that in all cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for reading over the instrument. They form no doubt the most satisfactory, though not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased." See also *Mitchell* v. *Thomas* (5). On the other hand, there is no rigid rule that if the Court is satisfied that a testator of a competent mind has read his will, or had it read to him, and has thereupon executed it, all further inquiry is shut out (see *Fulton* v. *Andrew* (2) per Lord Hatherley).

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(1) (1838) 2 Moo P C 480
(2) (1875) L. R. 7 H L 448
(3) (1893) L. R 1894 P. D 151.
(4) (1893) L R 1899 A C 563
(5) (1847) 6 Moo P. C. 137.

1901 JULY 10. — APPELLATE CIVIL. — 23 A. 472= A. W. N. 1901, 145.

returned to Cawnpore. On July 13th he signed the will now in question, and after getting four witnesses to attest his signature, he took it to the office of the District Registrar, and there deposited it in a sealed cover as his will under the provisions of section 42 of the Registration Act. Dr. Ganguli visited Gaya Prasad on July 15th, the day before his death, found him suffering from palpitation of the heart and prescribed for him. Gaya Prasad said that as that day was not an auspicious day he would have the prescription made up the next day. Early the next morning he was found dead on the floor in his house. The body was cremated within a few hours, and as there was no *post mortem* examination, the exact cause of his death cannot be ascertained.

The testator left surviving him—(1) his first wife, who is the appellant; (2) Musammat Ram Piari, the widow of his son Beni Madho; (3) Nanak Chand, the husband, (4) Kasi Prasad, the son, and (5) Musammat Savitri, the daughter of a deceased sister; (6) another sister, whose name has not been mentioned; [474] her son Gopi Narain *alias* Puttan Lal; (8) a third sister, named Musammat Mullo, and (9) her son Ram Kishen.

The testator's second wife died many years ago, a few months after the birth of her son Beni Madho.

The will in question is a lengthy document, consisting of 39 clauses written upon 12 sheets of foolscap paper, each of which is signed at the foot by the testator in the Mahajani character. It may be summarised as follows:—

[Here follows a summary of the contents of the will.]

The application for probate was made on August 25th, 1899, by the respondents Puttan Lal and Kunj Behari Lal, Sheo Prasad, Bal Mukand, Pirbhu Dyal and Sri Narain, the executors named in the will. The appellant lodged a caveat on September 16th, and a few days later filed a petition setting forth the grounds on which she objected to the grant of probate. They are shortly as follows:—That Gaya Prasad had for many years suffered from diabetes of a serious type, by which his constitution had been undermined, and his physical strength enfeebled; that he sustained such a severe shock by the death of his only son Beni Madho that his mind was affected, and thereafter his habits, ideas and general bearing became those of a person of unsound mind; that he also became subject to insane delusions, in particular to the delusion that the appellant had caused his son's death by witchcraft; that these delusions were fostered by designing persons, and so preyed upon his mind that he determined to commit suicide; that he was not possessed of testamentary capacity at the date of the will and that the will was executed under the influence of Puttan Lal and Kunj Behari.

The learned District Judge, as we read his judgment, was of opinion that the testator must be presumed to have been of sound mind, and that on proof of the *factum* of the execution of the will, nothing further was required of the propounders of it. He considered that the will was not of an unusual nature, and that allegtions made by the present appellant were not sufficient in themselves to raise suspicion *as to the bona fides of the propounders of the will.* Treating the burden of proof as lying entirely on the present appellant, the learned Judge found that she had failed to prove that the testator had committed suicide, or [475] that he was subject to delusions, or was otherwise of unsound mind. He therefore pronounced for the will, but, under section 78 of the Probate Act, he directed that the executors taking out probate

of the respondents that it was an order under section 244 of the Code of Civil Procedure, and therefore an appeal lay from it to the [478] lower appellate Court I do not agree with this contention The application for the amendment of the sale certificate was made by the respondent in his capacity as auction purchaser, and not in his capacity as decree holder It is the auction purchaser to whom a certificate of sale is granted under section 316, and it is the auction purchaser who can, under sections 318 and 319, apply for delivery of possession over the property sold The decree holder, as such, is not entitled to a sale certificate, nor is he, as such, entitled to ask for possession Further, the question of amendment of the sale certificate and of delivery of possession to the auction purchaser is not a question which arises between the parties to the suit or their representatives and relates to the execution, discharge, or satisfaction of the decree Section 244 has no application to the present case This view is supported by the ruling of the Calcutta High Court in *Bujha Roy* v *Ram Kumar Pershad* (1) The case of *Gulam Shabbir* v *Dwarka Prasad* (2) is also in point The ruling in *Imdad Ali* v *Jagan Lal* (3), on which the learned vakil for the respondent relies, has no bearing on the present question

As no appeal lay to the learned District Judge from the order of the Court of first instance, his appellate order cannot be sustained I allow the appeal, set aside the decree of the Court below with costs, and restore that of the Court of first instance

The appellant will have his costs of this appeal

Appeal decreed

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23 A. 478 (=A W N. 1901, 175)

APPELLATE CIVIL

Before Mr. Justice Burkitt and Mr Justice Chamier

DURGA KUNWAR (*Plaintiff*) v BALWANT SINGH (*Defendant*)
[6th August, 1901]

. . . . . *sale in execution had not obtained*

The plaintiff sued to set aside a sale of certain property in execution of a decree against him, on the grounds that the sale proceedings had been [478] secretly brought about without the knowledge of the plaintiff, and that the certified auction purchasers were *benamidars* for the decree holders who had not obtained permission to purchase *Held* that under the above circumstances the plaintiff s remedy was not by suit, but by application under section 244 and the last clause of section 294 of the Code of Civil Procedure *Viraraghava Ayyangar* v *Venkatacharyar* (4), *Viraraghava* v *Venkata* (5), *Chintamanrav Natu* v *Vithabai* (6), *Genu* v *Sakharam* (7), *Subbarayudu* v *Kotayya* (8), *Mahomed Gazee Chowdhry* v *Ram Loll Sen* (9), *Mohendro Narain*

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* Second Appeal No 740 of 1900, from a decree of B J Dalal, Esq District Judge of Mainpuri, dated the 6th March 1900, reversing a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpur, dated the 22nd December 1897

(1) (1899) I L R 26 Cal 529
(2) (1895) I L R 18 All 36
(3) (1895 I L R 17 All. 478.
(4) (1882) I L R 5 Mad 217
(5) (1892) I L R 16 Mad 287
(6) (1887) I L R 11 Bom 588
(7) (1896) I L R 22 Bom 271
(8) (1892) I L R 15 Mad 389
(9) (1884) I L R 10 Cal 757

1901 JULY 10. — APPELLATE CIVIL.

[The judgment then went on to discuss the facts of the case, and ultimately affirmed the decision of the District Judge granting probate and dismissed the appeal. Only so much of the judgment is set forth as is material for the purposes of the present report.—ED.]

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23 A 472= A. W. N. 1901, 145.

23 A. 476 (=A. W. N. 1901, 156.)

APPELLATE CIVIL.

Before Mr. Justice Banerji.

SADDO KUNWAR (*Judgment-Debtor*) *v.* BANSI DHAR (*Decree-holder*).*
[19th July 1901.]

Execution of decree—Sale in execution—Purchase by decree-holder—Application for amendment of sale certificate—Appeal.

A decree-holder applying for execution of his decree asked for a 2 annas 8 pies share belonging to his judgment-debtor to be put up to sale. This [477] share was advertised for sale, and ultimately the decree-holder himself bought at the sale; but a sale certificate was granted to him in respect of a 2 annas 5 pies share only. The decree-holder applied for amendment of the sale certificate, which was refused him. He then appealed against the order of the Court refusing to amend.

Held, that no appeal lay from such order, either under section 588 or by virtue of section 244 of the Code of Civil Procedure. *Bujha Roy* v. *Ram Kumar Pershad* (1) and *Gulam Shabbir* v. *Dwarka Prasad* (2) referred to.

[Ref : 19 C. L. J. 209=23 I. C. 811.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *J. Simeon* for the appellant.

Munshi *Jang Bahadur Lal* for the respondent.

BANERJI, J.—The respondent obtained a decree against the appellant, and in execution of that decree caused a 2 annas 8 pies share to be advertised for sale. A sale took place, and was in due course confirmed. A certificate of sale was granted under section 316 of the Code of Civil Procedure to the auction purchaser, who happened to be the decree-holder himself. In that certificate the extent of the share sold was stated to be 2 annas 5 pies. He aplied for delivery of possession, and possession was delivered over to him of 2 annas 5 pies share. He then made an application to the Court which executed the decree, alleging that the extent of share sold at auction, and purchased by him, was 2 annas 8 pies ; that the said extent of share should have been stated in the sale certificate ; and that possession should have been delivered to him in respect of it. He prayed that the certificate of sale be amended and that he be put into possession of the remaining 3 pie share. This application was refused by the Court of first instance. He appealed to the District Judge, who entertained the appeal, set aside the order of the Court of first instance, and granted his prayer. It is contended in this appeal, which has been preferred by the judgment-debtor, that no appeal lay to the Court below. This contention must, in my opinion, prevail. The order of the Court of first instance was admittedly not appealable under section 588 of the Code of Civil Procedure. It is urged on behalf

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* Second Appeal No. 1421 of 1900 from a decree of J. E. Gill, Esq., District Judge of Allahabad, dated the 14th September 1900, reversing a decree of H. David, Esq., Subordinate Judge of Allahabad, dated the 2nd October 1899.

(1) (1899) I. L. R. 26 Cal. 539. (2) (1895) I. L. R. 18 All. 36.

of the respondents that it was an order under section 244 of the Code of Civil Procedure, and therefore an appeal lay from it to the [478] lower appellate Court I do not agree with this contention The application for the amendment of the sale certificate was made by the respondent in his capacity as auction purchaser, and not in his capacity as decree holder. It is the auction purchaser to whom a certificate of sale is granted under section 316, and it is the auction purchaser who can, under sections 318 and 319, apply for delivery of possession over the property sold The decree holder, as such, is not entitled to a sale certificate, nor is he, as such, entitled to ask for possession Further, the question of amendment of the sale certificate and of delivery of possession to the auction purchaser is not a question which arises between the parties to the suit or their representatives and relates to the execution, discharge, or satisfaction of the decree Section 244 has no application to the present case This view is supported by the ruling of the Calcutta High Court in *Bujha Roy* v *Ram Kumar Pershad* (1) The case of *Gulam Shabbir* v *Dwarka Prasad* (2) is also in point The ruling in *Imdad Ali* v *Jagan Lal* (3), on which the learned vakil for the respondent relies, has no bearing on the present question

1901 JULY 19 — APPELLATE CIVIL. — 23 A 476= A W N 1901, 156

As no appeal lay to the learned District Judge from the order of the Court of first instance, his appellate order cannot be sustained I allow the appeal, set aside the decree of the Court below with costs, and restore that of the Court of first instance

The appellant will have his costs of this appeal

Appeal decreed

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23 A 478 (=A W. N. 1901, 175)

APPELLATE CIVIL

Before Mr. Justice Burkitt and Mr Justice Chamier

DURGA KUNWAR (*Plaintiff*) v. BALWANT SINGH (*Defendant*)
[6th August, 1901.]

sale in execution had not obtained

The plaintiff sued to set aside a sale of certain property in execution of

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* Second Appeal No 740 of 1900, from a decree of B J Dalal, Esq District Judge of Mainpuri, dated the 6th March 1900, reversing a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpur, dated the 22nd December 1897

(1) (1899) I. L R. 26 Cal 529
(2) (1895) I L R 18 All 36
(3) (1895 I. L R 17 All. 478.
(4) (1882) I L R 5 Mad 217
(5) (1892) I L R 16 Mad 287
(6) (1887) I L R 11 Bom 588
(7) (1896) I L R 22 Bom 271.
(8) (1892) I L R 15 Mad. 383
(9) (1884) I L R 10 Cal 757

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JULY 10.
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APPELLATE
CIVIL.

[The judgment then went on to discuss the facts of the case, and ultimately affirmed the decision of the District Judge granting probate and dismissed the appeal. Only so much of the judgment is set forth as is material for the purposes of the present report.—ED.]

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23 A 472=
A. W. N.
1901, 145.

23 A. 476 (=A. W. N. 1901, 156.)

APPELLATE CIVIL.

Before Mr. Justice Banerji.

SADDO KUNWAR (*Judgment-Debtor*) *v.* BANSI DHAR (*Decree-holder*). *
[19th July 1901.]

Execution of decree—Sale in execution—Purchase by decree-holder—Application for amendment of sale certificate—Appeal.

A decree-holder applying for execution of his decree asked for a 2 annas 8 pies share belonging to his judgment-debtor to be put up to sale. This [477] share was advertised for sale, and ultimately the decree-holder himself bought at the sale; but a sale certificate was granted to him in respect of a 2 annas 5 pies share only. The decree-holder applied for amendment of the sale certificate, which was refused him. He then appealed against the order of the Court refusing to amend.

Held, that no appeal lay from such order, either under section 588 or by virtue of section 244 of the Code of Civil Procedure. *Bujha Roy* v. *Ram Kumar Pershad* (1) and *Gulam Shabbir* v. *Dwarka Prasad* (2) referred to.

[Ref : 19 O. L. J. 209=23 I. C. 811.]

THE facts of this case sufficiently appear from the judgment [illegible] Court.

Mr. *J. Simeon* for the appellant.

Munshi *Jang Bahadur Lal* for the respondent.

BANERJI, J.—The respondent obt[illegible] decree against the
lant, and in execution of that decree [illegible] annas 8 pies shar
advertised for sale. A sale took pla[illegible] in due course con
A certificate of sale was granted un[illegible] of the Code
Procedure to the auction purchaser [illegible] to be the
holder himself. In that certificate [illegible] the share
stated to be 2 annas 5 pies. He ap[illegible] of possessio
possession was delivered over to hi[illegible] 5 pies share.
made an application to the Court [illegible] the decree,
that the extent of share sold at [illegible] by him,
annas 8 pies ; that the said extent [illegible] have been
the sale certificate ; and that posse[illegible] ve been deli
him in respect of it. He prayed th[illegible] of sale be
and that he be put into possession [illegible] 3 pie sha
application was refused by the Co[illegible] He app
the District Judge, who entertained [illegible] the or
Court of first instance, and granted [illegible] cont
appeal, which has been preferred [illegible], that
lay to the [illegible] This [illegible] opinion,
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* Second Appea[illegible]
Judge of Allahabad, [illegible]
Esq., Subordinate Judge [illegible]

(1) (1899) I. L. R. 26 [illegible]

and the cases referred to in the foot notes to that case It appears to us that there is an overwhelming current of authority against the appellant's contention in this case We are of opinion that the suit brought by the plaintiff was not maintainable, and was properly dismissed by the lower appellate Court

23 A 478= A W N 1901, 175

[481] Another point raised for the appellant was, that only one of the *benamidars*, namely, Balwant Singh appealed from the judgment of the first Court The other *benamidar*, Zabar Singh, did not join in the appeal, and was not brought in as a respondent It is contended that, as far as Zabar Singh is concerned, the decision of the first Court has become final As to that question it is sufficient to refer to section 544 of the Code of Civil Procedure This is clearly a case to which that section applies The decree appealed against did proceed on a ground common to the two *benamidars* and that being so, it was quite allowable for one of them to appeal against that decree The reversal of the decree of the first Court enured to the benefit of both the *benamidars* We are unable in this case to treat the plaint as an application made in the execution proceedings under *sections* 244 and 294 The execution proceedings were in the Court of the Munsif, and this suit was instituted in the Court of the Subordinate Judge, who is not seised of the execution proceedings For the above reasons we dismiss this appeal with costs

Appeal dismissed

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23 A 481 (=A W N 1901, 162)

APPELLATE CIVIL

Before Mr Justice Burkitt and Mr Justice Chamier.

PADARATH (*Defendant*) v RAM GHULAM (*Plaintiff*) *
[17th July, 1901]

Act No. XII of 1881 (*North Western Provinces Rent Act*), *sections* 10, 93 95—*Act No XIX of* 1873 (*North Western Provinces Land Revenue Act*), *section* 241—*Jurisdiction—Civil and Revenue Courts—Suit by mortgagee from occupancy tenant for possession of the mortgaged property against occupancy tenant and an alleged trespasser, and for a declaration*

The plaintiff was the mortgagee from an occupancy tenant of some 34 and odd bighas of land When he attempted to take possession of the land under

. . . .

and also for a declaration that the second defendant had "nothing to do with the land "

[482] *Held*, that the suit was properly brought in a Civil Court, and that the Civil Court was competent to grant the plaintiff a decree for possession, though it could not grant him the declaration asked for *Ajudhia Rai* v *Parmeshar Rai* (1) *Subarni* v *Bhagwan Khan* (2) *Dukna Kunwar* v *Unkar Pande* (3), *Kaliani* v *Dassu Pande* (4) and *Baru Mal* v *Niadar* (5) referred to

THE facts of this case sufficiently appear from the judgment of Chamier, J

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* Second Appeal No 60 of 1900 from a decree of H E Holme Esq , District Judge of Azimgarh, dated the 6th October 1899, confirming a decree of Munshi Murari Lal, Munsif of Muhammadabad Gohna, dated the 30th August 1899

(1) (1896) I L R 18 All 340
(2) (1896) I L R 19 All 101
(3) (1897) I L R 19 All 452
(4) (1898) I L R 20 All 520
(5) Weekly Notes, 1901, p 127.

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APPELLATE CIVIL.

23 A. 478= A. W. N. 1901, 175.

Chaturaj v. *Gopal Mondul* (1), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2) and *Bhubon Mohun Pal* v. *Nunda Lal Dey* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* (for whom Mr. *Abdul Jalil*) for the appellant.

Pandit *Baldeo Ram* for the respondent.

BURKITT and CHAMIER, JJ.—The suit out of which this appeal has arisen was instituted by one Gyan Singh, the present appellant's husband, and the object of the suit was to have set aside a judicial sale of the plaintiff's property, which had taken place in execution of a money decree obtained by Musammat Ratan Kunwar and others. The grounds on which it was sought to set aside the sale were that the sale proceedings had been secretly brought about without the knowledge of the plaintiff, and that the certified auction purchasers, namely, Balwant Singh and Zabar Singh, were *benamidars* for the decree-holders, who had not obtained permission to purchase; in short, that the decree-holders had purchased without first having obtained permission from the Court. The Court of first instance gave the plaintiff a decree. The lower appellate Court reversed the decision of the first Court and dismissed the suit, holding that the plaintiff had mistaken his remedy, and that instead of instituting a regular suit he ought to have made an application in the execution proceedings under section 244 and the last clause of section 294 of the Code of Civil Procedure. In appeal here it is contended that the decree of the Court below is wrong, and that the plaintiff was entitled to bring a regular suit to have the sale set aside. Now [480] in our opinion this question is one which is concluded by the authority of a long string of cases in the Madras, Bombay and Calcutta Courts. So far back as 1882, just before the present Code of Civil Procedure became law, it was held by the Madras High Court in *Viraraghava Ayyangar* v. *Venkatacharyar* (4) that in a matter of this kind a regular suit would not lie, and that the proper procedure was by an application under section 244, Civil Procedure Code. The case we have just referred to was followed in *Viraraghava* v. *Venkata* (5) and by the Bombay Court in *Chintamanrav Natu* v. *Vithabai* (6), which, in turn, was followed in the case of *Genu* v. *Sakharam* (7). For the appellant the case of *Subbarayadu* v. *Kotayya* (8), was cited. That case, however, is no authority on the question before us. The question in that case was whether the agent of a party who had obtained permission to purchase and who purchased for himself, and not for his principal, could be allowed to sue for possession of the property which he had so purchased. The case of *Mahomed Gazee Chowdhry* v. *Ram Loll Sen* (9), was also cited for the appellant. The decision in that case has no bearing upon the question before us, but some remarks in the judgment of that case support the appellant's contention. The case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1), is, as far as it goes, in favour of the appellant. But the authority of that case was much shaken by the remarks of the Privy Coucil in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2), which are entirely consonant with the rule laid down by the Madras and Bombay High Courts in the cases cited above. This has been recognised by the Calcutta High Court in *Bhubon Mohun Pal* v. *Nunda Lal Dey* (3),

(1) (1890) I. L. R. 17 Cal. 769.
(2) (1892) I. L. R. 19 Cal. 683.
(3) (1899) I. L. R. 26 Cal. 324.
(4) (1882) I. L. R. 5 Mad. 217.
(5) (1892) I. L. R. 16 Mad. 287.
(6) (1887) I. L. R. 11 Bom. 588.
(7) (1896) I. L. R. 22 Bom. 271.
(8) (1892) I. L. R. 15 Mad. 389.
(9) (1882) I. L. R. 10 Cal. 757.

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(e) of the Land Revenue Act, counsel for the appellant referred to two cases decided by the Full Bench of this Court, namely, *Ajudhia Rai* v. *Parmeshar Rai* (1) and *Subarni* v. *Bhagwan Khan* (2) In the former case the plaintiffs alleged that they were tenants at fixed rates [484] of a holding, that at settlement the Settlement Officer had wrongly entered the defendants as tenants at fixed rates, and the plaintiffs as mortgagees only, and they asked for a decree for maintenance of possession "by invalidating the proceeding of the Settlement Officer" The Full Bench held (Banerji, J, *dubitante*), that the jurisdiction of the Civil Court to entertain the suit was barred for two reasons, namely—(1) that to give the plaintiffs the decree which they sought would be to determine that the plaintiff had a certain class of tenancy, and that the defendants had no class of tenancy in the holding, and that that would be "the determination of the class of a tenant" within the meaning of clause (e) of section 241 of the Land Revenue Act, (2) that either of the parties to the suit could make an application under section 10 and section 95 (a) of the Rent Act In that case the main relief claimed was considered to be the determination of the class of a tenant—a relief which, in the opinion of the majority of the Court, could have been obtained by either party under the Rent Act In the present case the main relief claimed is a decree for possession In the second of the Full Bench cases it was held, as I understand, that the suit was not maintainable in the Civil Court, because the defendant had presented an application to a Court of Revenue which was substantially an application under section 10 and section 95 (a) of the Rent act, and the order passed thereon had, under section 96 (b) of the Act, the same effect as a judgment of a Civil Court In the case before us there has been no application under the Rent Act, nor have there been any proceedings in any Court in which the status of either the plaintiff or the defendant has been determined

Counsel for the respondent relied upon the decisions of this Court in *Dukna Kunwar* v *Unkar Pande* (3), *Kaliani* v *Dassu Pande* (4) and *Baru Mal* v *Niadar* (5) In the last of these cases, Banerji, J, held that a suit for possession was maintainable in the Civil Court against a person who had been placed or maintained in possession by the revenue authorities as the heir of an occupancy tenant, the plaintiff alleging that the defendant was a trespasser, and that he was entitled to the land That was [485] not a case like the present, but the two other cases just referred to are clear authorities for the proposition that a *Civil Court* has jurisdiction to entertain a suit for possession by an occupancy tenant, or a tenant at fixed rates against a person alleged by the plaintiff to be a trespasser, although the Court cannot give the plaintiff a declaration as to his status According to these decisions the first defendant to this suit could maintain a suit in the Civil Court for possession against the second defendant, and if that is so, the plaintiff, who, as mortgagee, is the representative of the first defendant, can maintain the present suit so far as it is a suit for possession, but according to the decision of the Full Bench he cannot have a declaration as to his title

A suit of this kind is certainly a suit of a civil nature within the meaning of section 11 of the Code of Civil Procedure, and therefore

(1) (1896) I L R 18 All 310
(2) (1896) I L R 19 All 101
(3) (1897) I L R 19 All 452
(4) (1898) I L R 20 All 520
(5) Weekly Notes, 1901 p 127

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APPELLATE CIVIL.

23 A. 481= A. W. N. 1901, 162.

Mr. *Abdul Raoof* for the appellant.

Mr. *Abdul Majid* (for whom Mr. *Ishaq Khan*) for the respondent.

CHAMIER, J.—This is an appeal against a decree of the District Judge of Azamgarh confirming a decree of the Munsif of Muhommadabad Gohna. The plaintiff asserts that the first defendant, Turant, being the occupancy tenant of 34 bighas 9 biswas of land in mauza Jamre, mortgaged that land to him on August 13th, 1897, but that when he (the plaintiff) went to take possession of the land, as he was entitled to do under the mortgage, the second defendant, Padarath, obstructed him in regard to 17 bighas 15 biswas 18 dhurs of that land. The relief claimed by the plaintiff is a decree for possession of 17 bighas 15 biswas 18 dhurs "by virtue of the first defendant's right of occupancy and his (the plaintiff's) right as mortgagee," and a declaration that the defendant Padarath has "nothing to do with the land."

The first defendant did not defend the suit.

The second defendant alleged that he had been in possession of the land for more than twelve years before the suit as occupancy tenant; that the first defendant had never been in possession of, and had no right to, the land; and he pleaded that the suit was barred by limitation by an order of a Deputy Collector, dated February 18th, 1897.

The Munsif held it proved that the first defendant's grandfather and father had been occupancy tenants of the land in suit, and that the first defendant was entitled to the land as occupancy tenant at the date of the mortgage to the plaintiff, and [483] that the second defendant had acquired no right to the land by adverse possession or otherwise.

On appeal the District Judge confirmed the decree of the first Court.

The first point taken in appeal to this Court is, that the order of the Deputy Collector, dated February 18th, 1897, declared that the second defendant, and not the first defendant, was the occupancy tenant of the land, and therefore the question was *res judicata*. We have examined the copy of the order which is on the record, and we find that it was merely an order passed upon the report of a kanungo, directing the entry of Padarath's name in the revenue records on the ground of possession. Obviously such an order cannot be conclusive upon a question of title, and it was so held in regard to a similar order in *Kaliani* v. *Dassu Pande* (1).

The next point taken on behalf of the appellant is that the jurisdiction of the Civil Court to entertain the present suit is barred by section 95 read with section 10 of the Rent Act, and by clauses (*d*) and (*e*) of section 241 of the Land Revenue Act.

Clause (*d*) of section 241 of the Land Revenue Act deprives the Civil Court of jurisdiction over "the formation of the record of rights," but as the plaintiff does not ask the Court in the present suit to interfere with the record of rights, and the suit does not involve any interference with the record of rights, that clause clearly does not bar this suit. It might as well be contended that if, on the death of the proprietor of the land, the revenue authorities effected mutation of names in favour of *A* on the basis of possession, *B* could not sue *A* for possession of the land in the Civil Court on the basis of his title.

In support of his argument that cognizance of the present suit by the Civil Court was barred by section 95 (*a*) of the Rent Act and section 241

(1) (1898) I. L. R. 20 All. 520.

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The case of *Gangadhar* v *Zahurriya* (1), which followed in 1886, is also one in which no allusion whatever is made to the provisions of clause (*cc*), and the judgment given by Mr Justice Mahmood would be unintelligible except on the supposition that this clause had been overlooked Mr Justice Tyrrell did not go [490] into the question at all Close upon the heels of the last named case came the case *Prosonno Mai Debi* v *Mansa* (2) In this case clause (*cc*) of section 93 of the Rent Act was undoubtedly considered by the learned Judges It was a suit in which the landholder prayed for the removal of certain trees planted by a tenant on land let to him for cultivating purposes, and to obtain a mandatory injunction, not to prohibit a person from planting trees, but to uproot trees which had already been planted A faint attempt was made to remove the suit from the provisions of clause (*cc*) It appears to me that the plaintiff in this case could have attained his object by a suit brought under clauses (*b*), (*c*), and (*cc*), and with great respect to the learned Judges who decided that case, I would hold that, this being the case, the matter in issue between him and his defendant could be heard and determined by the Revenue Courts alone I do not propose to discuss at any length the cases in which an opposite view was held in this Court, namely, *Deodat Tiwari* v *Gopi Misr* (3), *Chet Ram* v *Kokla* (4), *Jai Kishen* v *Ram Lal* (5)

The words of the Act are so express and clear that it seems difficult to understand how contrary views, except in *Raj Bahadur* v *Birmha Singh* (6), were held by this Court I would dismiss this appeal with costs

AIKMAN, J —This appeal arises out of a suit brought by the plaintiff, a landholder, against his tenant Musammat Huriyan and her sub tenant Wahid, on the allegation that nearly two years before the date of suit the defendants had planted trees in a plot of land in their occupation, that this was a use of the land for purposes other than agricultural, and an act detrimental to it and injurious to the plaintiff, and that the defendants refused to uproot the trees when called on to do so The plaintiff prayed that the defendants should be ordered to remove the trees within a time to be fixed by the Court, and restore the land to its original state

The suit was instituted in the Court of the Munsiff of Bareilly, who dismissed it as not cognizable by the Civil Court On appeal the Additional Subordinate Judge held that the suit was [491] cognizable exclusively by a Revenue Court under section 93 (*cc*) of Act No XII of 1881, and dismissed the plaintiff s appeal

The plaintiff comes here in second appeal, contending that the lower appellate Court was wrong in holding that the suit was not cognizable by the Civil Court

The appeal came before our brother Burkitt sitting singly He expressed his opinion that the suit was cognizable only by a Rent Court, but referred the case to a larger Bench owing to the conflicting rulings of the Court on the question at issue in this appeal

The following cases were relied on by the learned vakil who appears on behalf of the appellant

Raj Bahadur v *Birmha Singh* (6) This was a Full Bench decision The suit is stated to have been one brought by a landholder claiming that the defendant—his tenant—might be restrained from constructing a well

(1) (1886) I L R 8 All 446
(2) (1886) I L R J All 35
(3) Weekly Notes, 1882, p 102
(4) Weekly Notes, 1892, p 45
(5) (1898) I L R 20 All 519
(6) (1880) I L R 3 All 85.

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as tenants. He also asked for damages. The respondents in their written statement do not in so many words take exception to the jurisdiction of the Civil Court to try the matter in dispute between them and the appellant. I find, however, that the question of jurisdiction was in a half-hearted way made a matter in issue, and the decision of the Munsif was that the plaintiff could not sue for the relief he sought in the Civil Courts. In appeal the lower appellate Court went further and held in plain terms that the suit was cognizable only by the Revenue Court under clause (cc) of section 93 of Act No. XII of 1881.

A second appeal was filed in this Court and the question again raised as to whether the suit was or was not cognizable by the Civil Court. In view of the conflict of rulings in this Court my brother Burkitt referred the case to a Bench of two Judges. Eventually the appeal was referred for decision to a Full Bench of this Court.

The determination of the question seems clearly provided for by the express words of section 93 of Act No. XII of 1881. This section provides that "Except in the way of appeal as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise." One of the suits so mentioned is a suit for compensation for or to [489] prohibit any act, omission or breach mentioned in clause (b) or clause (c) of section 93. On turning to clause (b) I find that the acts prohibited are acts detrimental to the land in the occupation of a tenant or inconsistent for the purpose for which the land was let. The appellant, as his plaint shows, maintains that the respondents have planted a a grove on the land in dispute without any right, and are using the land for purposes other than agricultural. This act is deemed injurious to the land and prejudicial to the plaintiff's right. In other words, the suit is clearly one for compensation for and prohibition of an act detrimental to the land in the occupation of the respondents. It is a suit which might be brought under clause (cc) of section 93 of Act No. XII of 1881, and being so, was a suit that no Court other than a Court of Revenue had jurisdiction to hear and to determine. So far, then, as the express words of the Legislature go, I have no hesitation in answering and holding that the suit was one over which the Civil Court had no jurisdiction.

There are, however, certain cases in which this Court has held otherwise. The first of these cases is a Full Bench decision of this Court—*Raj Bahadur* v. *Birmha Singh* (1). That suit was instituted when Act No. XVIII of 1873 was still in force. The last mentioned Act contained no provision similar to that contained in clause (cc) of section 93 of Act No. XII of 1881, and I think it may safely be held that had such provision existed, that decision would have resulted otherwise than it did. Owing to the distinct change in the law, it is no longer a decision binding upon this Court. The next decision in order of time is that in *Amrit Lal* v. *Balbir* (2). The attention of the Judges who decided that case does not appear to have been drawn to the provisions of clause (cc) of section 93 already cited, and their decision was apparently in ignorance of its existence.

(1) (1880) I. L. R. 3 All. 85. (2) (1883) I. L. R. 6 All. 68.

tion of a house and removal of trees The Court (Brodhurst and Mahmood, JJ), held that such a suit was not cognizable by the Civil Court Their judgment cites the opening words of section 93, and points out that the plaintiff might have obtained his object by dint of a suit under section 93 (b), and an order under section 149 of the Rent Act

The next case in favour of the respondent is that of *Chet Ram* v *Kokla* (1) This was a case in which a landholder sued his tenant for two reliefs,—*first*, that certain trees planted by the defendant in his holding should be removed and the land restored to its former state, *second*, that the defendant should be ejected for having, in planting the trees, done an act inconsistent with the purpose for which the land was let When the appeal was argued in this Court, it was admitted that the claim for the second relief was not within the cognizance of the Civil Court But it was contended on the strength of the ruling in *Gangadhar* v *Zahurriya* (2) that the Civil Court had jurisdiction to deal with the claim for the first relief Straight, J, overruled this contention, pointing out that in the judgment cited there was no reference to the clause (cc) of section 93 of the Rent Act He held that the suit fell within that clause, inasmuch as it was a suit to prohibit the defendant from maintaining upon the land the trees he had planted Edge, C J, entirely agreed, remarking that if clause (cc) had been brought to the attention of the learned Judges who decided the case *Gangadhar* v *Zahurriya* (2) he had little doubt they would have given effect to it, and applied it to the case before them The attention of the learned Chief Justice does not appear to have been called to his own decision in *Prosonno Mai Debi* v *Mansa* (3)

In this conflict of authority we have to decide which view is correct I have no hesitation in expressing my concurrence with the opinion of my learned colleague who referred this case, and holding that the suit is not cognizable by the Civil Court As before remarked, the material words governing the question of jurisdiction are to be found in the first paragraph of section 93 of the Rent Act, which is as follows :—

[494] "Except in the way of appeal as hereinafter provided, no Courts, other than Courts of Revenue, shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suit shall be heard and determined in the said *Courts of Revenue* in the *manner provided* in this Act and not otherwise"

The question we have to ask ourselves in regard to this suit is, whether it was a dispute or matter in which any suit of the nature mentioned in section 93 might be brought This is a question which, in my opinion, cannot be answered save in the affirmative

The plaintiff might have sued under clause (b) to eject the defendant on the ground that the planting of the trees was an act detrimental to the land or inconsistent with the purpose for which the land was let If a decree had been given for ejectment the relief asked for in this suit might have been obtained by an order under section 149 of the Rent Act

The plaintiff might further have sued under clause (cc) for compensation, or he might under the same clause have sued for an order prohibiting the planting of the trees, or their maintenance when planted

(1) Weekly Notes, 1892, p 45
(2) (1886) I L R 8 All 446.
(3) (1886) I L R 9 All. 85

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23 A. 486= A. W. N. 1901, 164.

upon land occupied by him, that the materials might be removed, and the land restored to its former condition, and that a sum of Rs. 10 might be awarded to him (plaintiff) as compensation. It was held in that case that the matter in dispute was, whether the plaintiff was entitled to demolish the well, and that that was not a matter in respect of which a suit could be brought in the Revenue Court. The fact that the judgment was passed before the enactment of clause (*cc*), section 93 of the N.-W. P. Rent Act, deprives it of any binding force in the present case. In the case of *Amrit Lal* v. *Balbir* (1), the plaintiffs had sued in the Revenue Court to eject the defendants, who were their tenants at fixed rates, on the ground that by building a house on their holding they had done an act detrimental to the land. The suit was dismissed by the Revenue Court. The plaintiffs then sued in the Civil Court to have the house demolished. The Subordinate Judge held that the suit was barred by section 13 of the Code of Civil Procedure. On appeal to this Court, Oldfield and Tyrrell, JJ., without specifically considering the question whether the suit was cognizable by the Civil Court, held that it was not barred by section 13. The case of *Gangadhar* v. *Zahurriya* (2), was a suit similar [492] to the present, *i.e.*, for removal of trees planted by a tenant on land in his occupation. The Munsif dismissed the suit as cognizable only by the Revenue Court. On appeal the District Judge, without expressing any opinion on the question of jurisdiction, held that the suit was barred by limitation. The appeal to this Court was heard by Tyrrell and Mahmood, JJ. Tyrrell, J., does not discuss the question of jurisdiction. The judgment of Mahmood, J., does, and he holds that the suit was cognizable by the Civil Court. He refers to the rulings just cited, but he does not refer to the opening words of section 93 of the Rent Act, which are the material words to be considered, and it is difficult to reconcile his judgment with a judgment presently to be referred to—*Deodat Tiwari* v. *Gopi Misr* (3), to which he was a party. The next case relied on by the appellant is *Prosonno Mai Debi* v. *Mansa* (4), decided by Edge, C. J. and Oldfield, J. This, like the present, was a suit for the removal of trees planted by a tenant in his holding. The Courts below had held the suit not to be cognizable by the Civil Court. Edge, C. J. (Oldfield, J., concurring), held that the suit was cognizable by the Civil Court. He expressed his doubts of the correctness of the ruling in *Deodat Tiwari* v. *Gopi Misr* (3), and held that as the suit was one to remove trees already planted and not to prohibit planting, clause (*cc*) would not apply.

In this case also, as in the other cases relied on by the appellant, the Court omitted to consider the material words governing the question of jurisdiction, *i.e.*, the words with which section 93 opens. As will be shown later on, Edge, C. J., adopted a different view in a subsequent case.

Reference was also made to the case of *Musharaf Ali* v. *Iftkhar Husain* (5); but as that was a case in which the trees were planted by the tenant, not on land in his occupation, but on waste land belonging to the zamindar, it has no bearing on the question before us.

For the respondent reliance was placed on the following cases.

Deodat Tiwari v. *Gopi Misr* (3). This was a case in which certain tenants at fixed rates were sued by the landholder for the [493] demoli-

(1) (1883) I. L. R. 6 All. 68.
(2) (1886) I. L. R. 8 All. 116.
(3) Weekly Notes, 1883, p. 103.
(4) (1886) I. L. R. 9 All. 35.
(5) (1888) I. L. R. 10 All. 634.

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ment for non payment In *Queen Empress* v *Chagan Jagannath* (1), to which reference was made in the argument, the learned Judges appear to have been of opinion that if the total term of imprisonment, including that imposed for default in payment of the fine, was not in excess of the term of imprisonment imposed by the Magistrate, that did not amount to an enhancement, and this also seems to have been the view of Mr Justice Shephard in the case cited in that judgment With great deference I am unable to agree [499] with this view as it overlooks the provisions of section 70 of the Indian Penal Code, to which I have already referred The question whether the sentence has been enhanced by the appellate Court, is a question of fact in each particular case, and must be determined with reference to the facts of the case This was held in *Rakhal Raja* v *Kirode Pershad Dutt* (2) and this appears to have been the opinion of Brodhurst, J, in *Empress* v *Meda* (3) In this case, if the alternative sentence of imprisonment in default of payment of fine be undergone by the accused, he would serve out the full term of imprisonment imposed by the Magistrate, and he would still be liable to have his property seized and sold for realization of the fine The alteration of the sentence by the appellate Court therefore amounted to an enhancement of the sentence, and was consequently illegal I allow the application, and alter the sentence to that of a fine of Rs 20, in addition to the sentence of four months' rigorous imprisonment As I am informed that the fine has already been realized, it is not necessary to pass an alternative sentence in default of payment

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23 A 499 (=21 A W. N 161)

APPELLATE CIVIL.

Before Mr Justice Burkitt and Mr Justice Chamier

MURARI LAL (*Judgment debtor*) v UMRAO SINGH. (*Decree holder*) * [13 July, 1901]

Civil Procedure Code, sections 36 *and* 37 —*Act No XV of* 1877 (*Indian Limitation Act*) *Sch ii, Art* 179 (4)—*Execution of decree—Limitation—Application not in accordance with law—Application made by general attorney, decree holder being at the time within the jurisdiction of the Court*

Held, that an application in execution of a decree was not an application 'in accordance with law within the meaning of article 179 of the second schedule of the Indian Limitation Act, 1877, when it was made by a general attorney of the decree holder at a time when the decree holder himself was a resident within the local limits of the jurisdiction of the Court executing the decree

[Fol 26 All 19=1903 A W N 172 Ref 11 C L J 285 37 Cal 399 6 P L J 11 Dist 26 All 154, 2 Pat L T 160]

THE facts of this case sufficiently appear from the judgment of the Court

[500] Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the appellant

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondent

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* Second Appeal No 156 of 1900 from a decree of Munshi Shankar Lal, Additional Subordinate Judge of Saharanpur, dated the 27th November 1899, reversing a decree of Pandit Kunwar Bahadur, Munsif of Muzaffarnagar, dated the 25th February 1899

(1) (1898) I L R 23 Bom 439
(2) (1899) I L R 27 Cal 175
(3) Weekly Notes, 1887, p 100

1901 JULY 5. — FULL BENCH. — 23 A. 486= A. W. N. 1901, 164.

It is clear, therefore, that the lower Courts were right in holding that the Civil Court had no jurisdiction to entertain the suit.

The decisions of this Court, in which an opposite view was taken, are, in my opinion, erroneous and should be overruled.

The plaintiff ought to have sued in the Revenue Court. When he did come into Court his right of action had become barred under section 94 of the Rent Act, as on his own showing upwards of a year had elapsed from the day on which his right to sue accrued.

For the above reasons I would dismiss this appeal with costs.

BANERJI, J.—I agree with my learned colleagues, but not altogether without hesitation. Having regard to the frame of the suit and the prayer contained in the plaint, namely, the prayer that the defendants be ordered to uproot the trees planted by them and to restore the land to its original state, the claim was one for a mandatory injunction. Such a suit ordinarily lies in the Civil Court. It may, however, be inferred from the terms of clause (*cc*) of section 93 of Act No. XII of 1881, that the Legislature intended **[495]** that a suit like the one before us, when brought by a landlord against his tenant, should be instituted in a Court of Revenue, as held in the recent rulings of this Court to which reference was made in the argument and to which my learned colleagues have referred in detail. It is desirable that the conflict of authority which exists on the subject should be removed, and I think the manner in which my learned colleagues propose to remove it will effectuate what appears to have been the intention of the Legislature. I may observe that in the Tenancy Bill now before the Legislative Council, it is proposed to confer jurisdiction on Revenue Courts in suits for an injunction like the present suit.

I concur in dismissing this appeal with costs.

BY THE COURT.—The order of the Court is that this appeal be dismissed with costs.

Appeal dismissed.

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23 A. 495 (=A. W. N. 1901, 155.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BALDEO SAHAI (*Defendant*) *v.* JUMNA KUNWAR (*Plaintiff*).*
[16th July, 1901.]

Act No. IX of 1872 (*Indian Contract Act*), *section* 23—*Consideration opposed to public policy—Parents making profit for themselves out of the marriage of their daughter—Small Cause Court Suit—Act No. IX of* 1887 (*Provincial Small Cause Courts Act*) *Sch. ii, cl.* 38.

The parents of a girl caused her to enter into an utterly unsuitable marriage, the husband agreeing to pay a certain sum monthly for the maintenance of the parents. On suit by the mother to recover certain instalments of the maintenance so promised, it was *held* (1) that the suit was one no' cognizable by a Court of Small Causes ; and (2) that the agreement was one which was opposed to public policy and ought not to be enforced.

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*Second Appeal No. 251 of 1900 from a decree of Maulvi Syed Zainulabdin, Subordinate Judge of Ghazipur, dated the 15th January 1900, confirming a decree of Babu Baidya Nath Das, officiating Munsif of Ghazipur, dated the 26th September 1899.

behind the back of the judgment debtor, and, as we have said, section 578 cannot now be made use of

If we were to hold that the application now in question was an application made ' in accordance with law, we see no reason why an application made by a person holding no power of attorney, or even by the " man in the street, should not be held to be an application made in accordance with law

For these reasons we think that the present application for execution is not saved from the bar of limitation by the application of January 9th, 1896

We have also considered the question referred to, but not decided by, the lower appellate Court, namely, whether the decree holder is entitled to deduct the time spent in the proceeding held by the Collector We find that it is unnecessary to [502] decide this question, for even if the fourteen months claimed by the decree holder be deducted, the present application will still be barred by limitation For these reasons we accept this appeal, set aside the decree of the lower appellate Court, and dismiss this application for execution with costs in all three Courts

Appeal decreed

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23 A 502 (=21 A W N 150)

APPELLATE CIVIL

Before Mr Justice Burkitt and Mr Justice Chamier

GANGA PRASAD (*Plaintiff*) v RAM DAYAL (*Defendant*) *
[9th July, 1901]

Suit for balance of account—Evidence—Account stated—Acknowledgment—Act No XV of 1877 (*Indian Limitation Act*) *Sch ii Art* 64

[Fol 1 L B R 190 132 P R 1907 Ref 84 P R 1904 102 P R 1905=22 P L R 1906 62 I C 898 56 I C 379=5 P L J 371 Dist 26 Mad 186=12 M L J 444 7 O C 166 1906 A W N 185=3 A L J 800]

THE facts of this case sufficiently appear from the judgment of the Court

Maulvi *Muhammad Ishaq*, for the appellant

The respondent was not represented

BURKITT and CHAMIER JJ —The plaintiff s case, as stated in the

* Second Appeal No 696 of 1899 from a decree of Babu Prag Das Subordinate Judge of Saharanpur dated the 31st May 1899 reversing a decree of Munshi Shiva Sahai Munsif of Kairana dated the 16th August 1898

(1) (1892) I L R 15 All 1
(2) (1896) I L R 22 Bom 513
(3) (1880) I L R 2 All 641
(4) (1880) I L R 2 All 872
(5) (1881) I L R 3 All 148
(6) Weekly Notes 1883, p 47
(7) (1881) I L R 3 All 581
(8) Weekly Notes, 1881, p 65
(9) (1867) Agra F B p 94
(10) (1871) 6 Mad H C Rep 197
(11) (1883) I L R 10 Cal 284

1901
JULY 13.

APPELLATE
CIVIL.

23 A. 499=21
A. W. N. 161.

BURKITT and CHAMIER, JJ.—The appeal arises out of proceedings in execution of a decree. The only question which we have to decide is, whether the present application for execution was within time or not.

The decree is dated January 31st, 1894. The present application for execution is dated September 19th, 1898.

The decree-holder relies upon an application dated January 9th, 1896, for the payment out of Court of the proceeds of certain property sold in execution of the decree, as being an application made in "accordance with law," asking the Court to take some step in aid of execution. The judgment-debtor does not deny that the application in question was made to the proper Court, and was one asking it to take a step in aid of execution, but he contends that the application was not made "in accordance with law."

The application was presented by a person holding a general power-of-attorney from the decree-holder, but it is found as a fact that the decree-holder, at the time when the application was made, was resident within the local limits of the jurisdiction of the Court. Consequently the person who presented the application was not a person who, with reference to sections 36 and 37 of the Code of Civil Procedure, was entitled to make any application to the Court on behalf of the decree-holder.

His power-of-attorney authorized him to grant receipts for money; the Court concerned allowed him to act and apply on behalf of the decree-holder, and the decree-holder has given credit for the sum received from the Court.

The question is whether, under such circumstances, the application should be held to have been made "in accordance with law" within the meaning of clause 4 of article 179 of Schedule II of the Limitation Act. Pandit *Sundar Lal*, on behalf of the decree-holder, relied upon section 578 of the Code of Civil Procedure, but we think that that section applies only to errors or defects or irregularties in the suit or proceedings out of which [501] the appeal then being heard arises, and not to previous suits or proceedings which have come to an end. He also relied upon the circumstances that the person who made the application had power to give a receipt for the money, that credit had been given for the money received from the Court, and that the judgment-debtor had not only not been damnified by the proceeding, but had actually benefited thereby. These circumstances, if established, entitle the decree-holder to our sympathy, but on consideration we have come to the conclusion that it would be a dangerous extension of the rule that defects of form do not prevent an application for execution from being one "made in accordance with law" if we were to hold that an application made by a person who was not entitled to make it at all was an application made "in accordance with law."

It may be that if the defects in the application had been brought to notice in 1896 when it was made, the Court might have allowed it to be amended by the addition of the signature of the decree-holder, or some authorized person. It may also be that a judgment-debtor can waive such a defect, or that if proceedings are taken on such an application, a Court of appeal would, by reason of section 578 of the Code of Civil Procedure, in an appeal arising out of those proceedings, decline to reverse orders passed therein. But in the present case there was no amendment : such proceedings as took place on the application were held

1901 JULY 9 — APPELLATE CIVIL — 23 A. 502=21 A W N 150.

Kunhaya Lal v *Bunsee* (1), it was held that a mere acknowledgment did not create a new obligation, in *Hirada* v *Gadigi* (2) it was held that a mere acknowledgment could not alone be the basis of a suit In *Dukhi Sahu* v *Mohamed Bikhu* (3), Mitter and Wilkinson, JJ, considered that an acknowledgment of this kind did not amount to a new contract to the same effect is the decision in *Shankar* v *Mukta* (4) Thus it seems that there is a consensus of opinion that a mere acknowledgment does not amount to a new contract In all these cases the question for decision was really one of limitation, but if an acknowledgment does not amount to a new contract for the purpose of giving a fresh period of limitation, it does not amount to a contract which can be sued upon No doubt, as pointed out in the Bombay case, in England an acknowledgment, if unconditional, is held to be sufficient evidence of a new contract which can be sued upon, but there no difficulty arises with reference to the law of limitation, because an unconditional acknowledgment takes a case out of the statute of Limitation, whether it is made before or after the period of limitation expires In India it is otherwise An acknowledgment in writing signed by a debtor provides a fresh period of limitation, only if it is made before the period of limitation expires After the period expires, nothing short of a fresh contract will revive the debt and provide a fresh period of limitation If it were held that an ancknowledgment of a debt is an account stated within the meaning of art 64 of sch ii of the Limitation Act, or is evidence of a new contract which may be sued upon, then section 19 of that Act would be a dead letter It would be unnecessary to inquire [505] whether an acknowledgment was in writing, or was signed by the debtor, or was made within the period of limitation, and even an oral acknowledgment would revive a time barred debt. The only way of avoiding such a result is to hold that an acknowledgment of the kind which we have here is neither an account stated, to which art 64 applies, nor evidence of a new contract, which can be the basis of a suit As shown above, there is ample authority for such a conclusion

For these reasons we are of opinion that the plaintiff s suit as brought was not maintainable, and that the decision of the lower appellate Court is correct We therefore dismiss this appeal with costs

Appeal dismissed

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23 A 505 (=21 A W N 160)

APPELLATE CIVIL

Before Mr Justice Burkitt and Mr Justice Chamier

KESHO DAS AND OTHERS (*Plaintiffs*) v NARAIN SINGH (*Defendant*)* [12th July, 1901]

Act No III of 1878 (*Local Rates Act*)—*Act No IX of* 1889 (*Kanungo and Patwaris Act*)—*Cess—Assignment of Government revenue—Assignees not entitled to cesses*

Held that an assignee of the Government revenue assessed on a certain patti was not entitled to receive patwari rates and local cesses from the Zamindar, such rates and cesses have to be paid by the zamindar to the Government

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* Second Appeal No 163 of 1900 from a decree of W F Wells, Esq, District Judge of Agra dated the 28th November, 1899, modifying a decree of Munshi Muhammad Ali Khan, Assistant Collector of Agra, dated the 11th September, 1899

(1) (1867) Agra F B p 94
(2) (1871) 6 Mad H C Rep 197
(3) (1883) I L R 10 Cal 284
(4) (1896) I L R 22 Bom 513

1901 JULY 9. — APPELLATE CIVIL. — 23 A. 502=21 A. W. N. 150.

plaint, is that on July 20th, 1897, the defendant having examined his account acknowledged a balance of Rs. 549-11 to be due by him, and affixed his signature to the plaintiff's account-book. Allowing for sums since received and adding interest to the balance, the plaintiff claims Rs. 508-11, stating that the cause of action accrued on July 21st, 1897. The defendant denied all the allegations made in the plaint, and the parties went to trial on the single issue whether or not the defendant had signed [503] the plaintiff's account-book as alleged, no evidence being given regarding the transactions recorded in the book.

The first Court found in favour of the plaintiff and decreed the claim. On appeal the Subordinate Judge dismissed the suit, holding on the authority of *Shankar* v. *Mukta* (1), that the entry in the plaintiff's book was a mere acknowledgment, and could not alone be the basis of a suit. The plaintiff has appealed to this Court.

It is contended that what the plaintiff is suing upon is not a mere acknowledgment, but is an "account stated," on which a suit may be based, and reference was made to art. 64 of sch. ii of the Limitation Act, which provides for a suit upon an account stated.

An "account stated" in the true sense is where several cross claims are brought into account on either side, and are set off against each other and a balance is struck. The consideration for the payment of the balance is the discharge on each side. Such an account stated certainly evidences a new contract on which a suit can be based. It was held in *Jamun* v. *Nand Lal* (2), that art. 64 of sch. ii of the Limitation Act applied only to such an account stated, and not to a case like the present, where there were no demands to be set off against each other, but only debts on one side of the account and payments made by the debtor on the other.

The earlier decisions of this Court are conflicting. In *Nand Ram* v. *Ram Prasad* (3), *Thakurya* v. *Sheo Singh* (4) (*ib.* 872), *Zulfikar Husain* v. *Munna Lal* (5), and *Sital Prasad* v. *Imam Bakhsh* (6), it seems to have been assumed, rather than held, that a mere acknowledgment of a balance struck in the plaintiff's books was an account stated within the meaning of art. 62 of sch. ii of the Limitation Act of 1871, or of art. 64 of sch. ii of the present Limitation Act. The Court's attention does not in any of those cases seem to have been directed to the precise meaning of an account stated.

On the other hand, in *Kanhaiya Lal* v. *Stowell* (7), a settlement of accounts, such as we have in the present case, seems to have been considered a mere acknowledgment; and in *Ghasita* v. *Ranchore* (8) the Court declined to uphold a decree which was based entirely [504] on an acknowledgment of this kind. In this state of the authorities in this Court we consider that we are free to follow the decision in *Jamun* v. *Nand Lal* (2), and hold that what is sued upon in the present case is not an account stated, but a mere acknowledgment. Then it was contended that upon an unconditional acknowledgment of this kind, a promise to pay ought to be implied, and that such an implication may be the basis of a suit. If such an acknowledgment can form the basis of a suit, it must be on the ground that it amounts to a new contract; but in

(1) (1896) I. L. R. 22 Bom. 513.
(2) (1892) I. L. R. 15 All. 1.
(3) (1880) I. L. R. 2 All. 641.
(4) (1880) I. L. R. 2 All. 872.
(5) (1881) I. L. R. 3 All. 148.
(6) Weekly Notes, 1883, p. 47.
(7) (1881) I. L. R. 3 All. 581.
(8) Weekly Notes, 1881, p. 65.

THE

INDIAN HIGH COURT REPORTS,

ALLAHABAD VOL. I

(I. L. R. ALL. VOL. XXIV)

1901 JULY 12. — APPELLATE CIVIL. — 23 A. 505=21 A. W. N. 160.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the appellants.

Pandit *Madan Mohan Malaviya* for the respondent.

BURKITT and CHAMIER, JJ.—The matter at issue in this appeal refers to the patwari rates and other cesses payable on account of patti Hardeo in mauza Birahu. In that village it appears that at settlement the zamindar, Narain Singh, accepted the terms offered by the Settlement Officer for patti Hardeo, and the settlement was accordingly made with him, and at the same time the Government revenue assessed on that patti was assigned to the present plaintiffs appellants. As to the rest of the mahal the zamindars refused the terms offered by the Settlement Officer, [506] and the consequence was that settlement was made with the plaintiffs appellants, and a malikana allowance was fixed for the zamindars. The present suit was brought by the plaintiffs claiming a certain sum as revenue of the patti Hardeo. It was objected that in that amount two items were claimed for patwari rates and local cesses payable under Acts No. III of 1878 and IX of 1889 on patti Hardeo. A decree was given for the amount of revenue in arrears, but the lower Court refused the plaintiffs a decree for the cesses and rates. Hence this appeal. It is admitted that the patwari rates and cesses in dispute concern patti Hardeo alone. The plaintiffs' allegation is that they were compelled by the Revenue authorities to pay those rates and cesses, and they now seek to recover them from the defendant, Narain Singh. We should say that there is no allegation in the plaint as to any such compulsion, but the statement was made to us by the learned advocate who appeared for the appellants.

We are unable to see how the defendant respondent is liable to the plaintiffs for those rates and cesses, or how the plaintiffs are liable to Government for them. The plaintiffs' only connection with patti Hardeo is that they are the assignees of the Government revenue payable in respect of that patti. They have no other concern with it. They are not the assignees of the cesses or of the rates, they therefore are not authorized to demand these cesses or rates from the defendant, nor is there any obligation on the defendant, the zamindar, with whom the patti was settled, to pay them to the plaintiffs. Neither Act No. III of 1878 nor Act No. IX of 1889 affords any justification for this suit. The person liable to pay these rates and cesses is no doubt the defendant, Narain Singh, but the persons to whom he should pay and is bound to pay are the local Revenue authorities and not the muafidars. Whether the plaintiffs have a remedy by suit in a Civil Court to recover from the defendants the sums they say they have paid to Government is a matter as to which we think it unnecessary to express any opinion.

For the above reasons we are of opinion that this appeal must fail as far as the rates and cesses are concerned. We therefore dismiss this appeal with costs.

Appeal dismissed.

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24 A 1 (=28 I. A. 169=8 Sar. 65)

PRIVY COUNCIL

1901
FEB 28
MAY 11

PRIVY
COUNCIL.

24 A 1=28
I A 169=
8 Sar 65.

PRESENT:

Lords Hobhouse, Davey, and Lindley, Sir Richard Couch and Sir Ford North

MAQBUL HUSAIN AND ANOTHER (*Appellants*) *v* LALTA PRASAD (*Respondent*) [28th February and 11th May, 1901]

[*On appeal from the Court of the Judicial Commissioner of Oudh*]

Construction of a Government order—Release of nazul property—Limitation

The proprietary right in the site of a bazar, and interests in the houses thereon, were disputed between the zamindar claiming them, and the resident occupiers, whose rights by agreement were to be determined by the decision in the case of the defendant who was one of them In 1879 the Government released the bazar from the nazul, it having been entered in the District Register of that property in 1860

In the written order of Government sanctioning the withdrawal of the entry in the Register there were words as to the effect of which the Courts below differed, the Court of first appeal holding that the release was to the zamindar, the Court of second appeal holding that the occupiers of the houses were severally made proprietors of them The words were "as the occupiers appear to have all along exercised proprietary rights without question of their power to do so, it is now too late to disturb their status"

Held, that the intention of the Government, as shown, was merely to annul the entry in the Register, and to restore the rights which existed when the entry had been erroneously made More importance was attached to the act of the Government than to the words used in their order The effect was a disclaimer of title and a release to those who would have been entitled but for the confiscation by the act of State of 1858 thus following out the policy at the general settlement of Oudh lands There was no intention to benefit one party more than the other, or to confer title upon either as against the other, in this release

Held also, that limitation did not apply Before the annexation of the province there was no limitation causing either bar of suit or title to accrue So long as the ownership was in the Government, and till the release, neither party had any interest to enforce The earliest date from which limitation could commence was the date of the release

[2] On questions not yet disposed of below as to the titles of the parties, irrespectively of those supposed to have been conferred by the order of 1879, and as to the claim in regard to the materials, the suit was remanded to the first Court for trial upon issues

An official report forwarded with the application for sanction of the release of the property from the nazul was referred to as showing the materials which the Government had before them for deciding to act as they did.

APPEAL from a decree (3rd June, 1897) of the Judicial Commissioner, reversing a decree (26th February, 1895) of the District Judge of Hardoi, and restoring a decree (30th August, 1894) of the Subordinate Judge who had dismissed the plaintiff's suit

paid zamindari dues, he and his predecessors having been in free possession for upwards of a hundred years Limitation was also pleaded It was added that no such custom about the materials existed and that it was not the fact that the bazar was made over to the plaintiff from the Nazul Department, also that the bazar was released because no one ever paid dues in respect of it

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PRIVY COUNCIL

24 A 1=28 I A 169= 8 Sar 65

The issues related to whether the plaintiff had the title alleged by him and whether the bazar was re leased to him in [4] 1879, whether he had since been in possession receiving zamindari dues, whether limitation was applicable whether the custom was as stated, and what was the price to be paid in respect of the materials if the plaintiff should be found entitled as he alleged

The Subordinate Judge dismissed the suit His judgment passed over the question of the plaintiff s right by ancestral title He was of opinion that nothing had been granted or allowed to the plaintiff on the release of the bazar from the nazul by the order of Government and that therefore he had no interest in the property In effect he found that the grant was to the resident occupiers and not to the Chaudhri zamindars He also held that the suit failed because it was barred by limitation under Article 142, Schedule II Act No XV of 1877

The District Judge on the plaintiff s appeal reversed the above decision He was of opinion that by occupants the Government order of the 26th of May, 1879, meant the zamindar The circumstances of the case made it clear to him that the expression was used in this sense No question had been raised between the Government and the resident occupiers when the letter of that date was written It had then not yet been asserted that the occupiers had the proprietary right to the land on which the bazar stood The only question that had been raised with them was whether they were liable to pay rent and that question was left in abeyance by the local authorities until it should have been decided whether the Government or Abdul Baki should be the recognised proprietor The District Judge found for these reasons that the plaintiff was the proprietor He held that the suit was not barred by time He remanded it for decision upon the issues not decided by the first court as to the rights of the parties in the materials of the houses and their estimated price

The defendant then appealed to the Judicial Commissioner, who reversed the decree of the District Judge, and restored that of the Subordinate Judge dismissing the suit He was of opinion that the Government order of 1879 referred to the "occupants" of the houses He would not construe that order, by the aid of the Deputy Commissioner s letter of the 1st of March 1879, as referring to the zemindars and as conferring the proprietary title to the bazar Amaniganj on the plaintiff

[5] Mr *L DeGruyther*, for the appellants, argued that the Judicial Commissioner had misconstrued the order of the 26th of May 1879, and that he was wrong in holding that the plaintiff had failed to prove his title to the site of the bazar The Judicial Commissioner had considered that the order placed the property at the disposal of the occupants, whose status was not to be disturbed and he construed that term to mean the resident occupiers The District Judge had taken the correct view that the word referred to the zamindar, finding that the circumstances justified this interpretation It was submitted that the recommendation of the Deputy Commissioner on the 1st of March, 1879,

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The appellants were the sons and successors in estate of Chaudhri Abdul Baki, a zamindar of Ashraftola in the town of Sandila, who filed this suit on the 12th of May, 1890, and died while it was pending. The claim was for the proprietary possession of the site of, and an interest in, two houses occupied as shops in Amaniganj bazar in that town. The defendant was a grain dealer occupying them. He had built a third of which the materials were now claimed.

The town of Sandila came within the general confiscation under the act of State of the 26th of March, 1858. Property other than the bazar, was restored to the Chaudhri family afterwards; but in 1860, Amaniganj bazar was entered in the Nazul Register of the Hardoi district, the bazar being then erroneously believed to have been the property of the ex-King of Oudh. In March 1877, the assessment of a ground rent was ordered by the Deputy Commissioner, but was not paid.

On the 3rd of September 1877, the present plaintiff petitioned the Deputy Commissioner to order an executive inquiry into his claim for the proprietary right to the bazar as against the title of the Government. On the 20th of July 1878, the Tahsildar, after taking the evidence of some of the resident occupiers and others purporting to have knowledge of the facts, sent a report on the case. This was forwarded on the 1st of March, 1879, to the Government by the Deputy Commissioner. The particulars of this, with all the facts relevant to the appeal, are stated in their Lordships' judgment.

On the 26th of May, 1879, the order sanctioning the application that the entry of bazar in the Register should be withdrawn was [3] sent to the above officer through the Commissioner of the Sitapur Division (within which Hardoi was then comprised). The Government letter stated that as the occupants appeared to have all along exercised proprietary rights without question of their power to do so, it was now too late to attempt to disturb their status.

The bazar having been released from the nazul, Abdul Baki instituted suits after the lapse of some years. In 1890 he sued thirty-seven occupiers of whom the defendant was one.

The main question on this appeal was as to the effect on the rights of the parties of this act of release by the Government. The plaintiff-appellant, and the thirty-six other occupiers, had consented to abide by the decision in the case of the present defendant.

The plaint stated that the plaintiff had title to the bazar by ancestral right, that the houses were built by those who lived there as ryots, the defendant occupying two, and having built another without permission, and that since the release of the bazar from the nazul, all the ryots had been rendering zamindari dues to the plaintiff, in favour of whom the release had been made, and who had since then had possession. A custom of the town was that the materials of a house left by a ryot of his own accord became the zamindar's and that on the ryot's selling a house he paid one-fourth of the price to the zamindar; who, if he made the occupier quit, paid to him three-fourths of the estimated price. The claim was for possession of the two houses on payment by the zamindar of three-fourths of the value of the materials. Those of the other house were claimed without payment.

The defendant's written answer denied that the site was ever the ancestral property of the plaintiff and that the defendant had ever

impose the payment of a ground rent upon the occupiers The occupiers refused to pay, apparently on the ground that they were not liable by their tenure to pay rent, and the Tashildar was ordered to institute a test action Before anything was done, however, an inquiry was directed to be made as to when and by whom the shops were built, how did they become a nazul property, and what proof there was of their being such On [7] the 3rd of September, 1877, Abdul Baki (the plaintiff) petitioned the Government "that an executive inquiry be made through the "Tahsildar or some other officer, and if the bazar be found to be the "petitioner's property an order for its release be passed," and an inquiry was directed accordingly

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The report of the Tahsildar by whom these inquiries were conducted is dated the 20th of July, 1878 It is a lengthy document and contains a history of the case He reported that the entry in the register was the only proof of the bazar being nazul, and that with regard to the proprietorship of the bazar there was no contradiction to the Chaudhris being the owners of it, whose heirs were Abdul Baki and others And he also found that although payment of rent in money or of two pice and betel at the construction of a new shop had not been stated by any witness, yet no one denied the proprietorship of the petitioner and his ancestors, and the payment of other dues was also admitted

On the 1st March, 1879, the Deputy Commissioner of Hardoi forwarded to the Commissioner the following docket as to "the Nazul Amaniganj" ·—

"Sir,

"Certain shops in Sandila, known as Amaniganj, are in the Nazul Register "Last year I imposed a light ground rent on them, and the rent not being paid, "threatened to sue

"Petitions of objections were lodged, first, by the zamindars, who claimed that "the proprietary right was theirs secondly, by Musammat Lado, who claimed a "portion of the property as hers A very careful inquiry has been held on the spot "by the Tahsildar in each case I forward translations of his reports

"2 The result may be summed up as follows —

"I That the bazar was built 80 or 90 years ago and was called after the "reigning King, but no one can say who built it

"II That the zamindars hold —

"(a) a *mazhar* or attested statement of title

"(b) a mortgage deed executed by them

"(c) a deed of gift on their part in favour of Musammat Lado, "with regard to a portion of the property

"III That these documents are apparently genuine

"IV. That they appear to have received presents from the owners of shops "in acknowledgment of their proprietorship up to 1860, when the "*ganj* was declared nazul

'V That as far as is known no proprietary rights have ever been exercised "or rents received either by the Kings of Oudh or by the present 'Government.

"[8] Under these circumstances I recommend that the *ganj* (market) be struck "out of the Nazul Register A copy of the entry in the register is annexed.

"(Sd.) J QUINN,

"Deputy Commissioner '

Their Lordships do not refer to these documents as evidence against the respondent of the truth of the matters stated in them, but for the purpose only of showing the materials which the Government had before it when it gave its decision in the ambiguous terms to be next stated, and the nature of the case upon which that decision was given

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on which the Government had acted, could only refer to the recognition of the title of the zamindar as against the claim of the Government. It could not mean a recognition of a proprietary right in the occupiers who had then claimed no such title; whose rights had not been investigated, and who were referred to on any view of the subject-matter, by a doubtful expression. It was argued that the word "occupants" referred to the zamindars who were Abdul Baki and his ancestors. The latter had all along exercised enough proprietary rights to show that such rights existed. The occasion, the documentary evidence, and the order of 1879, were all such as to show that the object of the Government was to restore the state of things which existed before the events leading to the entry in the Nazul Register. It was within the power of the Government to grant or to withhold the title. Reference was made to the judgment in *Nawab Malka Jehan Sahiba* v. *The Deputy Commissioner of Lucknow* (1), showing that all who claimed property that had fallen within the confiscation of 1858, must claim through the Government in whom it had vested.

The respondent did not appear.

On the 11th May their Lordships' judgment was delivered by LORD DAVEY.

This is an appeal from the decree of the Judicial Commissioner of Oudh of the 3rd of June, 1897, reversing the decree of the District Judge of Hardoi of the 26th of February, 1895, and restoring the decree of Subordinate Judge of Hardoi of the 20th of August, 1894, which dismissed the suit of the plaintiffs and [6] present appellants. The respondent has not appeared, which their Lordships regret the more because it is stated to be a test case upon the decision of which 36 similar cases will depend. It is surprising that the 37 defendants did not combine to instruct counsel to argue their case at their Lordships' Bar.

The appellants are the heirs of the original plaintiff Chaudhri Abdul Baki who by his plaint claimed to be entitled to the land or soil occupied by a bazar called Amaniganj in the town of Sandila in Oudh as his ancestral property. It was alleged that the residents of the said bazar live there as ryots, having built houses at their own costs, and that the defendant was one of such residents in occupation of two shops and having without permission built another shop on a piece of fallow. The plaint contains an allegation of a custom in the town of Sandila that if a ryot leaves of his own accord a house or shop occupied by him the materials thereof become the property of the zamindar. If he wishes to sell the materials of a house or shop he pays one-fourth of the price to the zamindar and if the zamindar desires the ryot to vacate a house or shop he pays the ryot three-fourths of its estimated price. The prayer is for possession of the land occupied by the defendant subject to the payment of three-fourths of the price of the defendant's shops (other than the one erected without permission) according to the custom.

The defence is in substance a denial of the plaintiff's title and a plea of limitation.

After the mutiny the town of Sandila shared the general confiscation of Oudh territory. Other family property was restored to the plaintiff, but in 1860 the bazar was entered in the Nazul Register under the belief (which appears to have been mistaken) that it was previously the property of the King of Oudh. In the year 1877 the Government determined to

(1) (1879) L. R. 6 I. A. 63, at p. 74.

learned Judge's judgment are well founded —"It was a question of "proprietary right between Government and the zamindar It was not "a question between Government and the shopkeepers It was never "asserted that the shopkeepers had a proprietary title to the land The "only question with them was whether they could be made to pay rent "and that question was left in abeyance [10] until it was decided whe "ther Government or Abdul Baki was the proprietor of the land"

Finally the Judicial Commissioner reversed the decree of the District Judge and restored that of the Subordinate Judge substantially for the same reasons The Judicial Commissioner comments upon the facts that the whole of the correspondence upon which the Government Order of the 26th of May is based was not before the Court Since the hearing before the Judicial Commissioner the appellants have obtained from Government copies of certain letters which preceded those of the 26th of May and asked leave to read them on the hearing of this appeal But as the respondent has not appeared and it did not appear that any notice had been given to him that leave to produce fresh evidence would be asked for, their Lordships did not think fit to accede to the application, though they do not doubt their power to do so Both sides seem to be equally in default in not obtaining earlier production of these letters

Their Lordships are impressed by the weight of the observations which have been quoted from the judgment of the District Judge Throughout the exhaustive report of the Tashildar there is not a trace of any claim by any of the occupiers (of whom seven gave evidence) to the ownership of the land, but on the contrary it is expressly stated in the report that there was no denial of the title of Abdul Baki and his ancestors

They cannot without the clearest evidence attribute to the Government any intention to adjudicate upon or decide a matter which was not before it, or gratuitously to confer title on persons who never claimed it to the prejudice of others whose claim was reported by the Government Officers to be well founded Their Lordships attach more importance to the act of the Government than to the terms of the letter They think that the intention of the Government was simply to annul the entry in the Nazul Register and restore the rights which existed when it was erroneously made And they think that the effect of expunging the entry in the register was a disclaimer by the Government of all title, and a surrender or release of the property to those whom it might concern, or (in other words) those who would have been entitled but for the confiscation, according to [11] their several rights and interests, thus following out the policy of the Government at the general settlement of the land in Oudh It would seem that some of the land had been parted with by ancestors of the appellants before the confiscation Nor is there anything in the letter of the 26th of May 1879 which is inconsistent with this view of the effect of expunging the bazar from the register Whatever the opinion of the Government might be on the materials before it, it would naturally not disire to prejudge any rights which might be asserted before the Law Courts and the only direction in it is 'to sanction the Deputy Commissioner's proposal to expunge the shops from the Nazul Register' This proposal, based on the report of which he gives a summary, is certainly not to give the ownership of the land to the occupiers The earlier words in the letter which are relied on state the reasons for this order, which may have been based on an imperfect appreciation of the Deputy Commissioner's recommendation But it must

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On the 26th of May 1879 the Government addressed the following letter to the Commissioner of Sitapur :—

"From ROBERT SMEATON, ESQ.,

"Junior Secretary to Government, N.-W. Provinces and Oudh,

"To the Commissioner of the Sitapur Division.

"WITH reference to correspondence ending with your No. 1464, dated 10th May, "regarding the removal from the Hardoi Nazul Register of certain shops, known as "Amaniganj, in Sandila, I am directed to say that as the occupants appear to have "all along exercised proprietary rights without question of their title to do so, it is "too late now to attempt to disturb their status; and the Lieutenant-Governor "and Chief Commissioner is accordingly pleased to sanction the Deputy Commis- "sioner's proposal to expunge these shops from Nazul Register."

In compliance with this order the bazar was struck off the Nazul Register and proclamation made thereof.

The principal question on this appeal is what the effect was of this act of the Government? The appellants contend by their pleadings and at the bar that the letter of the 26th of May 1879 was according to its true construction and when read by the light of previous proceedings a regrant to the *zamindar* of the land and soil of the bazar. The respondent on the other hand relied upon the letter of the 26th of May 1879 as a grant to the occupiers of full proprietary rights in their houses and shops and the land upon which they are constructed and thus turned them from ryots and occupiers into landowners. It is of course agreed that any person claiming land in Oudh must show a title from Government subsequent to the confiscation; but the question is to whom it is to be inferred from these informal proceedings that the grant was intended to be made.

[9] The following issues were framed by the Subordinate Judge :—

"1. Is the land on which the bazar called Amaniganj in Sandila is situate "plaintiff's ancestral property and do the residents of the bazar live in it like ryots?

"2. Was the bazar restored in favour of the plaintiff, or given to the plaintiff, "and the plaintiff has been in possession ever since, and has regularly received or "taken zamindari dues from all the tenants of the same?

"3. When did the cause of action accrue to plaintiff, and is plaintiff's claim "within limitation?

"4. Is there any custom prevailing in Sandila to the effect that whenever the "zamindar or owner of the land wishes to turn out any tenant living on his land, "he can do so and pay three-fourths of the value of the materials of the tenant's "house, and if so, does such custom apply or govern the bazar of Amaniganj?

"5. If the plaintiff be found to be entitled to the possession of the houses and "shops, what is the amount in each case on payment of which he can obtain pos- "session?"

The Subordinate Judge did not think it necessary to determine the first issue because he held that the letter of the 26th of May, 1879, operated as a grant by the Government of full proprietary rights to the occupiers. He also found on the third issue that the plaintiff had not been in possession within limitation and his suit was barred by Article 142, Schedule II, of the Limitation Act.

The District Judge on appeal held that the Government in 1879 surrendered the proprietary right in the land of the *ganj* to Abdul Baki, and that he was not barred by limitation from bringing the suit, and remanded the case for trial of Issue No. 4 and, if necessary, Issue No. 5. The District Judge thought that it was clear from the history of the case that by the word "occupants" in the letter of the 26th of May 1879 was meant the zamindar. Their Lordships cannot see their way to adopting this construction. But they think that the following sentences of the

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[13] not barred from bringing his suit by limitation. Substitute for Issue 1 the following issues —

IA Is the plaintiff (having regard to the foregoing declaration) proprietor of the land on which the bazar called Amaniganj in Sandila is situate?

IB Have the residents of the bazar any and, if so, what rights and interests in the houses and shops therein occupied by them? Remand the case to the Subordinate Judge for trial of the above issues, and also (if and so far as necessary) of Issues 4 and 5 Direct that the costs of the trial which has already taken place and of the appeals to the District Judge and Judicial Commissioner respectively abide the result of the suit And they will humbly advise His Majesty accordingly

Their Lordships observe that the Issue 4 does not accurately follow the words in which the custom is pleaded in paragraph 4 of the plaint, inasmuch as it speaks of "the value of the materials of the tenant's "house" whereas the plaint says "its' (i e, the house's) "estimated price" But no doubt the variance was deliberately made and is the result of explanations given at the time of the settlement of the issues Their Lordships content themselves with pointing out the variance and will not advise any alterations to be made in the language of the issue

Their Lordships will direct that the costs of this appeal also do abide the result of the suit and be disposed of by the Courts below accordingly

Appeal allowed, suit remanded

Solicitors for the appellant·—Messrs *Watkins* and *Lempriere*

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PRIVY COUNCIL

PRESENT —

Lord Hobhouse, Lord Davey, Lord Robertson and Sir Richard Couch

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GANGA BAKSH SINGH *(Plaintiff)* v DALIP SINGH AND OTHERS (*Defendants*) [20th June, 1901]

[*On appeal from the Court of the Judicial Commissioner of Oudh*]

Act No. XIV of 1891 (*Oudh Courts Act*), *section* 8—*Appeal—Jurisdiction—Appeal below heard by a Court not properly constituted—Practice*

. . . .

[Fol 20 A L J 631]

APPEAL from a judgment and decree (17th August, 1896) of the Additional Judicial Commissioner of Oudh, whereby a decree (30th June,

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be remembered that the bazar was classed with the other lands belonging to the King of Oudh and so was entered as nazul. The minds of the Oudh Executive in 1879 would doubtless be addressed to the question whether the bazar did really belong to the King. As the report showed that zamindars and shopkeepers alike dealt with the land independently of the King, it was not far from accurate, though not well chosen, language to say that "the occupants appear, &c., &c." with the meaning that the private claimants of interests enjoyed them undisturbed, in the same way as other people enjoy private property. What the Government does is to sanction the Deputy Commissioner's proposal, and reading the letter with the Tashildar's report, and the Deputy Commissioner's recommendation, their Lordships cannot find in it any indication of the Government's intention to benefit either party at the expense of the other.

Their Lordships are also of opinion that the appellants are not barred by limitation. There could not be any bar or title by limitation prior to the annexation. The act of State known as the confiscation, which followed soon afterwards, made a clean sweep of all titles and vested them in the Company from whom they passed to the Crown. There is no suggestion of a [12] title by limitation against the Crown. As long as the Crown remained owner neither zamindars nor ryots had interests which they could enforce against one another. Nothing was done to divest the title of the Crown and to restore it to the former owners prior to the letter of the 26th of May 1879. To take that letter rather than the actual alteration of the registers as the act which conveyed title to the former owners from the Crown is the most favourable view for those who plead the bar of limitation. But this suit was commenced within 12 years of the date of the letter, and bar by time is therefore out of the question.

There was no actual finding by the Subordinate Judge on the first issue as to the title of the appellants. That Judge presumed for the purpose of argument that it might be answered in the plaintiff's favour, but, as already stated, it became immaterial. There should be a finding upon it now, and in this respect the decree of the District Judge requires amendment.

Their Lordships are of opinion that the Judicial Commissioner should have left the decree of the District Judge undisturbed except by directing that the matters contained in Issue I should be tried as well as the other matters of remand. Issue I, however, as at present framed will not enable the Court to finally adjudicate on the respective rights of plaintiff and defendant. It may be that the ryots have by long occupancy acquired some rights which will protect them against eviction at the will of the zamindar. Their Lordships therefore think it should be broken up into two issues as stated below.

In the result their Lordships think that the order of the Judicial Commissioner should be reversed and that the simplest course will be to discharge all the orders made in the Courts below and to direct that a decree be passed in the following form. On the second issue declare that the letter of the Government dated the 26th of May, 1879, coupled with the consequent removal of the bazar from the Nazul Register operated as a surrender and regrant by the Government of the bazar and the shops and houses in it to these persons, who, if they had not been confiscated, would now be entitled thereto according to their several rights and interests, and on the third issue find that the plaintiff was

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The plaintiff valued his suit at Rs 6,258 under section 7, cl 2 of of the Court Fees Act (VII of 1870) and instituted it in the Court of the Subordinate Judge with reference to sections 17 and 18 of Act XIII of 1879

The suit was dismissed by the Subordinate Judge as not being maintainable, an appeal from that decision was heard by the Additional Judicial Commissioner sitting alone, and he affirmed [16] the decree but not the decision of the Subordinate Judge Section 8 of Act No XIV of 1891 enacts that "an appeal from a decree or order of a Subordinate Judge to the Judicial Commissioner shall be heard by the Judicial Commissioner and the Additional Judicial Commissioner sitting together provided (i) that the amount or value of the subject matter of the suit in the Court of first instance was Rs 10,000 or upwards, and the amount or value of the matter in dispute on appeal to the Judicial Commissioner is the same sum or upwards, or (ii) that the decree or order appealed from involves directly or indirectly some claim or question to or respecting property of like amount or value"

From the decree of the Assistant Judicial Commissioner the plaintiff applied for a certificate of appeal to the Privy Council, and in support of his application he filed affidavits that his claim was worth 20 years' purchase of the annual rent The first and second Judicial Commissioners who heard the application said "we have no doubt that the amount or value of the subject matter of the suit in the Court of first instance and of the matter in dispute in appeal to Her Majesty in Council is Rs 10,000 or upwards, and they granted a certificate that the case was a fit case in point of value for appeal to Her Majesty in Council

The first and preliminary ground of appeal was—'Because under section 8 of Act No XIV of 1891 the Additional Judicial Commissioner had no jurisdiction to hear the appeal, which should have been heard by him and the Judicial Commissioner sitting together

Mr *Leslie DeGruyther* contended on the above ground that the Additional Judicial Commissioner had no jurisdiction to hear the appeal alone Section 8 of Act No XIV of 1891 is express in its terms, and this case would come within cl (*b*), proviso (ii) of that section, that is, the decree appealed from involved indirectly "a claim or question to or respecting property of Rs 10 000 or upwards The appeal should be allowed on this ground In cases where a similar kind of objection has been taken by a respondent, it was held that the objection must prevail, unless withdrawn or waived—*Ex parte Anderson* (1), where an objection was taken by the respondent that an appeal in bankruptcy had not been heard [17] by the proper court, it rendered the appeal liable to be dismissed, but the objection was withdrawn In *Hardeo Bax* v *Jawahir Singh* (2), where a similar objection was taken, the dismissal of the appeal was avoided by the Judicial Committee granting special leave to appeal and the case proceeded The objection here is taken as a ground of appeal by the appellant Act No XIII of 1879 (the Oudh Civil Courts Act, 1879), sections 17 and 18, as amended by Act No XX of 1890 (the N W P and Oudh Act, 1890) sections 39 and 40, was referred to

Mr *J D Mayne* for the respondents, admitted that the case appear

(1) (1870) L R 5 Ch Ap 473
(2) (1877) L R 4 I A 178 I L R 3 Cal 522

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(note) 51 I C 73=17 A L J 691, 15 I C 890 Fol 7 O C 1 7 O C 8 1 P W R 1908=63 P L R 1908 (F B)=49 P R 1908 9 I C 309
(ii) Limitation Act, Ar's 10, 120 144—Pre-emption Suit, Appl 13 M L J 412 Fol 28 All 424 Ref 26 Mad 780 1 C L J 73 21 M L J 454=9 M L T 292=(1911) 1 M W N 137=9 I C 309 62 I C 27 8 N L R 142 10 O C 374 12 O C 314 28 I C 208 3 Lah 261 (P C)]

APPEAL from a judgment and decree (16th February, 1908) of the High Court at Allahabad (1) confirming a decree (28th November, 1894) of the Subordinate Judge of Gorakhpur, by which a suit brought by the present appellant was dismissed as being barred by lapse of time

The suit was brought to enforce a right of pre emption in respect of certain share in four villages named Patringwa, Sandhuria, Pipra, and Parsa Of the three first named villages the defendant Mansur Ali Khan and one Zahur Ali Khan, who were brothers, owned two thirds in equal shares, and they owned the whole of the fourth village also in equal shares

On the 14th of March, 1868, Zahur Ali Khan made a mortgage by conditional sale of his shares in the four villages in favour of one Sarju Prasad, represented in this appeal by the respondent Bhagwati Prasad The possession of the morgaged properties, [19] however, remained with the mortgagor This mortgage was foreclosed, and the period of one year given by Regulation XVII of 1806 expired on the 20th of January, 1881

Zahur Ali Khan died in 1876, and after his death his brother Mansur Ali Khan brought a suit in 1881 for redemption of the mortgaged property That suit and the appeal to Her Majesty in Council made therein from a decree of the High Court were eventually dismissed by an order of Her Majesty in Council dated the 13th of July, 1886, on the ground that the mortgagor had not done what was necessary by the terms of Regulation XVII of 1806 to entitle him to redemption (2) Afterwards Bhagwati Prasad, the son of Sarju Prasad the original mortgagee, brought a suit for possession of the mortgaged property and for mesne profits That suit was decreed on the 4th of August 1891, by the then Subordinate Judge of Gorakhpur, and on the 6th of July, 1893, the High Court on appeal confirmed his decree Bhagwati Prasad was thereupon put into formal possession of the shares in the four villages, and on the 27th of November, 1893, executed a dakhalnama (receipt of possession) in the usual manner

On these proceedings coming to her notice, the plaintiff, Batul Begam, the wife of the defendant Mansur Ali Khan, on the 4th of July, 1894, filed the suit out of which the present appeal arose, praying (inter alia) for possession of the mortgaged shares in the four villages on the basis of pre emption the condition of the wajib ul arz, the custom of the village, and the right of pre emption under Muhammadan Law, by setting aside all the proceedings and the foreclosure decree on payment of Rs 35,000, the consideration money, or of any other sum which the Court might determine The plaintiff based her right to sue on a gift made to her by her husband of a *six pie share of his original share in the four* villages, and she described herself as "a near co-sharer" of the vendor in the conditional sale and so entitled to pre emption The only defendant who filed a written statement was Bhagwati Prasad, and the only defence material, so far as the present appeal is concerned, was that the suit was barred by limitation

(1) (1898) I L R 20 All 315
(2) See *Mansur Khan v Sarju Prasad*, L R 14 I A 51, I L R 9 All 21.

ed to be wrongly before the Judicial Committee, the respondents had themselves taken this very point at a former stage of the case.

1901, June 20th.—The Judgment of their Lordships was delivered by LORD HOBHOUSE :—

In this case their Lordships will humbly advise His Majesty to discharge the decree of the Additional Judicial Commissioner of Oudh of the 17th August, 1896, to allow the appeal, and to remand the case to the Court of the Judicial Commissioner of Oudh, to be tried by the Judicial Commissioner and the Additional Judicial Commissioner sitting together, as provided by law.

Their Lordships give no costs of the present proceedings.

Appeal allowed ; case remanded.

Solicitors for the appellant :—Messrs. *Watkins and Lempriere.*

Solicitors for the respondents :—Messrs. *T. L. Wilson and Co.*

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PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Davey, Lord Robertson and Sir Richard Couch.

BATUL BEGAM (*Plaintiff*) *v.* MANSUR ALI KHAN AND OTHERS (*Defendants*). [19th June and 13th July, 1901.]

[*Appeal from the High Court, North-Western Provinces, Allahabad.*]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule ii, articles* 10, 120, 144—*Suit for pre-emption against heir of mortgagee by conditional sale—" Physical possession," meaning of—Accrual of cause of action in suit for pre-emption of property mortgaged by conditional sale—Expiration of year of grace.*

A suit brought to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is governed, where the [18] subject of the sale does not admit of physical possession and there is no registered instrument of sale, not by article 10 but by article 120 of schedule II of the Indian Limitation Act (No. XV of 1877), and limitation in such a suit runs from the expiration of the year of grace, that being the period when the right of the mortgagee has become mature : the mere fact that he has not enforced that right by a suit for possession is immaterial. *Ali Abbas* v. *Kalka Prasad* (1) followed.

Where the property sold was an undivided share in certain villages, *Held*, that the " subject of the sale " did not admit of " physical possession " within the meaning of article 10 of the Indian Limitation Act. The expression used by Stuart, C. J. in *Jageshar Singh* v. *Jawahir Singh* (2), in regard to the words " actual possession," is applicable with still more certainty to the words " physical possession," by which is meant a " personal and immediate " possession. In the present case such possession could not have been taken by the mortgagee without enforcing partition : article 10 therefore did not apply.

Nor was artile 144 applicable. Claims to pre-emption are specially considered in article 10, and although the particular claim in the present case did not (for the reasons above stated), fall within it, that did not affect the construction, of article 144 as illustrated by article 10. A claim to enforce a right of pre-emption is, as the latter article shows, a claim impeaching another's right and its primary object is to set aside the competing right. The circumstance that the plaint in the present suit inverted the proper order and, instead of first asking for the setting aside and then asking possession as the consequence, had asked for possession " by setting aside ", could not alter the nature of the action.

[(i) Vendor and Purchases—Sale of undivided share of Zamindari—Possession.—Ref. 179 P. L. R. 1905=88 P. R. 1905 ; 142 P. R. 1908 ; 5. A L. J. 98

(1) (1892) I. L. R. 14 All. 405. (2) (1876) I. L. R. 1 All. 311.

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applicable No such possession has been taken or had by the vendee As to the meaning of physical possession the case of *Unkar Das* v *Narain* (1) and Starling on Limitation commenting on article 10 of schedule II, were referred to

If article 10 does not apply, article 144 should govern the case, and not article 120 Article 120 is not to be applied unless in a case where no other article is applicable Article 144 applies to suits for possession of immoveable property, and this is a suit for possession The prayer of the plaint is for possession by setting aside the foreclosure proceedings

Even if the case is held to be governed by article 120, it is submitted that the cause of action does not accrue from the expiration of the year of grace as held by the High Court, but from the time the final decree for possession was passed in favour of the mortgagee, that would be in November 1893, so that, the period of limitation being six years, the suit would not be barred As to the accrual of the cause of action and the time from which [22] limitation began to run, *Forbes* v *Ameeroonissa* (2) and *Ali Abbas* v *Kalka Prosad* (3), were referred to

The respondent did not appear

The judgment of their Lordships was delivered by LORD ROBERTSON

The sole question in this appeal is whether the suit, brought to declare a right of pre emption against the heir of a mortgagee by conditional sale, who has foreclosed, is time barred, six years having elapsed from the expiry of the year of grace after foreclosure, and the main controversy comes to be whether the 120th article of the second schedule to the Limitation Act of 1877 applies to the case Admittedly it does apply, unless either article 10 or article 144 applies, and the real question is whether the appellant is right in affirming that the case falls under article 10 There is, however, a subordinate question as to the period from which the six years run, assuming article 120 to apply

The appellant is the wife of the nominal respondent, Mansur Ali Khan, and she derives from him by gift a six pie share of his original interest in the villages now in dispute, the remainder of his interest being still vested in him This Mansur Ali Khan and his brother, Zahur Ali Khan, at the date of the mortgage owned two thirds of each of the villages of Pathringwa, Senduria, and Pipra Kalan, each brother holding shares of 5 annas 4 pies, and the two owned the whole of the village of Parsa, each brother holding an eight anna share The brothers were Muhammadans The two of the villages were of pure zamindari tenure, the others were imperfect pattidari

On the 1st of March, 1868, Zahur Ali Khan, in consideration of money lent, executed a deed of conditional sale to Sarju Prasad, now deceased (whose heir is the respondent Bhagwati Prasad), of the whole of his shares in the four villages It is unnecessary to set out this sale deed, as nothing turns on its particular terms No change of possession took place on the execution of the mortgage Zahur Ali Khan died in January 1876 In 1880 the mortgagee having also died, the respondent, Bhagwati Prasad, his heir, foreclosed (by proceedings taken under Regulation XVII of 1806), and the money was not paid within the year of grace, [23] which expired on the 20th of January, 1881 Some litigation ensued which is immaterial to the present question and the rehearsal of

(1) (1881) I L R 4 All 24
(2) (1865) 10 Moo I A 340 (349)
(3) (1892) I L R 14 ,, ,,

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[20] On the 28th of November, 1894, the Subordinate Judge of Gorakhpur dismissed the suit as being barred by limitation. He referred to the case of *Ali Abbas* v. *Kalka Prasad* (1), in which it was held that where a mortgage by conditional sale has been duly foreclosed in accordance with the procedure laid down in Regulation XVII of 1806, and at the expiration of the year of grace the mortgage money, or a portion thereof, remains unpaid, the title of the conditional vendee becomes absoulte on the expiration of the year of grace, and the six years' period of limitation prescribed by article 120 of schedule II of the Limitation Act for a suit for pre-emption of the mortgaged property begins to run against the pre-emptor from the expiration of the year of grace, and held that there was no reason for not applying the law so laid down to the present case.

The plaintiff appealed to the High Court, and on the 12th of November, 1896, a Division Bench of that Court (BANERJI and AIKMAN, JJ.) at the first hearing of the appeal made an order referring to the Court below the following issue :—" Does the property in suit admit of physical possession?" On that issue the Subordinate Judge held on the oral and documentary evidence adduced with reference to it, and having regard to the cases of *Unkar Das* v. *Narain* (2) and *Bholi* v. *Imam Ali* (3) that the property in suit did not admit of physical possession. Objections to this finding were filed by the plaintiff in the High Court, and the appeal was referred by the Division Bench to a Full Bench of the Court for disposal.

On the 16th of February, 1898, the Full Bench (EDGE, C. J., and BLAIR, BANNERJI, BURKITT, and AIKMAN, JJ.) dismissed the suit, holding that it was barred by article 120, schedule II of the Limitation Act. The case before the High Court is reported in I. L. R. 20 All. 315.

The plaintiff appealed to His Majesty in Council.

Mr. *G. E. A. Ross* for the appellant contended that the Courts below were wrong in holding that the suit was barred by lapse of time. The article applicable to suits for pre-emption is article 10 of schedule II of the Indian Limitation Act, and under that article limitation runs from the date of the purchaser's getting "physical [21] possession," or in a case where physical possession is not practicable then from the date of registration of the instrument of sale. Here there is no instrument of sale registered. The question then is whether "physical possession" is practicable in this case, and that depends on the meaning given to those words. It is submitted that they mean the same as "actual possession," and according to a ruling of the majority of a Full Bench of the Allahabad High Court in *Jageshar Singh* v. *Jawahir Singh* (4) "actual possession" was the same thing as the "possession" of Act XIV of 1859, the earlier Limitation Act, and included constructive possession. If so, the property, the subject of sale, in this case admitted of "physical possession," and the High Court in the judgment now under appeal says that if the property allows of physical possession being taken, article 10 of the Limitation Act applies. Stuart, C. J., in the above case differed from the majority of the Full Bench and was of opinion that "actual possession" meant visible and tangible possession; but even if that interpretation be put on the words, limitation would not commence until such possession were taken, assuming that article 10 is

(1) (1892) I. L. R. 14 All. 405.
(2) (1881) I. L. R. 4 All. 24.
(3) (1881) I. L. R. 4 All. 179.
(4) (1876) I. L. R. 1 All. 311.

The appellant appealed to the High Court, who on the 12th of November, 1896, remanded the case for the trial of the following issue —"Does the property in suit admit of physical possession?" Evidence was taken, and the Subordinate Judge on the 11th of January, 1897, held that the property in suit does not admit of physical possession On appeal the High Court, on the 16th of February, 1898, dismissed the appeal with costs, and it is against that judgment that the present appeal has been taken

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24 A. 17= 5 C W N 833=28 I A. 243= 3 Bom L. R. 707=3 Sar 133.

The view of both Courts is that the appellant's claim falls under the 120th article of the second schedule of the Limitation Act, 1877, which is the final and residuary article including all suits not specially provided for, and fixing for all such suits the limitation of six years It is for the appellant to show which other article fits her claim, she points first to the 10th article —to this article most of the discussion has been directed, and this [25] occasioned the remand The 10th article purports to apply to suits "to enforce a claim of pre emption whether the right is founded on law or general usage or on special contract" One year is the period of limitation, and the time from which this period begins is "when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale has been registered" The interest of the appellant to maintain the application of the 10th article is that, if the subject is susceptible of possession, then possession has yet to be taken, for none has as yet been had.

The "property sold," "the subject of the sale," was in this case the 5 anna 4 pie share of each of the three villages and the eight anna share of the fourth Various questions of more or less subtlety suggest themselves as to the relation of the holder of such a right to the possession of the estate All those questions are, however, superseded by the extreme absoluteness of the language of the tenth article of the Limitation Act What has to be considered is, as the High Court accurately formulated, the question, Does the property admit of physical possession? The word 'physical' is of itself a strong word, highly restrictive of the kind of possession indicated, and when it is found, as is pointed out by the High Court that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used,—first in 1859 prescribing "possession," then in 1871 requiring "actual possession" and finally in 1877 substituting the word "physical" for "actual," it is seen that that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Court are right in the conclusion they have stated Their Lordships consider that the expression used by Stuart, C J, in regard to the words "actual possession" is applicable with still more certainty to the words "physical possession" and that what is meant is a "personal and immediate" possession.

This being the sound construction of the tenth article of the second schedule to the Act of 1877, the claim completely fails: the appellant, for the mortgagee's her had no semblance of physical [26] possession in the true and natural sense of the term. All that he had directly was the 'formal possession' [illegible] by the [illegible] nama, which was ceremonial and on paper. The physical possession of the villages was with others and [illegible] could not get physical possession of any [illegible]

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which would only obscure the narrative. In 1890, Bhagwati sued in the Court of the Subordinate Judge of Gorakhpur that he might "be put in proprietary possession of a 5 anna 4 pie share in each of Senduria, Pathriggwa, and Pipra Kalan and an eight-anna share of mauza Parsa by ejecting and dispossessing the defendants or any of them who may be found in possession thereof and by declaring their right of ownership to be extinct," and he obtained a decree which on appeal was affirmed by the High Court on the 6th of July, 1893. The terms of the decree were *inter alia* :—"It is decreed and ordered that the claim of the plaintiff for possession of the shares of the villages mentioned in the relief be decreed." On the 27th of November, 1893, Bhagwati executed a dakhalnama, declaring that under the order of the Judge "Munshi Jamiat Rai, the Amin of the Court, has given formal possession to me, the decree-holder, through my karinda (agent) over the shares of the villages detailed below," and the names of the villages and number of the shares are duly set out. Mutation of names was also obtained in respect to the shares. Bhagwati then attempted to take physical possession of the estate, but he was successfully resisted by Mansur Ali Khan. Bhagwati therefore never had possession at all, unless the possession of Mansur Ali Khan or the possession of the tenants, or his own "formal possession" will suffice; and it has not been suggested that his legal rights entitled him to anything more, in the way of possession, than he actually obtained, unless and until he had enforced a partition, which in fact never took place.

On the 4th of July, 1894, the appellant filed her plaint. She narrated the conditional sale, the foreclosure, the decree of possession, and the "delivery of possession." She described himself as a near co-sharer of the vendor (in the conditional sale), and asserted that under the condition of the wajib-ul-arz the usage and right of pre-emption under the Muhammadan law she possesses a preferential right of purchase. Her prayer, so far as material, was that a decree awarding possession over the mortgaged shares of the villages might be passed in her favour on the basis [24] of pre-emption, the condition of the wajib-ul-arz, the custom of the village, and the right of pre-emption under the Muhammadan law, by setting aside all the proceedings and the foreclosure decree, on payment of Rs. 35,000, the consideration money, or of any other sum which might be determined by the Court. A written statement was filed by the respondent, Bhagwati, in which various grounds of defence were stated :—*inter alia*, limitation was pleaded, the validity of the gift to the appellant which constitutes her title to claim pre-emption was challenged, and her alleged right of pre-emption was denied. Issues were settled on the 19th of September, 1894, but of those the only one which has been tried and decided, and requires present notice, is that of limitation. For the purposes of the present question, therefore, the appellant is to be assumed to have had a right of pre-emption, and the question is whether she had lost it by limitation before her plaint was filed.

On the 28th of November, 1894, the Subordinate Judge dismissed the suit on the ground of limitation, with costs. He held that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the six years' period of limitation prescribed by article 120, schedule II of the Limitation Act begins to run against the pre-emptor from the expiration of the year of grace.

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24 A 27= 28 I A 227= 3 Bom L R 576=8 Sar 142.

The appellant and respondent, two brothers were agents, the one for the other in dealing with their joint estate and the agency was found on the evidence to have continued until the 22nd of December, 1885 when the appellant brought a suit against the respondent for his share of money received by the respondent on the joint account *Held* by the Judicial Committee (upholding the judgment of the High Court) that a cross suit brought by the respondent against the appellant for an account was governed by article 89 of Schedule II of the Limitation Act, and having been brought within three years of the termination of the agency, it was not barred

'Moveable property in article 89 includes money

when it appeared that the facts ascertained on other evidence in the case as to certain items in the list were conclusive to the contrary of what was there set out, and inconsistent with the existence of the alleged settlement.

[Ref 32 Cal 719=1 C L J 232 6 C L J 535 2 I C 597 35 Cal 298=12 C W N 820=7 C L J 279 Foll 30 I C 697=43 Cal 218=19 C W N 1070=22 C L J 552 39 Mad 376 17 A L J 805=52 I C 373=41 All 635 53 I C 675=30 C L J 90 26 I C 740=28 M L J 140]

CONSOLIDATED appeal against three decrees (9th March, 1897) of the High Court at Allahabad, whereby decrees (15th and 16th September, 1893) of the Subordinate Judge of Saharanpur in two suits brought against each other by the appellant and first respondent, respectively were reversed

[28] The appellant and first respondent were brothers The second respondent Muzaffar was the son of the first respondent The first suit (189 of 1885) was brought by the appellant against Khurshed and Muzaffar for a moiety of Rs. 74,800, a sum received by Khurshed as the share due to the two brothers from their uncle Husain Ali on a partition of the family property In that suit the Subordinate Judge decreed the claim as against Khurshed, but dismissed it as against Muzaffar Khurshed appealed from this decree so far as it made him liable, and Asghar also appealed from it so far as it dismissed his suit against Muzaffar The result of the two appeals was that Asghar's suit was wholly dismissed

The second suit (211 of 1888) was brought by Khurshed against Asghar for money due on a balance of accounts The Subordinate Judge dismissed the suit, but on appeal by Khurshed, the High Court reversed that decree and gave Khurshed a decree for a sum of about Rs 25 000

Asghar's suit was brought on the 22nd of December, 1885 The plaint stated that the property of Asghar, Khurshed and a third brother Ahmad, had been under the management of Husain Ali, that on a settlement of accounts in 1875, when their properties were given over to them, a sum of Rs 74,800 was found due to them, which was paid by Husain Ali on the 8th of June, 1875, and received by Khurshed under a power of attorney from Asghar, that of this sum Khurshed deposited in the joint names of both brothers Rs 10,000 with Gulab Singh, Rs 4,800 with the firm of Bansidhar, and the balance Rs 60,000 he deposited in his own name in the Bank of Upper India at Meerut This sum, the plaint alleged, Khurshed had withdrawn from the Bank, invested about half of it on a mortgage from one Shere Singh in the name of Muzaffar, and placed the rest of the money in the Bank to the account of Muzaffar The plaint claimed the original moiety with interest, in all Rs 67,000 (for which it was alleged a claim had been made on the 25th of November 1885), and also prayed for a declaration that the money deposited in the names of Khurshed and Muzaffar was liable for any decree that

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and had no right to oust the existing occupiers. Accordingly their Lordships consider that the case does not come within the tenth article, in so far as possession is concerned. This being so, the alternative stated in the third column relating to registration arises, but the appellant did not argue upon it and no suggestion has been made that it affects the argument. The tenth article accordingly disappears from the case.

The alternative suggestion that article 144 applies cannot be supported. It applies to suits "for possession of immoveable property or any interest therein not hereby otherwise specially provided for," and the 12 years of limitation are to begin "when the possession of the defendant becomes adverse to the plaintiff." Now it is perfectly clear that claims of pre-emption are specially considered in article 10, and although this particular claim of pre-emption does not (for the reasons already stated) fall within it, that does not affect the construction of article 144, as illustrated by article 10. A claim to enforce a right of pre-emption is, as article 10 shows, a claim impeaching another's right; and its primary object is to set aside the competing right. The circumstance that this plaint has inverted the proper order and, instead of first asking the setting aside and then asking possession as the consequence, has asked for possession "by setting aside" cannot alter the nature of the action.

If neither article 10 nor article 144 applies, then admittedly the 120th article does; and the only remaining question is at what date does the period of six years begin? or, to apply the words of the Act, when did the right to sue accrue to the appellant? It seems to their Lordships to be clear that the expiry of the year of grace is the time at which the pre-emptor's right arises. The mortagagee's right of property had then become mature, and the mere fact that he had not enforced that right by a suit of possession does not affect the question. Their [27] Lordships are satisfied of the soundness of the decision of the High Court of the North-West Provinces in *Ali Abbas* v. *Kalka Prasad* (1).

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow, Rogers and Nevill.*

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24 A. 27 (=28 I. A. 227=3 Bom. L. R. 576=8 Sar. 142.)

PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Davey, Lord Robertson, and Sir Richard Couch.

ASGHAR ALI KHAN (*Plaintiff*) *v.* KHURSHED ALI KHAN AND ANOTHER (*Defendants*) AND TWO OTHER APPEALS.

[21st June and 2nd, 3rd, 4th, 5th and 27th July, 1901.]

[*On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.*]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, article* 89—*Suit for account between principal and agent—Termination of agency—" Moveable property "—Money—Evidence as to account stated.*

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(1) (1892) I. L. R. 14 All. 405.

January 1893 reversed this decision and remanded the case for trial on the merits 1901 JUNE 21

On the 15th of September 1893 the Subordinate Judge again gave a decision in the suit, decreeing the suit against Khurshed for the entire sum claimed with interest and costs, but dismissing it as against Muzaffar JULY 2, 3, 4, 5 & 27 PRIVY COUNCIL

Both Khurshed and Asghar appealed from this decision, and on the 24th of April, 1896, the High Court (BANERJI and AIKMAN, JJ) held that the alleged settlement of accounts of the 13th of March, 1885, never took place, and that the documents supporting it were not genuine, that the objection to the suit as being one for a specific item in a series of transactions was untenable and that Khurshed had in equity a right to claim a set off The material portion of their judgment as to these points was as follows — 24 A 27= 28 I A 227= 3 Bom L R 57t=8 Sar 142

"There is evidence produced by Khurshed which renders it highly improbable that Khurshed was at Jansath on the date upon which the *rukka* of the 13th of March, 1885, is alleged by the plaintiff and his witnesses to have been executed there The learned counsel for the appellant endeavoured to support his case by comparing the signatures on the *rukka* and list with genuine signatures of his client An argument drawn from a comparison of signatures is seldom conclusive, but it must [31] be admitted that the signatures on the *rukka* and list resemble one another more closely than any other pair of genuine signatures produced, and that they bear a greater similarity to the signatures of 1876 than to any of the signatures after 1880 A number of witnesses have been produced by the plaintiff whose statements, if they are to be believed, prove that in March 1885, there was an adjustment of accounts between the brothers, in consequence of which the *rukka* and list were prepared and signed by Khurshed, but the considerations which we have set forth shut us up to the conclusion that these witnesses are unworthy of credit We have the unexplained absence of all mention in the plaint of so material a circumstance in support of the case brought into Court as the *rukka* of the 13th of March, which could not possibly have escaped the plaintiff's recollection We have to our minds the irresistible internal evidence of the items of the list to which we have referred above which satisfies us that it is fictitious We have the letter of the 9th of November, 1885, from Khurshed Ali to his brother with Asghar Ali s endorsement thereon, . . . are utterly inconsistent with . . . that it is in every way more . . . r on behalf of the plaintiff to meet the letter of the 9th of November, 1885, than that the latter letter was fabricated by Khurshed Ali to meet a case which had not even been hinted at when the letter of the 9th of November was put in We therefore repel the plaintiff's plea that an adjustment had taken place

"We have now to consider the other contention raised on behalf of the appellant Those contentions are two fold—first, that having regard to the nature of the dealing between the parties the plaintiff was not entitled to maintain a suit for a specific item, but could sue only for an account, and that on this ground the plaintiff s suit as brought should have been dismissed Secondly, conceding that such a suit was maintainable, the defendant could protect himself against the plaintiff s demand by showing that the other items equal to or exceeding the amount claimed by the plaintiff were due to the defendant and that he could claim a set-off of such items

. . . .

items due to him by the agent being disallowed subsequently In this view the plaintiff was entitled to sue for the item claimed by him which had been admittedly

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might be passed; and for a similar declaration as to the sum advanced on mortgage to Shere Singh in Muzaffar's name.

[29] On the 9th of March 1886 Khurshed filed his written statement, in which he relied on limitation as barring the suit and alleged that he and Asghar were partners, and until the partnership account was adjusted no claim for a specified item could be made; that since the receipt by him of the sum in dispute Asghar had received sums amounting to Rs. 1,08,040, besides other sums of which he had given no account, and that altogether Asghar was largely in his debt. He filed a list of items showing this indebtedness. The sum of Rs. 14,800 he alleged had been long since recovered by both parties, and as to the sum in the Bank he asserted that it was his own money, and was not received by him as agent, and that he had given it to his son, Muzaffar.

Muzaffar also filed a written statement on the same date, in which he made the same allegations as to the money in deposit and on mortgage, and submitted that the suit was bad for misjoinder.

With his written statement Khurshed filed, amongst other documents which he had produced in obedience to an order of the Court on the 23rd of February, 1886, a letter signed by himself, dated the 9th of November, 1885, from himself to Asghar, in which he said: "I wish that all accounts up to this time should be cleared, settled, and disposed of, so that the matter might be cleared up." Endorsed on the letter was a reply from Asghar: "Please settle the account. I am responsible for what may be found due by me."

On the 31st of March Asghar filed a written statement in reply, being called on by the Court to do so. In it he denied the allegations as to the sum of Rs. 1,08,040 and the other sums alleged to have been received by him, and submitted that they could not be set off under section 111 of the Civil Procedure Code. He denied having received anything from Khurshed in respect of the Rs. 14,800. He also pleaded a settlement of account with Khurshed except as to the Rs. 74,800, and he filed as evidencing such settlement of account a *rukka* or note-of-hand executed as a memorandum by himself in favour of Asghar and dated the 13th of March, 1885, and an extract from the list of items signed by himself and Asghar on that date. These documents are set out in their Lordships' judgment, as also are the issues in the suit.

[30] The settlement of accounts of the 13th of March, 1885, was alleged by Khurshed to be a fabrication. It was spoken to by Asghar himself and by a number of respectable and apparently credible witnesses who were present on the occasion; there was evidence also of Khurshed's hand-writing by several witnesses, who had become acquainted with it in the course of business and against whose credibility no suggestion was made. Khurshed rested his defence to this settlement of accounts on an *alibi* showing he was not at Jansath where the settlement is said to have taken place, but at Muzaffarnagar, at the time of the transaction. He also relied on the settlement alleged by himself of the 9th of November, 1885, which was not admitted by Asghar.

The first decision in the suit was given by the Subordinate Judge on the 15th of September, 1890. In it he dealt only with the questions of misjoinder and limitation. The former objection he held was taken too late for it to be given effect to: on the latter ground he dismissed the suit as barred; the High Court, however, on appeal on the 16th of

The second suit (211 of 1889) was brought by Khurshed against Asghar Ali on the 9th of November, 1888 In his plaint he alleged that he and his brother had been carrying on a joint business, the management of which was entirely in the defendants (Asghar's) hands, that during the partnership joint and personal items of Khurshed were used in the joint business or by Asghar in his personal transactions, which sums it was agreed should be received or paid at the time of adjustment of account, that the only joint sum received by Khurshed was Rs 74 800, out of which Rs 14,800 had been credited in joint account and subsequently spent in the joint business, leaving only Rs 30 000 payable to Asghar as against Rs 1,04,080 due by him to Khurshed as set out in a list annexed to the plaint, and that Asghar had never rendered any account, though he had promised to do so on the 9th of November, 1885 Khurshed stated that his cause of action arose on the 23rd of December, 1885, when Asghar s suit (189 of 1885) against him was instituted, and he prayed for an account and for the payment of Rs 74,030 or whatever balance might be found due to him from Asghar

Asghar put in a written statement in which he denied that any partnership or joint business existed between himself and Khursed, except that they were co sharers in an hereditary [34] zamindari which was divided in 1882, and that there were certain small personal items due to him and realized by the other which were finally settled on the 13th of March 1885 Since that time he alleged that all the accounts had remained in possession of Khurshed He relied on limitation as barring the suit

On the 15th of September, 1890, the Subordinate Judge dismissed the suit, considering that the dismissal of suit No 189 of 1885, which took place on the same day, left the plaintiff in suit No 211 of 1888 without a cause of action

The High Court on the 16th of January, 1893, reversed this decision and remanded the suit (together with suit No 189 of 1885), for a decision on the merits

The Subordinate Judge dismissed the suit as barred by article 61 of Schedule II of the Limitation Act, and not being within article 106

On appeal by Khurshed, the High Court (BANERJI and AIKMAN, JJ) on the 9th of March 1897 held that the limitation applicable to the suit was not article 61, but article 89, and that Asghar's agency did not terminate till he filed suit No 189 of 1885 on the 22nd of December 1885, but that in any case the endorsement by him on Khurshed's letter on the 9th of November 1885 saved the suit from being barred They reversed the decision of the Subordinate Judge and gave Khurshed a decree for Rs 25,075 with interest

Against the three decisions of the High Court Asghar appealed to the Privy Council, and the three appeals were consolidated by order of the Judicial Committee on the 12th of December 1900.

Mr *J D Mayne* for the appellant contended that the High Court were wrong in rejecting the settlement of accounts of the 13th of March 1885 They gave no weight to the positive evidence in its favour which was given by a number of respectable and credible witnesses, several of whom were the friends and relations of both parties, and although the High Court admit that the evidence as to Khurshed's handwriting and the fact that the signatures on the *rukka* and list resemble one another more closely than any other pair of genuine signatures produced are

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received by the defendant for both of them. We cannot therefore sustain the first of the [32] contentions referred to above. We are of opinion that the second contention is valid, and we hold that looking to the peculiar relationship between the parties it would be inequitable to allow the plaintiff to recover a specific item without allowing the defendant the opportunity of setting off any sums which he may be able to prove that he has disbursed on plaintiff's account. This in fact is one of that numerous class of cases in which the transactions between the parties are such as to make it inequitable that the plaintiff should recover and that the defendant should be driven to a cross suit. If we were to hold that the defendant's only remedy was by way of a cross suit, injustice would result, as many of the items due to the defendant might be time-barred. The defendant did not advance a claim for what he alleges to be due to him, trusting to the other debts as the means of discharging the items so due. For those items the defendant has been led by the understanding which existed between him and the plaintiff to give credit, that understanding being that an adjustment of account should take place between the two. It has been repeatedly held that an equitable right of set-off exists independently of the provisions of section 111 of the Code of Civil Procedure. In our opinion this is a case in which the defendant had in equity a right to claim a set-off, and such a set-off we hold the defendant to have claimed in his written statement. The Court below was therefore not justified in refusing to go into the question of account and in making a decree for the amount claimed by the plaintiff, simply on the ground that it was his share out of a joint fund belonging to the parties."

In the result the suit was referred to the Lower Court "for the purpose of finding which, if any, of the items in the list appended to Khurshed's written statement are due to him by Asghar Ali." The Subordinate Judge found some of these items in favour of Khurshed, and others in favour of Asghar; and the case came again to the High Court, in which the same Judges gave their final judgment on the 9th of March, 1897, by which they allowed the appeal and dismissed Asghar's suit as against Khurshed. In doing so they observed:—

"Discarding then the items which we concur with the Subordinate Judge in thinking should be disallowed to the defendant, and also those which the defendant has abandoned, the total of the remaining items amounts to Rs. 70,655-6-2½. The total amount claimed by the plaintiff and decreed to him by the Court below is Rs. 57,509-11-0. This amount is one-half of two sums of Rs. 60,000 deposited with the Bank of Upper India, and Rs. 14,800 deposited with native bankers, including interest thereon. As to this sum of Rs. 14,800 deposited with native bankers at Meerut, we have already found in our order of the 24th of April 1896 that an examination of the accounts proves that that sum was drawn out and spent for joint purposes so that the claim for that sum is untenable. As for the amount deposited in the Bank of Upper India, the plaintiff's share including the interest which the Bank paid on the amount of the deposit, amounted to Rs. 45,457-11-0. As this sum is much less than the amount which we have found to be due to the defendant from the plaintiff, and [33] as having regard to the relations between the parties the defendant was entitled to set off that sum against the amount due to the plaintiff, the Court below ought, in our opinion, to have dismissed the plaintiff's suit.

"The result is that we allow this appeal and setting aside the decree below dismiss the plaintiff's suit with costs here and in the Court below."

Asghar's appeal from the decision of the Subordinate Judge, dismissing his suit against Muzaffar, was dismissed on the same date.

Whilst the two suits out of which the present appeal arose were proceeding, Khurshed Ali on the 18th of November brought a suit against Asghar to recover the half share of Rs. 6,000 alleged to have been received by Asghar on joint account from their uncle Husain Ali. The first Court dismissed it as barred by limitation, and this decision was affirmed by the District Judge, whilst the High Court dismissed it on the 9th of March, 1897, as relating to an item which is included in Khurshed's suit No. 211 of 1888. No appeal was brought from this decision.

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First of all then, in 1875, the uncle of the two brothers, Hussin Ali Khan, paid to the elder of them, Khurshed, the sum of Rs 74,800, being the amount due to the two as their share of the profits of estates which their father and Hussin, and afterwards the two brothers and Husain had held jointly From 1875 there was separation between Hussin and the two brothers, but the two brothers remained joint in all their estate until 1882 and in business until the present dispute arose Before speaking, however, of the relations between the two brothers as to estate and business generally it is convenient to complete the narrative of the Rs 74,800 which came from the uncle into the hands of Khurshed In a case abounding in mutual accusations of forgery and perjury, the main facts about this money are undisputed That the greater part of it, *viz*, Rs 60,000 was deposited in the Bank of Upper India and the rest, *viz*, Rs 14,800, with two native firms of bankers at Meerut is certain The sequel as to Rs 60,000 needs only to be told briefly in order to its being dismissed from further consideration It was given by Khurshed to the other respondent, Muzaffar, his son, but as Khurshed admits his liability to account for it, the whole history of Muzaffar's dealings with it has no further relation to the present dispute There was a dispute as to what [37] became of the Rs 14,800, but this is the sole controversial survival of the subject matter of the first suit, *viz*, the Rs 74,800 which came to the brothers from their uncle Husain, and it is ultimately dealt with in the account

Turning now to the general relations between the two brothers the, facts are simple They were joint in estate (as has already been said), they owned considerable property in the district of Muzaffarnagar, both were in Government service, employed in different districts, and one was at home at one time and another was at another It resulted from these mutual relations and similar engagements, that the one acted for the other in the receipt of the profits of their estate, and when necessary for more important matters, powers of attorney were granted by the one to the other This is common ground and the fierce controversies in this suit are as to which brother in certain specified cases collected moneys belonging to both In 1882 the greater part of the landed property belonging to them was divided between them, but they continued joint in other matters, and the growing distrust between the two did not produce an actual rupture until the litigation began in 1885

In this state of facts the resulting liability of either party to account for his receipts is clear, and, given appropriate action or actions to enforce those liabilities, then the questions are (1) is either claim to account barred by limitation (2) or by settlement of accounts and if not (3) what is the state of accounts? It will be found that in whatever other social or legal duty the parties have come short, they have not failed to sue enough actions to determine their rights, and some of the questions which were agitated as a defence to the first action are entirely superseded by the ample means ultimately afforded the Courts for doing complete justice

The first suit (No 189 of 1885) related to the Rs 74,800 which Khurshed received from Husain The plaint was filed by Asghar on the 22nd of December 1885, and asked for a decree against Khurshed for Rs 37,400, being half of the Rs 74,800, with interest, other decrees being

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"Dated the 13th of March 1885"

And also the following "list" —

No —160 —List of items realized by Syed Khurshed Ali Khan and Syed Asghar Ali Khan, which were allowed credit for at the time of the private adjustment.

Receipts on account of items due to Syed Khurshed Ali Khan by Syed Asghar Ali Khan on private account	Rs a p	Receipts on account of items due to Syed Asghar Ali Khan by Syed Khurshed Ali Khan on private account	Rs a p
On account of the decree passed against Musammat Jajbi Begam, wife of Inayat Husain, rais of Kwol (?) ..	9,743 7 4	On account of the price of the house, situate in Meerut Out of Rs 6,000 Syed Khurshed Ali Khan received from Syed Hussain Ali Khan	3,000 0 0
On account of bond executed by Raja Raza Ali, rais of Bundora	10,500 0 0	Out of Rs 7,374 on account of the bond executed by Syed Ewaz Ali, mukhtar am of the parties (Rs 3,687) were paid to Lala Harsahai Mal, banker of Meerut	3 687 0 0
On account of the sale deed of Nagla, &c, executed by Raja Raza Ali	1,200 0 0	On 4th April 1881, received (Rs 2,847 12) out of Rs 5,694 8 on account of the proportionate balance of the judgment debt, due by Syed Wazarat Hussain	2,847 12 0
On account of the receipt from the shop of Bunsidhar and Sheo Prasad, bankers of Meerut Out of Rs 22,110, after deducting Rs 30 which were paid for the Umballa journey under the account of the said bankers	11,025 0 0	On 4th April 1881, Syed Khurshed Ali Khan received (money) on account of the judgment debt due by Basharat Husain Out of it Rs 10,000 was credited to the shop of Banaidhar, Sheo Prasad A moiety of Rs 9,346-2 3	4,673 1 3
On account of the profits of the villages for 1283 Fasli	1,790 8 9	On account of bond executed by Nawab Azmat Ali Khan, rais of Karnal	20,000 0 0
Total	34,268 0 1	Total	31,207 13 3

[40] The following were the issues settled —

"1 Whether the objection taken on behalf of Muzaffar Ali Khan defendant, as to misjoinder of claims and parties is correct?

"2 What were the relative positions of the parties when the money was drawn from Husain Ali Khan and deposited at another place, and is any portion of claim affected by time?

iade as made

"4 Whether the item in question was deposited in the Meerut Bank in the names of the parties or in the name of defendant No I, whether the plaintiff was a sharer and entitled to the extent of one half of it, or with reference to the account produced by defendant No 1 nothing was due to the plaintiff out of the aforesaid item, and whether the said deposit item was drawn and transferred *mala fide* and secretly, or with the knowledge of the plaintiff?

"5 Whether the item of Rs 14,800 held in deposit by the firms was drawn by the parties or by the defendant alone?

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asked to the effect of tracing and attaching the money in the form in which it had been invested by Khurshed's son Muzaffar, who was made a defendant. [38] For reasons already indicated, it is only necessary to follow the progress of the litigation between the two brothers, for the claim against Muzaffar comes to nothing. Khurshed's written statement presented a perfectly definite theory of the case. So far from his being indebted to Asghar, Asghar was largely indebted to him, to the amount of more than a lakh of rupees, the details of which were given in an account produced. This being so, the Rs. 74,800 which came from Hussain had, to the extent of Rs. 60,000, been justly appropriated by Khurshed and as it happened had been given to Muzaffar. The rest (Rs. 14,800) had been spent by Asghar and Kurshed jointly. On this statement of facts, besides limitation, Khurshed pleaded that the brothers had been joint owners, that there must be a general account between them as partners, and that no action could lie for what was only one item in an account. On this last point it is sufficient to say that, whether good or bad, it is superseded by the fact that a cross action was brought by Khurshed to enforce the claims originally stated in support of his defence.

A minor incident of this defence must here be noted, as it bears very directly on one of the keenest controversies in the case. With Khurshed's written statement he produced a letter, dated the 9th of November 1885, written by himself and expressing a wish for a prompt settlement of accounts and having endorsed on it a reply by Asghar acquiescing and saying, "Please settle the account. I am responsible for what may be found due by me." This document was filed on the 23rd of February, 1886, and of its relevancy in support of the claim for an account there can be no doubt. The Court called on the appellant (plaintiff) for a replication and on the 31st of March 1886 he filed a written statement in which (*inter alia*) he denied the partnership and the receipt of any of the Rs. 14,800 "does not accept the correctness of the defendant's allegations (*a*) that the plaintiff received Rs. 1,08,040 from the defendant in accordance with the inclosed list" and (after other non-admissions) the replication proceeded :—

"6. The fact is this, that all the accounts were settled between the parties subject to the qualifications and statements contained in the plaint after inspecting and examining the *siahas* and registers of account (which the defendant has refused to produce on the plaintiff's application) as detailed [39] in the list signed by the parties annexed to the written statement, and that the sums due by either party were set off, and that the defendant executed the enclosed note-of-hand in favour of the plaintiff as a memo. to secure the abovementioned item. The present allegations of the defendant, after such clear and distinct proceedings, are very surprising."

Along with the replication, *i.e.*, on the 31st of March, 1886, was produced the following letter :—

"My dear brother, dearer than life, Syed Asghar Ali. May he live long!

"With prayers for your long life I inform you that whatever account was between you and me has been settled, *i.e.*, I have received the entire amount due and have understood my private account, the account of my son Muzaffar, the joint account and the account of the *siaha* deeds, &c. The whole of the aforesaid account with the exception of the joint money amounting to Rs. 74,800 received on the 8th of June 1875, and deposited in the Bank and credited with mahajans, and the deed of Ganga Charan has been settled. Nothing has remained unpaid.

"I have therefore written this memo. and affixed one anna stamp to it.

"(Sd.)———(Illegible).

was said to have proceeded made it incredible that the settlement took place. 1901 JUNE 21 JULY 2, 3, 4, 5 & 27 — PRIVY COUNCIL — 24 A 27=28 I A 227=3 Bom L R 576=8 Sar. 142

The appellant with some plausibility argued that the High Court has attached less importance to the positive evidence of [42] the settlement than to antecedent improbabilities arising out of complicated transactions He points to the substantial body of evidence of persons apparently of good repute who say they were present at the settlement and who depose to the writing and signature of the *rukka*, and he comments on the evidence being all one way as to the resemblance of the disputed writing to the undisputed signatures of Khurshed He has examined with great elaboration the evidence bearing on the questions as to which of the disputed documents were forged and which of the witnesses are perjured, and whether an *alibi* has been made out by Khurshed After very careful consideration their Lordships have come to the conclusion that the High Court was justified in rejecting the *rukka* on the grounds which are stated in their judgment They consider the evidence as to certain of the items in the statement to be conclusive to the contrary of what is set out in the list and to be inconsistent with the existence of the alleged settlement It is in their judgment less credible that Khurshed should have agreed to an acknowledgment to the direct contrary of known and recent facts of capital importance than that the documents are fabricated, and it has to be remembered that the opposite theory involves the believing a similar amount of fabrication and perjury to have taken place on the other side about the document of the 9th of November 1885 Their Lordships the more readily adopt the conclusion thus stated when they remember that the *rukka* and list of March 1885 were first heard of after the production by Khurshed of the *rukka* of November, 1885, in support of his counter claim For while it is true that in strictness they were not necessary to the plaint and appropriately supported the replication, yet it cannot escape notice that if they had been in existence they would inevitably have been in the mind of the plaintiff and would naturally have formed the starting point of the narrative of his plaint, and the subsequent procedure before the Subordinate Judge indicates a similar lack of confidence by the appellant in a controversial weapon which if authentic was conclusive

There remains the question whether Khurshed's claim is barred by the Limitation Act The Subordinate Judge dismissed the suit as time barred, but the High Court on the 9th of March [43] 1897, reversed this decree, and gave decree for Rs 25,075 with interest The question of limitation does not present much difficulty Given the relations (which have been already stated) between these two brothers as regards their joint property, and it is apparent that they were agents the one of the other in dealing with the joint estate Their Lordships are of opinion that the 89th article of the 2nd schedule of the Limitation Act, 1877, applies, for they hold the words "moveable property" to include money The evidence of Asghar shows that the relation of agency continued down to the institution of the suit and accordingly the plea of limitation fails In this view it is unnecessary to rely on the acknowledgment of November, 1885, or to consider the attempt to read the date as being in fact 1884 instead of 1885 The sequel of the suit after this judgment of the High Court showed that the question of accounts was little controverted and their Lordships were not asked to consider it

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"6. Whether the defendant can, under section 111, claim a set-off of the items set up by him in the plaintiff's account, and whether the items alleged by the defendant are also affected by time?

"7. Whether the plaintiff has, as alleged by him, a right for hypothecation as to the property mortgaged by Chaudhri Sher Singh and others on account of the money due to him, and whether the mortgage was taken for this very money.

"8. Whether the claim for interest is correct according to practice?

"9. What decision should be made as regards the defendant's application for costs?"

This defendant being called on to admit or deny certain documents declared the *rukka* of the 13th of March and the "list of items" to be fabricated. In like manner the plaintiff put among the documents not admitted by him the *rukka* of the 9th of November, 1885, with reply. On the 9th of November, 1888, a cross action (No. 211) was brought by the respondent Khurshed against the appellant. It claimed rendition of accounts and payment of Rs. 74,030. For practical purposes the state of accounts upon which this sum was brought out was the same as that set out in the defence to the suit of the appellant.

This action merely restated the controversy between the parties in another form, and it is only necessary to note that the appellant in defence pleaded limitation.

Another suit was brought by the appellant against the respondents; but it is unnecessary to deduce the procedure. The [41] evidence taken was made to apply to all three suits, and the suits were kept together in the subsequent procedure. The appeals ultimately taken have been consolidated. It will simplify the narrative if in the meantime the original action be mainly attended to.

Evidence was taken before the Subordinate Judge and many witnesses were examined, whose credibility has been vehemently impugned. It was not until the 15th of September 1890 that the Subordinate Judge pronounced his first judgment, and by it he dismissed the suit (189) on the ground of limitation. Against this the appellant (plaintiff) appealed to the High Court and on the 16th of January 1893 the High Court set aside the decree and remanded the case under section 562 of the Civil Procedure Code to be tried promptly on the merits and according to law.

On the 15th of September 1893 the Subordinate Judge decided in favour of the appellant for the full amount of his claim as against Khurshed, but dismissed the suit as against Muzaffar. On appeal the High Court on the 24th of April, 1896, referred the case to the lower Court for the purpose of finding which, if any, of the items set forth in the list appended to the written statement filed by Khurshed are due to him by Asghar. They added, "Such finding will be irrespective of any plea of limitation that may be raised on behalf of Asghar Ali." Their Lordships in passing must observe that while in the present instance it may not have led to miscarriage, this was not the proper order to be pronounced, and it was irregular to take the account irrespective of the plea of limitation.

The High Court, however, did much more than appears from the mere terms of this remand; for by their judgment leading up to the remand they decided, adversely to the appellant, the most important question in the case, *viz.*, the alleged settlement of account in March, 1885. They held on the evidence that no settlement had taken place, and they reached this result by holding that the ascertained facts about certain items of the list of statement (set out above) on which the settlement

2 I C 630, 662 8 I C 592 43 All 170=18 A L J 1001=59 I C 632 64 I C 1004, 5 C L J 289 36 Mad. 32, Diss 10 A L J 36=15 I C 15 Fol 25 I C 611 (F B) 32 All 215, Cited 17 A L J 629=51 I C 242=41 All 538, Ref 12 I C 993 64 I C 1004, Fol 20 A L J. 631]

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FULL BENCH

24 A 44= A W N 1901, 194

THE facts of this case are as follows —

On the 10th of May, 1848, one Kesri Narain made a usufructuary mortgage of the property in suit in favour of Lekhraj, [45] the predecessor in title of the defendants respondents, to secure a loan of Rs 308. Sita Ram, plaintiff No 1, and Thakur Das, father of the other plaintiffs, purchased Kesri Narayan's equity of redemption

In 1869 Sita Ram and Thakur Das brought a suit against the defendants for redemption of the mortaage of 1848 In that suit the defendants pleaded that a later mortgage deed for Rs 800 had taken the place of the mortgage of 1848, and that the plaintiffs must pay that amount in order to redeem This plea was sustained, and a decree was passed declaring the plaintiffs entitled to redeem and to recover possession of the property on condition of payment by them of the full amount of the mortgage money within one month The decree went on to provide that if the money was not paid as directed, "this judgment shall, after expiry of the above mentioned period, be considered as non existent (*ma'adum*)" The plaintiffs failed to pay the money as directed

No further poceedings were taken in connection with the mortgage until the 26th of May, 1896, when a fresh suit for redemption was instituted by Sita Ram and representatives of Thakur Das The plaintiffs alleged that the cause of action arose on the 12th of May, 1896, on which date the defendants refused to render an account and to allow redemption of the mortgage, and they prayed that accounts should be adjusted between the parties, and redemption decreed, without payment, if it were found that the mortgage had been satisfied out of the usufruct, or on payment by them of such part of the mortgage money as might be found due

The defendants pleaded *inter alia* that the suit was barred by section 13 of the Code of Civil Procedure, and contended that, having regard to the result of the suit of 1869, the plaintiffs were not entitled to any relief.

The Court of first instance (Munsif of Mahaban) disallowed the defendants' contention and gave the plaintiffs a decree for redemption on payment by them of Rs 500

On appeal by the defendants the lower appellate Court (Subordinate Judge of Agra) following the case of *David Hay* v [46] *Razi ud din* (1) reversed the Munsif s decree and dismissed the plaintiffs' suit

The plaintiffs thereupon appealed to the High Court

Babu *Durga Charan Banerji* (with whom Munshi *Gokul Prasad*) for the appellants

I submit that the Subordinate Judge is wrong So long as there is no order debarring the plaintiffs of the right to redeem or no order for sale made upon the defendants mortgagees' application in case of non payment within the time fixed, the right to redeem s not extinguished Sections 92 and 93 of the Transfer of Property Act, 1882, put the matter beyond any doubt There was no such order in this case and therefore the plaintiffs are still entitled to redeem The soundness of

(1) (1897) I L R 19 All 202

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The result of the whole matter is that Khurshed is entitled to what has been awarded him and that Asghar fails in his suits. The several actions have been disposed of by the High Court in the appropriate manner. Their Lordships will humbly advise His Majesty that the appeals ought to be dismissed; and the appellant will pay the costs of the consolidated appeals.

Appeals dismissed.

Solicitors for the appellant:—Messrs. *Pyke* and *Parrott.*

Solicitors for the respondents:—Messrs. *Ranken, Ford, Ford* and *Chester.*

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24 A. 44 (=A. W. N. 1901, 194).

[44] FULL BENCH.

Before Mr. Justice Knox, Acting Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

SITA RAM AND OTHERS (*Plaintiffs*) *v.* MADHO LAL AND ANOTHER (*Defendants.*)* [11th July, 1901].

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 60, 92, *and* 93—*Mortgage—Redemption—Decretal money not paid in within the time limited by the decree—Decree not in accordance with the Transfer of Property Act—Subsequent suit for redemption not barred—Civil Procedure Code, sections* 13, 244—*Res judicata.*

The plaintiffs brought a suit for redemption of a usufructuary mortgage and obtained a decree for redemption, conditioned on their paying a certain sum within a time specified in the decree. This decree, however, instead of going on to direct that in default of payment by the due date the property should be sold, directed that if payment was not made within the time fixed the "judgment should be deemed to be non-existent." The plaintiffs did not pay the decretal amount within the time fixed, but some years afterwards brought a second suit for redemption. *Held* that the second suit was not under the circumstances barred, either by reason of anything contained in the Transfer of Property Act, 1882, or by section 13 or section 244 of the Code of Civil Procedure. *David Hay* v. *Razi-ud-din* (1) overruled. *Sami Achari* v. *Somasundram Achari* (2), *Periandi* v. *Angappa* (3), *Karuthasami* v. *Jaganatha* (4), *Ramunni* v. *Brahma Dattan* (5), *Ramasami* v. *Sami* (6), *Vallabha Valiya Rajah* v. *Vedapuratti* (7), *Nainappa Chetti* v. *Chidambaram Chetti* (8), *Chaita* v. *Purum Sookh* (9), *Doobee Singh* v. *Jowkee Ram* (10), *Sheikh Golam Hoosein* v. *Masumat Alla Rukhee Beebee* (11), *Anrudh Singh* v. *Sheo Prasad* (12) *Muhammad Samiuddin Khan* v. *Mannu Lal* (13), *Dondh Bahadur Rai* v. *Tek Narain Rai* (14), *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (15) *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (16), *Maloji* v. *Sagaji* (17), *Roy Dinkur Dayal* v. *Sheo Golam Singh* (18), and *Nowab Asimut Ali Khan* v. *Jowahir Singh* (19), referred to.

[Rel. 24 All. 479; Ref. 2 A. L. J. 278=(1905) A. W. N. 107; 49 I. C. 894=21 Bom. L. R. 56=43 Bom. 334, 447; 29 All. 481=A. W. N. 1907, 137=4 A. L. J. 447;

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* Second Appeal No. 651 of 1897, from a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 22nd April, 1897, reversing a decree of Munshi Jawala Prasad, Munsif of Mahaban, dated the 23rd December 1896.

(1) (1897) I. L. R. 19 All. 202.
(2) (1882) I. L. R. 6 Mad. 119.
(3) (1883) I. L. R. 7 Mad. 423.
(4) (1885) I. L. R. 8 Mad. 478.
(5) (1892) I. L. R. 15 Mad. 366.
(6) (1893) I. L. R. 17 Mad. 96.
(7) (1895) I. L. R. 19 Mad. 40.
(8) (1897) I. L. R. 21 Mad. 18.
(9) N. W. P. H. C. Rep. 1867, p. 256.
(10) N. W. P. H. C. Rep. 1868, p. 381.
(11) N. W. P. H. C. Rep. 1871, p. 62.
(12) (1882) I. L. R. 4 All. 481.
(13) (1889) I. L. R. 11 All. 386.
(14) (1899) I. L. R. 21 All. 251.
(15) (1883) I. L. R. 7 Bom. 467.
(16) (1886) I. L. R. 10 Bom. 461.
(17) (1888) I. L. R. 13 Bom. 567.
(18) (1874) 22 W. R. C. R. 172.
(19) (1870) 13 Moo. I. A. 404.

the decisions of this Court regarding the point in issue, asked that the case might be referred to a Full Bench What we now have to consider and determine is whether a mortgagor who has obtained a decree for redemption, which does not contain a provision that [48] if payment is not made on the date fixed by the Court, the mortgagor shall be absolutely debarred of all right to redeem the property, and who has not enforced that decree and has not paid in the decretal amount within the time, can subsequently bring a second suit for redemption of the mortgage in respect of which such first decree was obtained According to the decision in *David Hay* v *Razi ud din* (1) he cannot bring such a second suit According to rulings of this Court prior in point of time to *David Hay* v *Razi ud din* (1) he can

It has been found that in 1869 the plaintiff appellant, Lala Sita Ram, and the ancestor of the other plaintiffs appellants, did institute a suit for redemption of this very mortgage, and that they did obtain a decree for redemption, but never put it in force The mortgage was a usufructuary mortgage In coming to a decision upon this point, I do not propose to go into the various precedents that are to be found in the reports These have been very carefully considered and fully discussed by my learned brother Aikman, and I concur in the views he holds about them I think it sufficient to consider the provisions of Act No IV of 1882 which seem to bear upon this point To my mind they return a sufficient and conclusive answer to the question referred The first provision is that contained in section 60 which lays down that "at any time after the principal money has become payable the mortgagor has a right, on payment or tender at a proper time and place of the mortgage money, to require the mortgagee to deliver the mortgage deed, if any, to the mortgagor, and where the mortgagee is in possession of the mortgage property, to deliver possession thereof to the mortgagor" No limitation is put upon this right, with the one exception that it must not have been extinguished by act of the parties or by an order of the Court In the present case there is no question as regards the act of parties The only point which will hereafter have to be considered is, whether the right has been extinguished by an order of a Court As it is common ground that the mortgagee has not up to the present asked for an order that the mortgaged property be sold, it is not necessary to consider the provisions relating to such a circumstance, and I pass on to section 92, which directs that "in a suit for redemption if the plaintiff [49] succeeds the Court shall pass a decree ordering that an account be taken of what will be due to the defendant, and that upon the plaintiffs paying to the defendant, or into Court the amount so due upon a day to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such persons as he appoints, all documents in his possession or power relating to the motgaged property, and shall retransfer it to the plaintiff free from the mortgage and free from all incumbrances created by the defendant or any person claiming under him, and shall, if necessary, put the plaintiff into possession of the mortgaged property" Such a suit for redemption the plaintiffs did bring in the year 1869 A decree was passed in their favour, ordering very much as has been set out above But whilst section 92 of the Transfer of Property Act goes on to enact that the decree passed in a case for redemption should direct that if payment of the amount found due is not made on or before the day fixed

(1) (1897) I L R 19 All 202.

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the ruling in *David Hay* v. *Razi-ud-din* (1) has been doubted in *Dondh Bahadur Rai* v. *Tek Narain Rai* (2). I also rely upon *Sami Achari* v. *Somasundram Achari* (3), *Periandi* v. *Angappa* (4), *Karuthasami* v. *Jaganatha* (5), *Nainappa Chetti* v. *Chidambaram Chetti* (6) and *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (7), also upon *Raham Ilahi Khan* v. *Ghasita* (8) and *Nihali* v. *Mitter Sen* (9). These cases establish beyond doubt that the right to redeem not having been extinguished this second suit for redemption is maintainable.

Pandit *Sundar Lal* for the respondents. The mortgage merged in the decree which had been obtained on it. It ceased to exist independently of the decree. No suit to obtain another decree upon the same mortgage therefore lies: *King* v. *Hoare* (10) *Ex parte Tewings* (11), Leake on Contracts, p. 807, Chitty on Contracts, p. 780, Coote on Mortgages, pp. 707 and 708, Fisher on Mortgages, pp. 822 and 823, Brett's Commentaries on the present Laws of England, p. 361. The decree upon the mortgage having become time-barred gives the plaintiffs no right to bring a fresh suit. They could not have brought this suit so long as the decree for redemption previously obtained by them was alive. [47] The fact that they allowed the decree to become time-barred by their own *laches* gives them no fresh right to sue. The decree in so far as it operates to merge the mortgage in itself is as effective after the time for executing it has passed as before the expirtion of that period.

The decree in the previous suit was obtained before the passing of the Transfer of Property Act, 1882. There was then at least no difference between a decree on a mortgage and other decrees. The remedy of the decree-holders was to enforce the decree under section 244 of the Code of Civil Procedure. They could not again sue upon it. *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (12), *Ramasami* v. *Sami* (13), *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (14), *Anrudh Singh* v. *Sheo Prasad* (15), *Maloji* v. *Sagaji* (16) and *David Hay* v. *Razi-ud-din* (1). The mortgagor has a right to redeem by execution of the decree and not by suit.

The Transfer of Property Act, 1882, has made no alteration in the law. The right to redeem which is given by section 60 of the Act is exhausted when once a decree for redemption has been obtained.

The following judgments were delivered:—

KNOX, ACTING C. J.—The plaintiffs, who are now appellants, are the assignees of the equity of redemption over certain land situate in mauza Kopa, pargana Saidabad. They instituted the suit, out of which this appeal arises, and asked for a decree for enforcing the equity of redemption. Their suit has been dismissed, and the lower appellate Court has been guided to this decision by a precedent of this Court, *David Hay* v. *Razi-ud-din* (1). The Bench of this Court before which this second appeal first came for hearing, having doubts as to the soundness of the view held in *David Hay* v. *Razi-ud-din* (1) and it having been pointed out to them that there was a conflict of authority in

(1) (1897) I. L. R. 19 All. 202.
(2) (1899) I. L. R. 21 All. 251.
(3) (1882) I. L. R. 6 Mad. 119.
(4) (1883) I. L. R. 7 Mad. 423.
(5) (1885) I. L. R. 8 Mad. 478.
(6) (1897) I. L. R. 21 Mad. 18.
(7) (1889) I. L. R. 11 All. 386.
(8) (1898) I. L. R. 20 All. 375.
(9) (1898) I. L. R. 20 All. 446.
(10) (1844) 13 M. and W. 494.
(11) (1883) L. R. 25 Ch. D. 338.
(12) (1883) I. L. R. 7 Bom. 467.
(13) (1893) I. L. R. 17 Mad. 96.
(14) N. W. P. H. C. Rep. 1871 p. 62.
(15) (1882) I. L. R. 4 All. 481.
(16) (1888) I. L. R. 13 Bom. 567.

they held this in the face of the words contained in section 93—"the plaintiff's right to redeem shall be extinguished" These words would be pure surplusage if the cause of action [51] merged in the decree, or if section 13 of the Code of Civil Procedure had any similar effect. On the contrary, it would appear that the words above quoted in section 93 were purposely inserted in order to remove a particular case of a suit for redemption from objections which might be raised under section 13 of the Code of Civil Procedure. Again, as regards the difficulty felt in connection with the principles contained in section 244 of the Code of Civil Procedure, it must be remembered that decrees in redemption suits differ from ordinary decrees, in that they contain provisions providing for a portion of them becoming incapable of execution under certain contingencies By their own internal virtue, so to speak, they make it impossible for questions relating to the execution, discharge or satisfaction of the decree to arise, inasmuch as they provide that upon a decree holder not making payment on a day fixed by the Court, all advantages which accrued to him, and which could be enforced by him under the decree, come to a complete end. In the present case, of course, the decree was of an extraordinary kind, but even so, the terms in which it was couched were of a nature which preclude any question arising of execution, discharge or satisfaction of that particular decree by the decree-holder. With due respect to the learned Judges who decided *David Hay* v. *Razi-ud din* (1) I cannot bring myself to believe that it was the intention of the Legislature as expressed in sections 92 and 93 of the Transfer of Property Act, that there should be one suit only for redemption. The principles of section 244 of the Code of Civil Procedure appear to me to be excluded under the express words which allow the mortgagor's right to redeem to continue alive and operative until extinguished by an order under section 93. It is true that where a Court has once adjudicated upon a mortgagor's right to redeem, so many of the issues as bore upon that, and were heard and determined, become *res judicata* and cannot be reopened; but unless there *has been a determination that the mortgagor has no right to redeem*, there would still remain one other issue in a subsequent suit which would not be *res judicata*, and which would have to be heard and determined. In a second suit for redemption there would always be the question to be tried whether the plaintiff has or has not a right to redeem [52] reserved to him by law until the mortgagee has applied for an order for sale. This issue would naturally not have been, and could not have been, in issue in the former suit, and could not therefore have been heard and determined. The Court would not be by section 13 debarred from trying that issue. It has not been suggested that there is any other order of the Court which stands in the way of the mortgagor's right to redeem. I am therefore of the same opinion as my learned brothers, that in the present case the mortgagor could bring the second suit for redemption, and I concur with them in the order proposed.

BANERJI, J.—This appeal raises the question whether a mortgagor, who has obtained a decree for redemption, and has failed to comply with the conditions imposed in it in regard to the payment of the mortgage money, is precluded from maintaining a second suit for the redemption of the same mortgage.

(1) (1897) I. L. R. 19 All 202.

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by the Court, the property was to be sold, the decree referred to in place of this ordered that if payment was not made, the judgment should, after the expiry of the time fixed in the decree, be considered as *ma'adum* or annihilated. If the Court which passed it had followed the law, then according to section 93 it was open to the mortgagee, when payment of the amount found due was not made, to apply for an order that the property or a sufficient part thereof be sold and the proceeds distributed as directed under section 93. Section 93 goes on further to enact that on the passing of such an order the plaintiff's right to redeem and the security shall, as regards property affected by the order, both be extinguished. Putting aside any other provisions of the law, the clear words of these sections would seem to be that until a mortgagee has applied for an order of sale under section 93, the plaintiff's right to redeem exists, and can at any time be enforced. There is a further clause in section 93, which seems to corroborate this view, and which permits a Court upon good cause shown and upon such terms, if any, as it thinks fit, from time to time to postpone the day originally fixed for payment. Every such postponement would prolong the existence of the plaintiffs' right to redeem. If it did not, it is difficult to assign any meaning or object to it, and this we cannot suppose of any piece of legislature.

[50] As no application had been made by the mortgagees for an order for sale up to the 26th of May, 1896, when they filed the present suit, it would follow that unless the plaintiffs' right to redeem be barred by some provision of law other than that contained in the Transfer of Property Act, his right to redeem was not exitinguished. It was unimpaired, and could be enforced by suit. In *David Hay* v. *Razi-ud-din* (1) where the opposite view was held, it was admitted that there are cases which support this contention, namely, the cases of *Sami Achari* v. *Somasundram Achari* (2). *Periandi* v. *Angappa* (3), *Rammuni* v. *Brahma Dattan* (4), and also *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (5). The learned Judges, however, who decided the case of *David Hay* v. *Razi-ud din* (1), held that it was the intention of the Legislature as expressed in section 92 and section 93 of the Transfer of Property Act that there should be one suit only for a redemption. They do not point out upon what portions of the sections above cited they held this view, and it must be remembered that in the case they then had to decide the decree under appeal did not specify what should take place in the case the mortgage money was not paid within the period limited in that respect. Otherwise it might be assumed that they based their judgment upon the concluding paragraph of section 92. I need not consider here what would be the result if, in the case under appeal, the decree had been made in strict accordance with law and had provided that the property was to be sold. This point does not arise. The learned Judges in *David Hay* v. *Razi-ud-din* (1) seem to have based their decision upon the reading they put upon sections 92 and 93 of the Transfer of Property Act, the principals contained in section 244 of the Code of Civil Procedure, and the fact that the failure by a mortgagor to comply, whatever that may mean, with his decree for redemption within time, cannot give him a fresh cause of action. His original cause of action, they considered, was extinguished. It is difficult to understand how

(1) (1897) I. L. R. 19 All. 202.
(2) (1882) I. L. R. 6 Mad. 119.
(3) (1883) I. L. R. 7 Mad. 423.
(4) (1892) I. L. R. 15 Mad. 366.
(5) (1889) I. L. R. 11 All. 386.

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can only be passed if the mortgage is not simple or usufructuary In the case of such mortgages the only order which has the [54] effect of extinguishing the right to redeem is the order for the sale of the mortgaged property or a sufficient part thereof. So long as such an order has not been applied for and obtained the right to redeem is not extinguished, and therefore the mortgagor is entitled under section 60 to bring a suit to enforce that right This effect of section 93 was evidently overlooked in the ruling of this Court in *David Hay* v *Razi ud din* (1) With all deference to the learned Judges who decided that case, I am unable to agree with them Their view is in direct conflict with the provisions of the Transfer of Property Act They have referred to "the law as administered in such matters in England," but they were oblivious of the fact that whereas in England "the dismissal of the action to redeem by reason of default in payment of the money, or for any other cause than for want of prosecution, operates as a judgment of foreclosure" (see Fisher's Law of Mortgage, 5th Edition, p 965), there can be no decree of foreclosure under the Transfer of Property Act in the case of a usufructuary mortgage The observation of the learned Judges that a mortgagee may be harassed by numerous suits if the mortgagor were permitted to institute repeated suits for redemption, has been fully answered by my brother Aikman, and in the judgment in *Dondh Bahadur Rai* v. *Tek Narain Rai* (2) referred to above It will be entirely in the power of the mortgagee to prevent such suits by obtaining an order for the sale of the mortgaged property As for the provisions of the Code of Civil Procedure to which reference has been made by the learned Judges I am unable to hold that they have any bearing on the question The operation of section 13 of the Code would depend upon the nature of the decree made in the previous suit in each instance If, for example, the first suit is dismissed on the ground that the plaintiff has no right of redemption, he will be precluded by the operation of that section from bringing a second suit for redemption Again, if the decree declares that upon default being made in the payment of the mortgage money, the plaintiff will be foreclosed of his right of redemption, and that decree is allowed to become final, although it is not in accordance with law, the plaintiff will not be entitled to maintain another [55] suit But where the decree has been framed in the terms of section 92 of the Transfer of Property Act the only order which can extinguish the mortgagor's right to redeem in the case of a usufructuary mortgage is an order for sale under the fourth paragraph of section 93 That section leaves no room for doubt that the mere fact of the non payment of the mortgage money on or before the date fixed does not extinguish the mortgagor's right of redemption, and vest the mortgaged property absolutely in the usufructuary mortgagee The very fact that such a mortgagee can obtain an order for the sale of the mortgaged property shows that the ownership of the property, that is, the equity of redemption, is in the mortgagor until the order has been obtained, as the mortgagee could not apply for the sale of the property which had vested in himself. With reference to the contention of the learned advocate for the respondents that after the mortgagor had obtained a decree for redemption his rights merged in the decree, and the only remedy available to him was the execution of the decree, it may be observed that this would be the case where the mortgage money has been discharged before

(1) (1897) I L. R. 19 All. 202. (2) (1899) I L. R. 21 All 251

authority on a question of importance, the hearing of this appeal has been referred to a Full Bench of three Judges 1901 JULY 11

The following are the facts of the case — FULL BENCH.

On the 10th of May, 1848, one Kesri Narayan made a usufructuary mortgage of the property in suit in favour of Lekhraj, the predecessor in title of the defendants respondents to secure a loan of Rs 308 Sita Ram, plaintiff No 1 and Thakur Das, father of the other plaintiffs, purchased Kesri Narayan s equity of redemption 24 A 44= A W N. 1101, 184.

In 1869 Sita Ram and Thakur Das brought a suit against the defendants for redemption of the mortgage of 1848 In that suit the defendants pleaded that a later mortgage deed for Rs 800 had taken the place of the mortgage of 1848, and that the plaintiffs must pay that amount in order to redeem This plea was sustained, and a decree was passed declaring the plaintiffs entitled to redeem, and to recover possession of the property on condition of payment by them of the full amount of the mortgage money within one month The decree goes on to provide that if the mortgage money is not paid as directed, "this judgment shall, after expiry of the above mentioned period, be considered as non existent" (ma adum) The plaintiffs failed to pay the money as directed No further proceedings in connexion with the mortgage were taken until the 26th May, 1896, when the suit out of which this appeal arises was instituted The plaintiffs alleged that the cause of action arose on the 12th of May, 1896, on which date the defendants refused to render an account and allow redemption of the mortgage The plaintiffs prayed that accounts should be adjusted between the parties, and redemption decreed, without payment if it were found that the mortgage had been satisfied out of the usufruct, or on payment by them of such part of the mortgage money as might be found to be due

The defendants pleaded that the suit was barred by section 13 of the *Code of Civil Procedure*, and *contended that*, having regard to the result of the suit of 1869 the plaintiffs were not entitled to [58] any relief now They also raised other pleas, which it is unnecessary to consider in this appeal

The Court of first instance, relying on the decision in Muhammad *Sami ud din Khan v Mannu Lal* (1), repelled the plea that the suit was not maintainable owing to the previous litigation in 1869, and in the result gave the plaintiffs a decree for redemption on payment of Rs 800

On appeal the learned Subordinate Judge, following, as he was bound to do, the later ruling in the case of *Dwarka Das v Husain Bakhsh* (2), sustained the plea that the previous suit barred the present suit, and set aside the Munsif s decree

We have now to decide which of the conflicting views taken in the two cases referred to is correct

I have no hesitation in coming to the conclusion that the decision in the earlier case is right [illegible] of the Madras High Court, [illegible] *Somasundram Achari* (3) [illegible] *baram Chetti* (4) [illegible] 19 All observed that [illegible] cases is not supported by [illegible] England That [illegible]

(1) (1883) I L R [illegible]
(2) (1897) I L R [illegible] (3) [illegible]

suit, either by receipt of rent or by actual payment, and the decree passed is one for possession on the ground that the mortgage has already been redeemed. This was the case in *Sheikh Golam Hoosein* v. *Musammat Alla Rukhee Beebee* (1). But where a conditional decree has been passed the right to redeem is not extinguished until the result of the failure to perform the condition comes into operation, either under section 93 of the Transfer of Property Act, or under the terms of the decree. The learned Judges who decided the case of *David Hay* v. *Razi-ud-din*(2) relied on the ruling referred to above as supporting their view; but the true scope of that ruling has been pointed out by my brother Aikman, and it does not, in my opinion, help the case of the respondents. I am unable to hold that, having regard to the provisions of the Transfer of Property Act, the case of *David Hay* v. *Razi-ud-din* (2) was rightly decided.

It was lastly urged on behalf of the respondents that the decree of 1869 was passed before the Transfer of Property Act came into force, and that before the enactment of that Act, a [56] decree dismissing a suit for redemption operated as a decree for foreclosure. That may have been the case in the Bombay Presidency; but so far as these Provinces are concerned, there is no authority for holding that the rule on the subject which obtains in England was ever applied to suits in this country. In *Chaita* v. *Purum Sookh* (3), decided by Morgan, C. J. and Spankie, J., in 1867, it was held that the omission to execute a decree for redemption does not cause the interest of the mortgagor to cease to exist, and that he may still maintain another suit for redemption. In *Nawab Azimut Ali Khan* v. *Jowahir Sing* (4), their Lordships of the Privy Council did not consider the dismissal of a suit for redemption to be a bar to the maintenance of a subsequent suit for the same purpose. I may also refer to the decision of the Calcutta High Court in *Roy Dinkur Doyal* v. *Sheo Golam Singh* (5), decided in 1874, and I may remark that no case has been cited to us in which, before the passing of the Transfer of Property Act, the view contended for by the respondents and approved in *David Hay* v. *Razi-ud-din* (2) was held in these Provinces.

I am of opinion that neither the provisions of law nor the terms in which the decree of 1869 was passed preclude the plaintiffs from maintaining the present suit. I would therefore accept the appeal, and, setting aside the decree of the Court below, remand the case to that Court under section 562 of the Code of Civil Procedure, allowing to the appellants the costs of this appeal. Other costs to follow the result.

AIKMAN, J.—This appeal arises out of a suit brought for the redemption of a mortgage. The plaintiff succeeded in the Court of first instance, but on appeal the learned Subordinate Judge reversed the decree of the Munsif and dismissed the suit. The plaintiffs have filed this appeal from the decree of the lower appellate Court. The learned Subordinate Judge relies on the judgment of this Court in the case of *David Hay* v. *Razi-ud-din* (2). That case undoubtedly supports the view taken by the Subordinate Judge. The plaintiffs, on the other hand, rely on an earlier judgement of this Court in the case of *Muhammad* [57] *Sami-ud-din Khan* v. *Mannu Lal* (6), which is as clearly in their favour as the other case is against them. Owing to this conflict of

(1) N. W. P. H. C Rep. 1871, p. 62.
(2) (1897) I. L. R. 19 All. 202.
(3) N. W. P. H. C. Rep. 1867 p. 256.
(4) (1870) 13 Moo. I. A. 101.
(5) (1871) 22 W. R. C. R. 172.
(6) (1889) I. L. R. 11 All. 386.

different from those of the present case and of the case in I L R 19 Allahabad The plaintiffs, relying on their proprietary title, had brought a suit to recover possession of mortgaged property on the ground that the mortgage had been satisfied They succeeded in establishing this, and got an unconditional decree for possession They allowed the period of limitation to expire without taking any steps to obtain possession, and then brought another suit based on their old title, and asking substantially for the relief which was sought for and obtained in the first suit Such a case is, I think, not to be distinguished from an ordinary action in ejectment, in which a plaintiff gets a decree for possession of the property If he takes no steps to execute that decree within the time allowed by law, he cannot by a fresh suit based either on the decree, or on his title as it stood at the time the first suit was brought evade the law of limitation It was so held by a Full Bench of this Court in *Doobee Singh* v *Jowkee Ram* (1) and the Judges who decided *Sheikh Golam Hoosein* v *Musumat Alla Rukhee Beebee* (2) held that the decision in *Doobee Singh s* case governed the case before them

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It appears to me that when a Court by its decree pronounces a mortgage debt to be satisfied, and the mortgagor entitled to immediate possession, that is equivalent to a declaration that the relation between the parties of mortgagor and mortgagee has come to an end The case is different when the decree declares that the mortgage debt is still unsatisfied In that case the relation of mortgagor and mortgagee still subsists, and so long as *that relation* subsists, *a mortgagor is entitled to claim* redemption, provided his right to do so has not been extinguished by act of parties or by order of a Court

In the present case it is not suggested that the mortgagor s right has been put an end to by *the act of parties, and I fail to* [61] *discover* anything in the decree in the previous suit which would extinguish it It is, of course, possible that in a suit for redemption of a mortgage, under which possession has been given to the mortgagee, the decree of the Court may be so framed as to have the effect of extinguishing the mortgagor's right to redeem Such was the case in *Ramasami* v *Sami* (3), relied on by the respondent where the decree declared that on the plaintiffs paying the amount found due within three months, he would be entitled to possession of the properties mortgaged, "and in default he will be debarred from redeeming them thereafter Such a decree is not a proper decree to pass in a suit for the redemption of a usufructuary mortgage under the Transfer of Property Act, but if passed, and allowed to become final, it is clear that on the plaintiffs failure to pay within the time fixed it operates as a foreclosure decree, and his right to redeem is extinguished

In the present case, had the decree of 1869 declared that on the plaintiffs' failure to pay within the time fixed the amount found due their right to redeem would be barred, the present suit would necessarily fail But no such declaration was made As stated above, the only result of default on the plaintiffs part which the decree of 1869 declared would ensue was the wiping out of the judgment I do not think that it can with any show of reason be maintained that it was an order of Court extinguishing the right to redeem

(1) N W P H C Rep 1868, p 381
(2) N W P H C Rep 1871, p 62.
(3) (1893) I L R 17 Mad

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by reason of the non-payment of the money or for any other cause than for want of prosecution, operates as a judgment of foreclosure (*vide* p. 1187, Coote's Law of Mortgage, Vol. II., edn. 1884, and the cases quoted there). But when the learned Judges go on to say that the Transfer of Property Act also shows that a second suit to redeen cannot be maintained, I must join issue with them. I think precisely the opposite lesson is to be learnt from the Transfer of Property Act. Section 60 of the Act provides that the mortgagor has a right to redeem at *any time* after the principal money has become payable, provided that that right has not been extinguished by act of the parties or by order of the Court. In a suit for redemption the Court (*vide* section 92) makes a decree determining the amount to be paid for redemption and fixing the time within which that amount is to be paid, and if the mortgage be [59] simple or usufructuary, ordering that the property be sold unless the amount be paid as directed. The sale of the property on the application of the defendant is the penalty provided by law for the failure of the plaintiff to pay within the time fixed. Now, if the view taken by the learned Judges who decided the case in I. L. R. 19 All. be correct, the penalty in the case of a decree which does not, as required by law, contain an order for sale, is the total loss of the property—a result which I have no hesitation in saying is not contemplated by the Act. Even if the decree be properly framed in terms of section 92, the result would be the same, for the mortgagee has only to sit quiet and refrain from making an application under section 93, with the result that the property becomes his own.

It may well happen that when an account is taken in a suit for redemption, the result is to show that an amount is due from the mortgagor, which he for the time being is quite unable to raise within the period fixed. The law never intended that in such a case the mortgagor should be punished by the total loss of his property. Even when, after a properly-framed, decree the mortgagee applies under section 93 for sale, the order which the Court has to pass is that the property, *or a sufficient part thereof*, be sold. Any balance of the sale proceeds which is left after payment of the amount due to the defendant mortgagee, and the expenses of the sale, is paid to the plaintiff mortgagor, or other persons entitled to receive the same. And, as is clear from the fifth paragraph of section 93, it is the passing of an order under that section which extinguishes the plaintiff's right to redeem. The inference is, that the right to redeem is considered to subsist until an order under that section has been passed.

The learned Judges who decided the case of *David Hay* v. *Razi-ud-din* (1) observe that if the authorities which take an opposite view are good law, "a mortgagor is only limited as to the number of suits which he may bring by the length of his life, or by the sixty years provided by the Limitation Act." I think the fear here expressed is chimerical, for, as pointed out in the case of *Dondh Bahadur Rai* v. *Tek Narain Rai* (2), even if the liability to pay costs did not act as a deterrent to the mortgagor, the [60] mortgagee could, by an application under section 93 of Transfer of Property Act, put a stop to any further litigation under the mortgage.

The learned Judges who decided the case of *David Hay* v. *Razi-ud-din* (1) rely on the Full Bench decision of this Court in *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (3). The facts of that case are

(1) (1897) I. L. R. 19 All. 202.
(2) (1899) I. L. R. 21 All. 251.
(3) N.-W. P. H. C. Rep., 1871, p. 62.

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Transfer of Property Act, which, it should be noted, had not been extended to the Bombay Presidency when that case was decided This case was followed in *Maloji* v *Sagaji* (1), where, however, the opinion was only an *obiter dictum* The cases in which an opposite view has been taken may now be shortly referred to In the case of *Roy Dinkur Doyal* v *Sheo Golam Singh* (2), the plaintiffs had brought a suit to recover possession of mortgaged property on the allegation that the amount due under the mortgage had been discharged by the usufruct of the property The Court found that a sum of Rs 4,824 14 9 was still due under the mortgage, and gave the plaintiffs a decree for possession on condition of their depositing that amount The plaintiffs failed to pay in this amount Four years after the decree had been passed they asked for possession in the execution department on the plea that the amount mentioned in the decree had by that time been satisfied out of the usufruct, but their application was rejected They then filed a fresh suit for possession, which was dismissed by the Court of first instance on the ground that it was barred by section 2, Act No VIII of 1859, which precluded a Court from taking cognizance of a suit brought on a cause of action which had been previously heard and determined by a Court of competent jurisdiction in a former suit between the parties

In appeal the decision of the Subordinate Judge was reversed by Phear and Norris, JJ They say —"What was the cause of action which was heard and determined between the present parties in the former suit, and what is the cause of action which is put forward by the plaintiffs in this present suit, and which they ask now to have heard and determined? It seems to us plain that the principal cause of suit is the relation which subsists between the parties as mortgagor and mortgagee, and the consequent right on the part of the mortgagor at all reasonable times [64] to ask for an account from the mortgagee * * * The former suit effected an adjustment of account up to the date of 18th April, 1868 The substantial cause of action in the present suit, that which the plaintiff desires to have heard and determined, is the state of accounts which has arisen since the 18th April, 1868, obviously an entirely fresh cause of action The matter which the Court is asked in this suit to hear and determine is a matter which has arisen and came into being since the matter of the last suit was heard and determined"

These observations, with which I agree, might, *mutatis mutandis*, be applied to the case before us The learned Judges further point out that the first decree did not put an end to the relation of mortgagor and mortgagee, and that the Court by that decree did not pretend to foreclose the plaintiffs' right of redemption, in the event of his not paying the money then declared to be due

In *Sami Achari* v *Somasundram Achari* (3), Turner, C J and Muttusami Ayyar, J, held that the fact that the plaintiff had previously got a decree declaring him entitled to redeem and recover possession on making a certain payment, which payment he omitted to make, did not debar him from bringing another suit for redemption, the first decree not having declared that the mortgagor would be foreclosed if he did not exercise the right of redemption therein given him

(1) (1888) I L R 13 Bom 567
(2) (1874) 22 W R C R 172
(3) (1882) I L R 6 Mad 119

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Reference is made both in *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (1), and in the case in I. L. R., 19 Allahabad, to the Full Bench decision of 1871. But neither of these judgments adverts to the peculiar circumstance noticed above, namely, that in the Full Bench case the decree in the first suit was not a decree declaring the mortgagor entitled to redeem, but an unconditional decree for possession. Had it been a decree for redemption, it is possible that the decision of the Full Bench would have been different, for in 1867, Morgan, C. J., and Spankie, J., both of whom were parties to the Full Bench decision of 1871, had held in the case of *Chaita* v. *Purum Sookh* (2), that the mere omission to execute a redemption decree does [62] not cause the interest remaining in the mortgagor to cease to exist, and that in respect of such remaining interest he may maintain a fresh redemption suit, even if all rights under the old suit have been lost. "The inquiry," they say, "in the new suit, whether he is entitled to redeem, and on what terms, may not be the same as the inquiry in the former suit. A different state of circumstances may have arisen."

The learned Judges who decided the case of *David Hay* v. *Razi-ud-din* (3) say that in their opinion it was the intention of the Legislature, as expressed in sections 92 and 93 of the Transfer of Property Act, that there should be one suit only for redemption. With all deference to the learned Judges, I am unable to find any indication in these sections of any such intention in the case of usufructuary mortgages. The language of section 93 points to an opposite conclusion. The second paragraph of that section provides that if payment is not made within the time fixed, the defendant mortgagee may apply for an order that the plaintiff, and all persons claiming through or under him be debarred absolutely of all right to redeem, *unless* the mortgage is simple or usufructuary. Nor am I able to follow the learned Judges in their opinion that it would be in contravention of the principles of section 244 of the Code of Civil Procedure to allow a second suit for redemption to be maintained, inasmuch as the question raised in the second suit is not a question relating to the execution, discharge, or satisfaction of the previous decree. The case would, of course, be different, were the second suit brought upon the decree in the first suit as a cause of action, as in *Doobee Singh* v. *Jowkee Ram* (4), and *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (5).

Nor am I able to see that section 13 of the Code of Civil Procedure would be any bar to a second suit for redemption. The decision in *Anrudh Singh* v. *Sheo Prasad* (6), merely followed the ruling of the Full Bench in *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee.* (7) and no facts are given.

The case of *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (8), is in favour of the respondent. It follows the two cases last [63] cited. Kemball, J. says :—"By reason of the default in payment of the money declared to be due within the time prescribed by law for the execution of decrees (no time having been fixed in the decree), the order for redemption must be taken to have operated as a judgment of foreclosure." This view, as shown above, is not in accord with the

(1) (1889) I. L. R. 11 All. 386.
(2) N. W. P. H C. Rep. 1867, p. 256.
(3) (1897) I. L. R. 19 All. 202.
(4) (N. W. P. H. C. Rep. 1868, p. 381.
(5) (1886) I. L. R. 10 Bom. 461.
(6) (1882) I. L. R. 4 All. 481.
(7) N. W. P. H. C. Rep. 1871, p. 62.
(8) (1883) I. L. R. 7 Bom. 467.

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this plea was, not that a second suit for redemption would not lie, but that in putting forward such a contention the plaintiff was setting up a different case from that which had been set up in the lower Court, and on which the case had been tried and decided Their Lordships did not, it is true, express any opinion as to whether a second suit for redemption would lie, but they expressed no disapproval of the decision in I L R 7 Mad 423, which was cited in support of the contention

In the case of *Muhammad Sami ud din Khan* v *Mannu Lal* (1), the mortgagors came into Court claiming possession of their property, which had been usufructuarily mortgaged, on the allegation that the amount due under the mortgage had been satisfied out of the usufruct The Court found that a sum of Rs 1,999 10 6 was still due to the mortgagees, and gave the plaintiffs a decree conditional on their paying this amount into Court within a time fixed, failing which payment the suit was to stand dismissed The money was not paid in, and consequently the suit stood dismissed from the expiration of the period fixed A second suit for redemption was dismissed by the lower Court on the ground that the right of redemption was extinguished by the order passed in the previous suit The learned Judges (Straight and Brodhurst, JJ) after a consideration of the previous rulings of this Court, and the provisions of the Transfer of Property Act, held that the right of redemption was not extinguished by what had taken place in the previous suit, and that the second suit was maintainable

I think it has been shown above that the weight of authority is against the view taken by the learned Judges in the case of *David Hay* v *Razi ud din* (2) and further that that decision is not in consonance with the provisions of the Transfer of Property Act

[67] Dissenting, therefore, from that decision, I would allow this appeal, and, setting aside the decree of the lower appellate Court would remand the case to that Court under the provisions of section 562 of the Code of Civil Procedure, for decision of the remaining pleas raised in the memorandum of appeal to it I would allow the appellants the costs of this appeal, and direct that the costs in the Courts below abide the event

BY THE COURT —The order of the Court is, that the decree of the lower appellate Court is set aside, and the case remanded to the lower appellate Court under the provisions of section 562 of the Code of Civil Procedure for re admission upon its file of pending appeals, and for decision of the remaining pleas raised in the memorandum of appeal The appellants will get the costs of this appeal The costs of the Courts below will abide the event

Appeal decreed and cause remanded

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(1) (1889) I L R 11 All 386 (2) (1897) I L R 19 All 202

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In a similar case *Periandi* v. *Angappa* (1), decided by the same learned Judges, a similar view was taken. It was pointed out that, as the decree in the first suit did not create a foreclosure it did not alter the legal relation which had subsisted between the parties prior to the suit, and that the incidents of the relation exist so long as the relation exists.

In *Karuthasami* v. *Jaganatha* (2) (Turner, C. J., and Hutchins, J.) the same view was taken. Turner, C. J., had been a party to the Full Bench decision of this Court in 1871, and in this judgment it is pointed out that in the Full Bench case the original suit was not, strictly speaking, a suit for redemption, but a suit to recover property on which the mortgage debt had, [65] it was alleged, been discharged, and the decree was absolute and unconditional.

These cases were followed in *Ramunni* v. *Brahma Dattan* (3), by Muttusami Ayyar and Best, JJ. In his judgment Muttusami Ayyar, J., points out the marked difference between the law of mortgage as administered in England and that contained in the Transfer of Property Act.

The question raised in this appeal did not directly arise in the case of *Vallabha Valiya Rajah* v. *Vedapuratti* (4), but both Parker and Shephard, JJ., expressed an opinion that the failure of the mortgagor to pay in the amount found due on the mortgage within the time fixed by the decree did not of itself put an end to his right to redeem.

In the case of *Nainappa Chetti* v. *Chidambaram Chetti* (5) the same contentions were put forward on behalf of the mortgagee as are advanced in this case. It was urged that the only remedy the mortgagor had was to have executed the decree in the first suit, that that decree being now barred, the mortgagor had lost his right to redeem, and could not fall back on the original mortgage and sue to redeem it, it having become merged in the decree. The learned Judges (Benson and Boddam, JJ.), repelled these pleas, holding that if the mortgagor failed to exercise the right of redemption given him by the decree, he, in effect, declined to put an end to the relation of mortgagor and mortgagee, that though the decree may become barred, the legal relation of mortgagor and mortgagee continues, "and the mortgagor may in a fresh suit again assert his right to redeem on payment of such sum as then may be due, which sum may on taking an account be greater or less than the sum which was requisite under the former decree."

In the case last cited reliance was placed on behalf of the mortgagee on the decision of the Privy Council in *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (6). That was a case in which a decree for redemption had been passed and not executed. After the period of limitation for execution of the decree had expired a second suit for redemption was brought, not upon [66] the mortgage, but upon the decree. The Courts in India held that such a suit would not lie. That view was affirmed by the Privy Council. On behalf of the mortgagor it was contended that, if he could not succeed in his suit based on the decree, he was entitled to fall back on the mortgage and redeem that. The ground upon which their Lordships overruled

(1) (1883) I. L. R. 7 Mad. 423.
(2) (1885) I. L. R. 8 Mad. 478.
(3) (1892) I. L. R. 15 Mad. 366.
(4) (1895) I. L. R. 19 Mad. 40.
(5) (1897) I. L. R. 21 Mad. 18.
(6) (1886) I. L. R. 10 Bom. 461.

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the decree of the Subordinate Judge and restored that of the Court of first instance (1) From this decision the plaintiffs appealed under section 10 of the Letters Patent

Dr *S. C Banerji* (with whom Munshi *Gulzari Lal*) for the appellants

I maintain that the share taken by a Hindu mother on partition among her sons and stepsons is not what is technically known to the law as *stridhan*

[69] The authorities upon which the decision now appealed from was based do not entirely support that decision The Full Bench case of *Bilaso* v *Dina Nath* (2), has no bearing on the present question Mayne (Hindu Law and Usage, § 622) pronounces against the view taken in the judgment now under appeal, and points to a very anomalous result which follows from the adoption of that view (*op cit* ed 6, p 816) Dr G D Banerjee (Tagore Law Lectures, 1878) no doubt follows the Mitakshara literally on pages 305 and 310 (*op cit*, ed 2), but on p 331 he expresses the opinion that the widowed mother does not take an absolute estate See also *op cit*, pp 278 279 In considering the definition of *stridhan* in the Mitakshara (II, 11, 2) we have to remember that Vijnaneshvara expressly uses that term in a non technical sense (sec II, 11, 3, Viramitrodaya, V, 1, 2; Sir W Macnaghten, Hindu Law, Vol I, p 38, G D Banerjee, *op cit* pp 277 278; K K Bhattacharya, Joint Hindu Family, p 617, Mayne, *op cit* p 799) As Dr Jolly points out, Vijnaneshvara was an innovator and started a new theory (Tagore Law Lectures, 1883, pp 242 247) But the British Courts have not adopted the etymological theory of Vijnaneshvara The Privy Council have qualified his definition and excepted 'inherited property' from the category of *stridhan* See *Mussumat Thakur Deyhee* v *Rai Baluk Ram* (3), *Bhugwandeen Doobey* v *Myna Baee* (4), *Chotey Lal* v *Chunno Lall* (5) [*Cf* on this last case Dr G D Banerjee's comments, *op cit* pp 300 302] At p 510 of the judgment in *Bhugwandeen* v *Myna Baee* (4) the Judicial Committee recognise the distinction drawn by Sir W Macnaghten between *peculium* and non technical *stridhan* Therefore the authority of the Mitakshara alone is not sufficient

Is there then any other reason why the share taken by a mother on partition should be deemed her *stridhan*? Observe first that the word *sambibhaga* used by Vijnaneshvara in the Mitakshara (II, 11, 2), though translated as 'partition' by Colebrooke, does not really include the mother's share on partition He is citing there a text of Gautama which specifies [70] the several means of acquisition of property See Mitakshara (I, 1, 8 and 12) *Sambibhdga* is Gautama's word and is explained by Vijnaneshvara to mean 'obstructed heritage' (I, 1, 13) There is no reason to suppose that Vijnaneshvara used the same word in a different sense in Chap II, § 11 Besides, even if Vijnaneshvara really meant 'partition' (as Colebrooke supposed), the only partition he recognises is of heritage between co owners [Mitakshara (I 1, 2 and 23)], and a widow is not a co owner with the sons

Consider next by what right the widowed mother takes a share Phear, J, suggests it is taken either (1) by right of inheritance or (2) in lieu of maintenance [*Mohabeer Pershad* v *Ramyad Singh* (6)] In the

(1) Weekly Notes, 1900, p 114
(2) (1880) I L R 3 All 88
(3) (1866) 11 Moo I A 139
(4) (1867) 11 Moo I A 487
(5) (1878) L R 6 I A 15
(6) (1873) 20 W. R. 192

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Before Mr. Justice Banerji and Mr. Justice Aikman.

CHHIDDU AND ANOTHER (*Plaintiffs*) *v.* NAUBAT AND OTHERS. (*Defendants*).* [17th July 1901.]

Hindu Law—Mitakshara—Joint Hindu family—Partition—Share of mother on partition—Stridhan.

According to the Mitakshara law the share which the mother in a joint Hindu family obtains on partition, after the death of the father, of the joint family property between the mother and the sons, becomes the mother's *stridhan*, which devolves on her death upon her own heirs and not upon the heirs of her husband. *Bilaso* v. *Dina Nath* (1), *Bhagwandeen Doobey* v. *Myna Baee* (2), *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (3), *Chotay Lall* v. *Chunno Lall* (4), *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (5), *Mohabeer Pershad* v. *Ramyad Singh* (6), *Lalljeet Singh* v. *Raj Koomar Singh* (7), *Sheodyal Tewaree* v. *Judoo Nath Tewaree* (8), *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry* (9), *Beni Parshad* v. *Puran Chand* (10) and *Ganpat Rao* v. *Ram Chandar* (11) referred to.

[Fol. 24 All. 82, A. W. N. 1907, 206=4 A. L. J. 673: 5 A. L. J. 246; 7 A. L. J. 69; 7 A. L. J. 269; 32 All. 253; Ref. 28 Mad. 1: Over; 34 All. 234: 14 I. C. 1000.]

[68] ONE Ganga Ram died leaving two sons, Gopal and Bhupal, by his first wife, and a third, Chunni, by his second wife, Musammat Udni, who also survived him. After his death a partition of the property of Ganga Ram took place, one half thereof being recorded in the names of the sons by the first wife and the other half being recorded as held in equal shares by Chunni and his mother, Musammat Udni. Musammat Udni died in 1869, and, Chunni also dying, the quarter share of which she was in possession was taken by the three sons of Chunni. The plaintiffs in this case, the sons of Gopal and Bhupal, sued to recover two-thirds of the share which had been in possession of Musammat Udni in her lifetime, on the ground that the share only came to her by way of maintenance and she had only a life-interest in it, and that after her death it should be divided amongst the grandsons of Ganga Ram *per stirpes*.

The Court of first instance dismissed the suit, holding that the fathers of the plaintiffs had separated from their father, Ganga Ram, during his lifetime, and that the defendants had acquired a title by adverse possession.

The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Aligarh) came to the conclusion that after the death of Ganga Ram a partition took place between his sons, under which the one-fourth share in question had been assigned to Musammat Udni, and holding that Udni had only a life-interest in the share, which, after her death, would revert to the heirs of Ganga Ram, gave the plaintiffs a decree.

The defendants appealed to the High Court. The main plea urged on their behalf was that the share which fell to Musammat Udni was her *stridhan*, and therefore the plaintiffs, sons of her stepsons, had no right to a share in it. The appeal was heard by a single Judge, who reversed

* Appeal No. 24 of 1900, under s. 10 of the Letters Patent.

(1) (1880) I. L. R. 3 All. 88.
(2) (1867) 11 Moo. I. A. 487.
(3) (1866) 11 Moo. I. A. 139.
(4) (1878) L. R. 6 I. A. 15.
(5) (1881) I. L. R. 3 Mad. 290.
(6) (1873) 20 W. R. 192.
(7) (1873) 20 W. R. 336.
(8) (1868) 9 W. R. 61.
(9) (1889) I. L. R. 16 Cal. 758.
(10) (1895) I. L. R. 23 Cal. 262.
(11) (1888) I. L. R. 11 All. 296

more in the nature of a gift, Morley's Digest, Vol II, p 217, and (3) in fixing its amount deduction has to be made for *stridhan* already given, the two kinds of property are lumped together, Mitakshara (I, 2, 8), (G Sarkar, Hindu Law, p. 184)

[72] Vijnaneshvara rejects any technical limitation of the meaning of *stridhan* For the rule of interpretation, see Dr J N Bhattacharji s *Commentaries* (ed 2), p 64 The *dictum* of the Privy Council is not to be extended beyond their actual decision, the Mitakshara, being the paramount authority in these provinces, should be followed See *Muthappudayan* v *Ammani Ammal* (1), *Salamma* v *Lutchman Reddi* (2), *Bhagirthibai* v *Kahnujirav* (3), *Debi Sahai* v *Sheo Shanker Lal* (4) The Mitakshara is to be interpreted, not overruled

There is no distinction between a wife taking a share when her husband partitions and a mother taking a share when her sons partition The crucial test for determining whether certain property is *stridhan* is —upon whom does that property devolve? Upon that point the Mitakshara (I, 6, 2) is conclusive The question of alienability is immaterial for the purposes of my argument in the present case

Dr *S C Banerji* in reply

The female members of a Hindu joint family are not co owners with the males *Narayana* v *Krishna* (5), they cannot enforce a partition, which every co owner can (J N Bhattacharji, *Commentaries*, pp 321 and 336, Mayne, Hindu Law, p 625, *Shama Sooonduree Dabia* v *Jardine, Skinner & Co* (6)

The dominion of an owner over her *stridhan*, as we now understand that term, is absolute, *Brij Indar Bahadur Singh* v *Ranee Janki Koer* (7) The passage in the Mitakshara (II, 1, 32, 3), is to be read with reference to the context Vijnaneshvara is discussing the widow s right to inherit The amount to be allotted to the mother is not to be limited to an allowance that will be just sufficient to maintain her But this passage by itself is not sufficient to negative the theory that she obtains the share really as a provision for maintenance That has always been the view of this Court, see *Rajah Buldeo Singh* v *Koonwer Mahabeer Singh* (8) West, J 's, observation on p 302, I L R, 11 Bom is *obiter*

[73] The argument based on the fact that in determining the amount of the share *stridhan* previously given has to be taken into account, applies to the Bengal school as well, see G Sarkar, Hindu Law, p 267 In fixing the amount of maintenance, too, productive *stridhan* has to be taken into account, see Mayne, *op cit* p 699

AIKMAN, J —One Ganga Ram died about 40 years ago, leaving three sons, namely, Gopal and Bhupal, sons by his first wife, and Chunni, son by his second wife Musammat Udni, who also survived him Ganga Ram owned a 2¾ biswa share in mauza Amba Madanpur After his death a partition of the property took place, one half being recorded in the names of the sons by his first wife and the other half being recorded as held in equal shares by Chunni and his mother Musammat Udni Musammat Udni died in 1869 Her son Chunni is also dead, and the quarter share, of which she was recorded as in possession, is now held by the three sons of Chunni, who, with their mother Musammat Lado,

(1) (1897) 21 Mad 58=8 Mad L J 9
(2) (1897) 21 Mad 100=8 Mad L J 14
(3) (1886) I L R 11 Bom 285
(4) (1900) I L R 22 All 353
(5) (1884) I L R 8 Mad 214
(6) (1869) 12 W R 160
(7) (1877) 1 C L R 318
(8) N W P H C Rep. 1866, p 155, at p. 157

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first case (this view is supported by Jagannath, Digest, bk. V., 87, com.), the principle of the Privy Council rulings applies, and the share is not *stridhan*. In the second case (in support of which view see *Sheo Dyal Tewaree* v. *Judoo Nath Tewaree* (1), *Lalljeet Singh* v *Raj Koomar Singh* (2), *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry* (3), *Beni Pershad* v. *Puran Chand* (4), and T. N. Mitra's *Tagore Law Lectures*, 1879, p. 467), the grant can enure only for life, *Ganpat Rao* v. *Ram Chundar* (5). See also Sir F. Macnaghten's Considerations on Hindu Law, p. 43; S. C. Sircar, Vyavastha Chandrika, Vol. II, p. 493.

The only passage in the Mitakshara really against me is to be found in I, 6, 2, but this does not carry us beyond II, 11, 2, because the same line of succession is laid down with respect to *stridhan* generally in II, 11, 12, and yet that fact did not prevent the Privy Council from holding that property inherited from males was not *stridhan*.

[BANERJI, J.—But then, with respect to such inherited property, a different rule of succession is laid down elsewhere.]

But that rule is really not inconsistent with this (see G. Sarkar, Hindu Law, p. 270). And then all that the text says is *Mathurduhitarah Sesham* such property may be, and literally is, the 'mother's property,' but that is not enough to constitute it *stridhan*, as that term is understood in Anglo-Hindu Law. It is [71] contrary to all principle that, though when the husband dies leaving no sons and the widow *inherits* the whole of his estate, she takes only a limited interest, yet when he dies leaving sons who exclude the widow, if they choose to separate, she, *who is no heir*, should take an absolute estate in the portion allotted to her.

Reference was also made to Vyavahara Mayukha (Mandlik), pp. 93, 97, 224, Vivada Chintamani (Tagore), p. 263, Smriti Chandrika (Iyer), pp. 53 and 110, Parasara Madhavya (Burnell), p. 41, *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (6), and West and Buhler, Hindu Law, pp. 356, 391, 781.

[BANERJI, J., also referred to the definitions of *stridhan* contained in the Subodhini and the Madana Parijat.]

Babu *Jivan Chandra Mukerji* replied on behalf of the respondents:

Confusion has been caused by a consideration of the law prevalent in other schools, and also owing to the idea that *stridhan* must be at the absolute disposal of the owner or must devolve in a particular way. The law of the Bengal school is essentially different from that of the Benares school; there can be no partition in Bengal in the father's lifetime.

The mother takes a share as a co-parcener. Every lady who comes into a family is a co-owner with the male members of the joint family. See K. K. Bhattacharya, Tagore Law Lectures, 1885, p. 142; G. Sarkar, Hindu Law, p. 125; Mayne, § 477, p 625. The "inchoate right" of a widow thus becomes perfected at the time of partition, *Bilaso* v. *Dina Nath* (7). By the same right an unmarried daughter also gets a share [Mitakshara (I, 7, 5, 9)]. Partition, according to Vijnaneshvara, is by pre-existent right [Mitakshara (I, 1, 17, 23)]. That the mother does not take her share in lieu of maintenance is expressly stated in the Mitakshara (II, 1, 32—3).

The mother's share is *stridhan*, because (1) it descends after her death to the daughter, Strange's Hindu Law, Vol. II, p. 382; (2) it is

(1) (1868) 9 W. R. 61.
(2) (1873) 20 W R. 336.
(3) (1889) I. L. R. 16 Cal. 758.
(4) (1895) I. L. R. 23 Cal. 262.
(5) (1888) I. L. R. 11 All. 296.
(6) (1888) I. L. R. 15 Cal. 292.
(7) (1880) I. L. R. 3 All. 88.

Mussumat . *Doobey* v *ganadha* ? that inher . the sources of a woman's separate property, that property which a woman inherits from a male is not in her hands *stridhan* transmissible to her own heirs In the last of the cases cited above, their Lordships say, at p 301 of their judgment —" It is not necessary now to state in any detail how impossible it is, whether with regard to other commentators or to other passages in the Mitakshara itself, to construe this passage as conferring upon a woman taking by inheritance from a male a *stridhan* estate transmissible to her own heirs "

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For the appellants reliance is placed upon a passage in the judgment of Phear, J, in the case *Mohabeer Pershad* v *Ramyad Singh* (5), where he says :—" After the consideration which I have been able to give to the authorities which were cited on both sides, I have arrived at the opinion that the widow is upon the division which has been directed to be made, entitled to her share, either by way of maintenance or as a portion of the inheritance ' It is argued with much show of reason that if it is by way of maintenance that a widow gets a share upon partition, that share should go back to her husband's heirs upon her death, on the other hand, if she gets it by way of inheritance the share will not, on the rulings of the Privy Council just referred to, descend to her heirs

The next case relied on by the appellants is *Lalljeet Singh* v *Raj Coomar Singh* (6), where it was held that under the Mitakshara Law a father may during his lifetime partition the joint family property, and that if he does so, he must allot a share to his wife for her maintenance in addition to the share which he takes himself With reference to this case we would call attention to a passage in the Mitakshara, Chap I, S 6, § § 1 and 2 which, in our opinion, has a material bearing on the question we have to decide in this case Vijnaneshvara is there considering the question " How shall a share be allotted to a [76] son born subsequently to a partition of the estate? ' Such a son, he says, obtains, after the demise of his parents, both their portions Then he adds these important words, " (he obtains) his mother's portion, however, *only if there be no daughter*, for it is declared that daughters share the *residue of their mother s property after payment of her debts* Here we have the author of the Mitakshara applying the special rules governing the descent of *stridhan*, to the share which a woman gets on partition during her husband's lifetime, showing clearly that he considers a share so acquired to be her *stridhan*

It is admitted that whilst a family subject to the law of the Mitakshara remains joint, a woman has no right to any share of the family estate, all that she can claim is maintenance But when a partition takes plaes in such a family, a mother is entitled to a share equal to a son's share In the case *Sheodyal Tewaree* v *Judoo Nath Tewaree* (7), Mitter J, remarked — 'There is no doubt that the share that is given to a Hindu mother at the time of partition is given to her for no other purpose than as a provision for her maintenance '

(1) (1866) 11 Moo I A 139
(2) (1867) 11 Moo I A 487
(3) (1878) L R 6 I A 15
(4) (1881) I L R 3 Mad 290
(5) (1873) 20 W R 192 at p 19?
(6) (1873) 20 W R 336
(7) (1868) 9 W R 61

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are the defendants to this suit. The plaintiffs are the sons of Gopal and Bhupal. Their case is that Musammat Udni held the share which was recorded in her name by way of maintenance, and for her lifetime only, and that on her death it should be divided amongst the grandsons of Ganga Ram *per stirpes*. They accordingly sue to recover possession of two-thirds of the share recorded in the name of Musammat Udni. The Court of first instance dismissed the suit, holding that the fathers of the plaintiffs had separated from their father Ganga Ram during his lifetime, and that the defendants had acquired title by adverse possession. On appeal the learned Subordinate Judge differed from these findings, and coming to the conclusion that after the death of Ganga Ram a partition took place between his sons, under which the one-fourth share in question was assigned to Musammat Udni, held that she had only a life interest in the property, which, on her death, reverted to the heirs of Ganga Ram, and gave plaintiffs the decree they asked for. The defendants appealed to this Court. The main plea urged on their behalf was that the share which fell to Musammat Udni was her *stridhan*, and, as such, the plaintiffs, sons of her stepsons, had no right to a share in it. The appeal was heard by a Judge of [74] this Court sitting singly, who sustained the defendant's plea, set aside the decree of the Subordinate Judge, and restored that of the Court of first instance. From that decision this appeal has been filed under the Letters Patent.

The whole argument has turned on the question whether, under the Hindu Law applicable to these Provinces, the share which fell to Musammat Udni in the partition which took place after Ganga Ram's death, became thereby her *stridhan*. It was admitted that if it was *stridhan* the plaintiffs were out of Court.

The question thus raised for our decision is one of considerable difficulty. We do not have for our guidance any decision of this Court, or of the Privy Council on the point. The case cited in the judgment of our brother Blair now under appeal, *i.e.*, *Bilaso* v. *Dina Nath* (1), decides that a Hindu widow who is entitled to an equal share with sons upon partition can claim that share not only against the sons, but also as against an auction-purchaser who has acquired the rights and interests of one of the sons before the partition. But it throws no light whatever on the question whether the share obtained by the widow becomes her *stridhan*.

In the case *Bhagwandeen Doobey* v. *Myna Baee* (2) the question which we have to decide was left an open one by their Lordships of the Privy Council. At page 514 of the judgment they say :—"The case is wholly distinguishable from those in which a widow, having a right to an ascertained share upon a partition with co-parceners, who have an absolute interest in their shares, is put by them in possession. *In such a case, it may be a question whether her interest does not become absolute*; though in a case coming from Lower Bengal the contrary was decided by this Committee on an appeal from the Supreme Court of Calcutta."

For the respondents reliance is placed on the well-known passage in the Mitakshara (Chap. II, S. XI, §2), where the author Vijnaneshvara includes amongst property which forms a woman's *stridhan*, "property which she may have acquired by inheritance, purchase, *partition*, seizure or finding." Their Lordships of the Privy Council have in the case of

(1) (1880) I. L. R. 3 All. 88. (2) (1867) 11 Moo. I. A. 487.

Mussumat [75] *Thakoor Deyhee* v *Rai Baluk Ram* (1), *Bhugwandeen Doobey* v *Myna Baee* (2), *Chotay Lall* v *Chunno Lal* (3), and *Muttu Vadu ganadha Tevar* v *Dora Singha Tevar* (4), held, notwithstanding the fact that inheritance is mentioned by the author of the Mitakshara as one of the sources of a woman's separate property, that property which a woman inherits from a male is not in her hands *stridhan* transmissible to her own heirs In the last of the cases cited above, their Lordships say, at p 301 of their judgment — It is not necessary now to state in any detail how impossible it is, whether with regard to other commentators or to other passages in the Mitakshara itself, to construe this passage as conferring upon a woman taking by inheritance from a male a *stridhan* estate transmissible to her own heirs

For the appellants reliance is placed upon a passage in the judg ment of Phear, J, in the case *Mohabeer Pershad* v *Ramyad Singh* (5), where he says —' After the consideration which I have been able to give to the authorities which were cited on both sides, I have arrived at the opinion that the widow is upon the division which has been direct ed to be made entitled to her share, either by way of maintenance or as a portion of the inheritance It is argued with much show of reason that if it is by way of maintenance that a widow gets a share upon partition, that share should go back to her husband s heirs upon her death, on the other hand, if she gets it by way of inheritance the share will not, on the rulings of the Privy Council just referred to, descend to her heirs

The next case relied on by the appellants is *Lalljeet Singh* v *Raj Coomar Singh* (6), where it was held that under the Mitakshara Law a father may during his lifetime partition the joint family property, and that if he does so, he must allot a share to his wife for her maintenance in addition to the share which he takes himself With reference to this case we would call attention to a passage in the Mitakshara, Chap I, S 6, § § 1 and 2 which, in our opinion, has a material bearing on the question we have to decide in this case Vijnaneshvara is there considering the question "How shall a share be allotted to a [76] son born subsequently to a partition of the estate? Such a son, he says, obtains, after the demise of his parents, both their portions Then he adds these important words, '(he obtains) his mother's portion, however, *only if there be no daughter*, for it is declared that daughters share the residue of their mother s property after payment of her debts Here we have the author of the Mitakshara applying the special rules governing the descent of *stridhan*, to the share which a woman gets on partition during her husband s lifetime, showing clearly that he con siders a share so acquired to be her *stridhan*

It is admitted that whilst a family subject to the law of the Mitak shara remains joint, a woman has no right to any share of the family estate, all that she can claim is maintenance But when a partition takes place in such a family, a mother is entitled to a share equal to a son s share In the case *Sheodyal Tewaree* v *Judoo Nath Tewaree* (7), Mitter J, remarked — There is no doubt that the share that is given to a Hindu mother at the time of partition is given to her for no other pur pose than as a provision for her maintenance'

(1) (1866) 11 Moo I A 139
(2) (1867) 11 Moo I A 487
(3) (1878) L R 6 I A 15
(4) (1881) I L R 3 Mad 290
(5) (1873) 20 W R 192 at p 195
(6) (1878) 20 W R 336
(7) (1868) 9 W R 61

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are the defendants to this suit. The plaintiffs are the sons of Gopal and Bhupal. Their case is that Musammat Udni held the share which was recorded in her name by way of maintenance, and for her lifetime only, and that on her death it should be divided amongst the grandsons of Ganga Ram *per stirpes*. They accordingly sue to recover possession of two-thirds of the share recorded in the name of Musammat Udni. The Court of first instance dismissed the suit, holding that the fathers of the plaintiffs had separated from their father Ganga Ram during his lifetime, and that the defendants had acquired title by adverse possession. On appeal the learned Subordinate Judge differed from these findings, and coming to the conclusion that after the death of Ganga Ram a partition took place between his sons, under which the one-fourth share in question was assigned to Musammat Udni, held that she had only a life interest in the property, which, on her death, reverted to the heirs of Ganga Ram, and gave plaintiffs the decree they asked for. The defendants appealed to this Court. The main plea urged on their behalf was that the share which fell to Musammat Udni was her *stridhan*, and, as such, the plaintiffs, sons of her stepsons, had no right to a share in it. The appeal was heard by a Judge of [74] this Court sitting singly, who sustained the defendant's plea, set aside the decree of the Subordinate Judge, and restored that of the Court of first instance. From that decision this appeal has been filed under the Letters Patent.

The whole argument has turned on the question whether, under the Hindu Law applicable to these Provinces, the share which fell to Musammat Udni in the partition which took place after Ganga Ram's death, became thereby her *stridhan*. It was admitted that if it was *stridhan* the plaintiffs were out of Court.

The question thus raised for our decision is one of considerable difficulty. We do not have for our guidance any decision of this Court, or of the Privy Council on the point. The case cited in the judgment of our brother Blair now under appeal, *i.e.*, *Bilaso* v. *Dina Nath* (1), decides that a Hindu widow who is entitled to an equal share with sons upon partition can claim that share not only against the sons, but also as against an auction-purchaser who has acquired the rights and interests of one of the sons before the partition. But it throws no light whatever on the question whether the share obtained by the widow becomes her *stridhan*.

In the case *Bhagwandeen Doobey* v. *Myna Baee* (2) the question which we have to decide was left an open one by their Lordships of the Privy Council. At page 514 of the judgment they say :—" The case is wholly distinguishable from those in which a widow, having a right to an ascertained share upon a partition with co-parceners, who have an absolute interest in their shares, is put by them in possession. *In such a case, it may be a question whether her interest does not become absolute* ; though in a case coming from Lower Bengal the contrary was decided by this Committee on an appeal from the Supreme Court of Calcutta."

For the respondents reliance is placed on the well-known passage in the Mitakshara (Chap. II, S. XI, §2), where the author Vijnaneshvara includes amongst property which forms a woman's *stridhan*, " property which she may have acquired by inheritance, purchase, *partition*, seizure or finding." Their Lordships of the Privy Council have in the case of

(1) (1880) I. L. R. 3 All. 88. (2) (1867) 11 Moo. I. A. 487.

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[78] The next authority referred to in the argument was Gooroodass Banerjee's Hindu Law of Marriage and Stridhana (Tagore Law Lecture, 1878), 2nd edn, 1896 At page 305 the author deals with the question whether the share, which a woman obtains on partition, becomes her *stridhan* He says —"The Mitakshara and the Mayukha answer this question clearly in the affirmative' He points out that Jagannatha gives conflicting answers, refers to the passage quoted above from Sir F Macnaghten, and sets forth the views entertained by the Bengal, Mithila and Dravida school In his summary at p 310 he says —' The share which a woman obtains on partition is her *stridhan* according to the Benares and Maharastra schools but it does not rank as *stridhana* according to the law of Bengal' The law of Mithila and that of Dravida are not very clear on the point, but there is reason for thinking that they do not differ from the law of Bengal At p 330 he says —' The Hindu Law is not very clear regarding the rights of a woman over the shares obtained by her on partition,' and remarks that the more correct view appears to be that a woman can have no greater rights over it than over the property of her husband which devolves on her by inheritance

Our learned colleague, whose decision is under appeal, refers to Mayne's Work on Hindu Law as supporting the view that he takes We doubt whether this is the case, for at p 816 of the last edition of his work, that learned author says —" Upon analogy there can be no reason why a woman who takes part of a property on partition between her sons should have a larger interest than if she had taken the whole in the absence of her sons"

The Viromitrodaya which has been referred to by the Privy Council as properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares school, has nothing clearly bearing on the question at issue, but it backs up the author of the Mitakshara in the extended meaning he gives to the term *stridhan*, remarking that the term "sixfold' used by Manu in connexion with *stridhan* " is intended, not as a restriction of a greater number, but as a denial of a less," and also supports him in saying that the word [79] *stridhan* has been used by Manu in its ordinary significance as denoting property whereof a woman is the owner, and not in any technical sense (*vide* Chap V, parts 1 and 2)

According to Sir W Macnaghten (Principles of Hindu Law, 3rd edn, p 37), the succession to *stridhan* " varies according to the condition of the woman and the means by which she became possessed of the property'

The Mitakshara, however, gives but one general rule for the descent of *stridhan*, the only exception being in the case of the *sulka* or present given on marriage—*vide* Chap II, Sec XI, 8 and 30

The distinction drawn by Sir W Macnaghten between what he calls woman's property and what he styles her *peculium*, has been shown by Messrs West and Buhler (Hindu Law, p 146 *et seq*), Jolly (Hindu Law, p 244 *et seq*), and Banerjee (Hindu Law of Marriage and Stridhan, 2nd edn, p 276) not to have been present to the mind of the author of the Mitakshara

The last case relied upon by the appellants is *Ganpat Rao* v *Ram Chandar* (1) In that case there were two brothers forming a joint Hindu family One died, leaving a son Ram Chandar, the other died,

(1) (1888) I L R 11 All 296

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If it were for no other purpose, one might suppose that when a partition takes place a woman would get only a share large enough for her maintenance.

But the author of the Mitakshara emphatically pronounces this idea to be "wrong." *Vide* II, I, 32.

There is nothing in the texts to indicate that she gets the usufruct only of the share; she gets the share itself.

For the appellants, reference is also made to the case of *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry* (1).

In that case, at p. 765 of the judgment, their Lordships of the Privy Council say:—When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of a provision for the maintenance for which the partitioned estate is already bound." This, it may be mentioned, was a case under the Dayabhaga law.

The case of *Beni Parshad* v. *Puran Chand* (2), also relied upon by the appellants, was a case under the Mitakshara law. At [77] p. 279 of the judgment, the learned Judges (Prinsep and Ghose, JJ.), say:—"The mother was entitled to hold her one-fifth share in lieu of maintenance only, and had therefore no absolute power of disposal, though, no doubt, the Mitakshara describes such property (*i.e.*, property acquired by partition) as woman's property." They refer to the cases already cited from the Weekly Reporter, to Mayne's Hindu Law, paras. 614 to 617, and Viramitrodaya (Golap Chunder Sarkar's translation), pp. 224, 245. In the argument before us, reference was also made to the law of the Hindu widow by Trailokyanath Mitra (Tagore Law Lectures, 1879).

At p. 467 of that work, it is stated that the share which a widow gets on partition, namely, a share equal to that of each of her sons, she obtains in lieu of her maintenance. The author goes on to explain the reason of the widow getting a share. He says:—"After partition she loses her accustomed position, she cannot attach herself to any one of the several families created by partition, and it is improper that she should be floating about between one family and another for the purpose of obtaining a precarious maintenance. This the ancient sages could not tolerate; and they accordingly ensured her maintenance, in case of a partition, by making her the recipient of a share, which, inalienable by her during her lifetime, would on her death devolve on her surviving heirs." If the author uses the words "her surviving heirs" advisedly, this passage would tell against the case set up by the appellants.

The appellants have also in their favour the authority of Sir Francis Macnaghten. At p. 43 of his "Considerations on the Hindu Law as it is administered in Bengal" (1824), he says:—"I believe it may now be laid down as the law that mothers who take a share upon partition, take an estate *for life* only, and with respect to dominion over the property, stand upon the same footing with widows who succeed to their husband's rights." He admits, however, that a distinction may possibly be made in a case in which all the sons had *agreed* to divide, remarking that in that case the share which the mother gets might be said to be *in the nature of a gift*, because they would all have concurred in the act by which their mother became entitled to a share of the estate.

(1) (1889) I. L. R. 16 Cal. 758. (2) (1895) I. L. R. 23 Cal. 262.

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my learned colleague has referred It is clear, and is indeed conceded, that the share which a mother obtains upon partition between her sons partakes of the same nature as that obtained by a wife under a partition made by the father in his lifetime As regards the share last mentioned, the rule of descent according to the Mitakshara is the same as in the case of *stridhan* In Chap I, S VI, § 2, it is laid down that a son born after partition "obtains after the demise of his parents both their portions his mother's portion, however, only if there be no daughter , for it is declared that 'daughters share the residue of the mother's property after payment of her debts' " The preference of the daughter to the son as the successor to the mother's share shows that whatever may have been the reason for the allotment of the share to the mother, Vijnaneshvara declared such share to be the separate property of the mother, and intended that it should devole in the same way as separate property of any other description Unlike the case of property obtained by a woman by inheritance to a male, there is in this respect no conflict between the different texts of the Mitakshara The safest course, therefore, seems to be to follow the text of the Mitakshara, and adopt the view which has been held by Mr Justice Gooroodass Banerjee in his work on the Hindu Law of Marriage and Stridhan The question is, however, beset with difficulties, and I must say that, although I do not feel myself justified in coming to a different conclusion from that at which my brother Aikman has arrived, my mind is not free from doubt I agree in dismissing the appeal with costs

Appeal dismissed

24 A 82

[82] APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

SRI PAL RAI AND OTHERS (*Defendants*) v SURAJBALI AND ANOTHER (*Plaintiffs*) AND RAGHUNATH RAI AND ANOTHER (*Defendants*) [17th July 1901]

Hindu Law—Mitakshara—Joint Hindu family—Partition—Share of mother on partition—Stridhan

The share which is taken by the mother in a joint Hindu family upon partition of the family property being her *stridhan*, she is capable of alienating it at her pleasure

[Foll, 4 A L J 673=A W N 1907, 206]

IN this case one Kanhaiya Rai died leaving three sons and a widow, the stepmother of the three sons After his death a separation was effected between the sons and stepmother in virtue of which the step mother received a one quarter share of the property of Kanhaiya Lal The widow then made a gift of her share to Raghubir Rai, one of her stepsons This gift was challenged by the sons of one of the other stepsons, who came into Court claiming one third of the property

The Court of first instance (Subordinate Judge of Gorakhpur) found that the stepmother had been in adverse possession of the property claimed for more than twelve years, and dismissed the suit upon that ground

The plaintiffs appealed The lower appellate Court (District Judge of Gorakhpur) found in their favour and decreed the claim

The defendants appealed to the High Court, and in this appeal two issues were remitted to the lower appellate Court, *viz*, whether the

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leaving a widow Musammat Lachhmi Bai. No partition had taken place, and it is clear that Lachhmi Bai was only entitled to maintenance. A deed was executed, whereby Ram Chandar having received from Lachhmi Bai a sum of money as representing the value of his half share of a house, declared her to be in sole proprietary possession of the whole of the house. She executed a deed of gift in respect of the house in favour of her brother's sons, the validity of which was impugned after her death. This Court held that under the circumstances the widow had no more than a life estate. We are of opinion that this case has no bearing on the question we have to decide.

The case then stands thus. The question we have to decide is pronounced by the Privy Council to be an open one, and there is, so far as we can ascertain, no case law in these Provinces bearing upon the point at issue.

In the conflict which undoubtedly exists amongst Hindu authorities, we consider ourselves bound to follow the Mitakshara, [80] the paramount authority in these Provinces. We are of opinion that according to the law as laid down in Chapter II, Section XI of that work, property acquired by a woman by partition is her *stridhan*, and follows the rule of descent laid down for such property. That rule of descent is applied by the author of the Mitakshara himself to the case of a share acquired by a woman by partition during her husband's lifetime—*vide* the passage cited above from Mitakshara (I., VI., 2), the importance of which seems to have been generally overlooked. We see no reason for thinking that Vijnaneshvara would have applied any different rule in the case of a share acquired by a woman by partition taking place after her husband's death.

For these reasons we arrive at the conclusion that the decision of our brother Blair was right, and we dismiss the appeal with costs.

BANERJI, J.—The question raised in this appeal, namely, whether the share, which a Hindu mother, governed by the Mitakshara Law, gets upon a partition between the sons, is her *stridhan*, which devolves on her death on her own heirs, and not on the heirs of her husband, is by no means free from difficulty. Whilst the author of the Mitakshara in Chapter II, S. XI, § 2 includes such property among what constitutes a woman's *stridhan*, there are other considerations from which it may be inferred that she gets such share as a provision for her maintenance, and that it cannot in any case rank higher than the interest which a widow acquires in her husband's estate by right of inheritance. There is, however, no express text in the Mitakshara, which declares that the share thus obtained by the mother is obtained by her for her maintenance. In this respect the Mitakshara differs from the Smriti Chandrika (see Chapter IV) which is followed in the Dravida country, where it conflicts with the Mitakshara. The latter, however, is the paramount authority in the Benares school, and its express texts must, in the absence of anything to the contrary, be followed in these Provinces. For the purpose of determining whether the author of the Mitakshara intended that property obtained by a woman upon partition between her sons should be deemed to be her *stridhan* in the sense of being her separate property, the best test is that [81] which was applied by their Lordships of the Privy Council in respect of property inherited by a woman from a male in the well-known case of *Bhugwandeen Doobey* v. *Myna Baee* (1), and the other cases to which

(1) (1867) 11 Moo. I. A. 487.

There is nothing peculiar in the provision regarding the allotment of a share to the mother on partition contained in the Dayabhaga (III, 2, 29) In deciding a question like this the whole of the Hindu law regarding the rights and obligations of widows in a joint family should be considered, and not only the special words used in a particular text or *placitum*

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24 A 82

The following judgment was delivered —

BANERJI and AIKMAN, JJ —In this appeal the same question arises which arose in Letters Patent Appeal No 24 of 1900, which we have just decided, namely, whether the share which a mother gets at a partition between her sons is her *stridhan* We have held in that case that such a share must be deemed to be a woman s *stridhan* That being so, Musammat Phuljhari was competent to make the alienation which has been impeached in this case It is conceded that the decree for possession which was made by the lower appellate Court could not in any event be sustained There is another reason why the suit must fail Raghunath is a nearer reversioner than the plaintiffs, and as it has not been found that he is in collusion with the widow, the plaintiffs are not entitled to maintain the suit On both these grounds the suit must fail The result is that we allow the appeal, set aside the decree of the lower appellate Court with costs, and restore that of the Court of first instance The appellants will get their costs of this appeal

Appeal allowed

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24 A 85 (=A W N 1901, 168.)

[85] APPELLATE CIVIL

Before Mr Justice Burkitt and Mr Justice Chamier

KISHAN PRASAD AND OTHERS (*Decree-holders*) v BENI RAM AND OTHERS (*Judgment Debtors*) * [29th July, 1901]

Execution of decree—Decree payable by instalments—Tender—Payment by money-order where creditor had to sendto the Post Office for the money—Implied authority to pay in a certain manner

A judgment debtor under an instalment decree remitted the amount payable on account of one instalment to one of the decree holders by money order The decree holder payee was at the time living in a village where he would have had to go himself or send some one to take the money from the Post Office but, on the other hand two previous instalments had been paid in a similar manner without objection on the part of the decree holder On this occasion the decree holder payee temporized so that the money was not at once returned by the Post Office to the sender and subsequently applied for execution of the whole decree on the ground that there had been no valid payment of this instalment

Held that the decree holder by not refusing the money order at once had prevented the judgment debtor from having an opportunity to pay the instalment within time he had not acted in good faith, and ought not to be allowed to take advantage of his action, even if the previous acceptance of payments made in the same manner did not amount to an implied authority to the judgment-debtor to pay by money order *Polglass* v *Oliver* (1), referred to

THE appellants in this appeal were the assignees of a decree for money, which under a compromise between them and the judgment

* Second Appeal No 412 of 1900 from an order of Rai Anant Ram, Additional Subordinate Judge of Ghazipur, dated the 7th February, 1900, reversing an order of Babu Bansgopal, Munsif of Ballia, dated the 30th September, 1899

(1) (1831) 37 R.R. 623

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property in suit was given to Musammat Phuljhari (the stepmother) as her share upon a partition being effected with the sons of Kanhaiya Rai, and, if so, was it given to her on the express understanding that she was to hold it only in lieu of maintenance? The lower appellate Court found as to the first of these issues in the affirmative and as to the second in the negative.

The arguments in this case were heard immediately after the arguments in the preceding case—*Chhiddu* v. *Naubat*, *supra* p. 398.

Pandit *Sundar Lal* for the appellants, amongst additional authorities, referred to Stokes' Hindu law Books, p. 394, H. H. Wilson's works, Vol. V, pp. 27 and 29, and K. K. Bhattacharya, Joint Hindu Family, pp. 617 and 627.

[83] If a share is allotted to the mother only in lieu of maintenance then how is it that no share is allotted to other people who are also legally entitled to maintenance, *e. g.*, the grandmother?

The reason why shares on partition have been provided for the parents seems to be to discourage partition in their lifetime.

If the share obtained by a mother on partition is not to be deemed her *stridhan*, then the word 'partition' had better be struck out from the Mitakshara (II, 11, 2). Because if only partition between co-owners has been contemplated, the property is already vested in the co-owners, and nothing new is acquired by partition. If two ladies are co-owners, before they partition the property is already their *stridhan*.

Sambibhaga is the same as *bibhaga* and means partition. See Wilson's Sanskrit-English Dictionary, *s. v.* The Bengal Judges who have decided that the mother obtains a share in lieu of maintenance had the special provisions of the Dayabhaga in mind. All the commentators on the Mitakshara support Vijnaneshvara in the wide interpretation that he has placed upon the word *stridhan*.

Dr. *S. C. Banerji* replied on behalf of the Respondents:

Even conceding that the share obtained on partition is *stridhan* in the mother's hands, there is no authority for the proposition that she may alienate it at pleasure. If the Mitakshara is silent as to the right of absolute disposal (see *per* West, J., 8 Bom. H. C. R., O. C. J., at p. 265), the Viramitrodaya makes it quite clear that *stridhan* other than *saudayika* cannot be alienated, *vide* Sarkar's translation, pp. 223-4. But Dr. Jolly has shown that the Mitakshara is really an authority negativing the alleged power of alienation. Tagore Law Lectures, 1883, p. 252, G. D. Banerjee. Tagore Law Lectures, 1878, p. 331, J. N. Bhattacharjee, Commentaries on Hindu Law, p. 573, and Mayne, Hindu Law and Usage pp. 796 and 816. are all authorities in my favour. West and Bühler (Hindu Law, p. 781) refer to a Bombay case in which it was ruled that the lady held only as a tenant for life.

As to the grandmother's right to a share the authorities are conflicting, see J. N. Bhattacharji, *op. cit.*, p. 340.

[84] Partition under the Mitakshara always takes place by virtue of a pre-existent right (I, 1, 23); it is only an adjustment of rights and not the source of a new right. We cannot put our own gloss where Vijnaneshvara has explicitly told us what he understands a particular word to mean. Besides, partition by two or more joint female heirs is expressly laid down by the commentators (G. Sarkar, Hindu Law, p. 271).

accepted by the decree holders, and they are now estopped from arguing that they were not legally bound to accept the present payment tendered in a similar manner through the medium of Jamna Prasad Section 258 of the Code of Civil Procedure does not apply to the present case, and even if it does, the information subsequently given to the Court by the judgment debtors is a sufficient compliance with the requirements of that section

The following judgment was delivered —

BURKITT and CHAMIER, JJ —The appellant obtained against the respondents a decree for the payment of money by instalments, one of the terms of which was that the respondents were to pay Rs 75 on or before the last day of Sawan in each year, and in case of default, execution might be taken out for the whole amount of the decree The respondents paid the instalments by due date in 1303 and 1304F, and there is no dispute as to them The question which we have to decide in this appeal concerns the instalment which was payable on or before the last day of Sawan 1305F (August 2nd, 1898) On July 23rd, 1898, the respondents despatched a money order for Rs 75 to the address of Jamna Prasad, one of the appellants, who resided in a locality in which, under the rules in force, the Post Office does not pay the amount of a money order to the payee at his house, but sends notice of the arrival of the money order, requesting him to attend personally at the Post Office, or send a duly authorized agent to receive payment of the amount On July 26th, a notice of this kind was sent to Jamna Prasad, who first of all said that he wished the money sent to his house, but afterwards told the Post master that he would "take the money after inquiry He never did take the money, and it was ultimately returned to the respondents but meanwhile the time within which the instalments had to be paid elapsed

On August 29th, the appellants applied for execution of the decree in respect of the whole sum decreed, alleging that the respondents had failed to pay the instalment for 1305F

[88] The Munsif ordered execution to issue as prayed, but on appeal the Subordinate Judge held that the instalment for 1305F had been sent to the appellants in time, and that they had improperly refused to accept it

The decree holders have appealed to this Court Their learned counsel, Mr *Wallach*, admitted that a valid tender made to one of the three joint decree holders would be sufficient compliance with the terms of the decree, but he contended that, on the facts found by the lower appellate Court, the respondents had made no valid tender to Jamna Prasad He also contended that even if a valid tender had been made, the Court executing the decree was bound by the last clause of section 258, Civil Procedure Code, to disregard the tender, because it had not been certified to the Court as required by that section

Ordinarily, no doubt, a tender of money in payment must be made with an actual production of the amount in cash (or in notes, where notes are legal tender), and if a debtor sends a cheque or bill without any authority or request by the creditor that the amount should be remitted in that manner, the creditor is not bound to accept it in payment Tender of the amount due at the house of the creditor by a Post Office peon holding a money order sent by a debtor would undoubtedly be a good tender by the debtor In the present case, the creditor would have

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debtors had come to be a decree payable by instalments. The compromise provided that Rs. 75 were to be paid on the puranmashi (30th) of each Sawan, and in case of default the decree-holders were at liberty to execute their decree for the whole balance remaining due. The decree-holders on the 2nd of September, 1898, applied for execution of the whole decretal amount then remaining due, alleging that the judgment-debtors having paid three instalments under the compromise had failed to pay the next instalment which had fallen due on the last day of Sawan, 1305 Fasli (the 2nd August, 1898). The judgment-debtors had in fact despatched a money-order to the address of Jamna Prasad, one of the decree-holders, who resided at a place in which, under the rules in force, the Post office does not pay the amount of a money-order to the payee at his house, but sends notice of the arrival of the money-order to the payee, [86] requesting him to attend personally at the Post Office, or send a duly authorized agent to receive payment of the amount. On July 26th a notice of this kind was sent to Jamna Prasad, who first of all said that he wished the money sent to his house, but afterwards told the Postmaster that he would "take the money after inquiry." He never did take the money, and it was ultimately returned to the respondents, but meanwhile the time within which the instalment had to be paid had lapsed.

The Court of first instance (Munsif of Ballia) held that this tender was insufficient and disallowing the judgment-debtors objections ordered execution to proceed.

The judgment debtors appealed; and the lower appellate Court (Additional Subordinate Judge of Ghazipur) found that the amount of the instalment in question was sent in time and that the decree-holders improperly refused to take it. He accordingly set aside the Munsif's order.

The decree-holders appealed to the High Court.

Mr. *W. Wallach* (who appeared, holding the brief of the Hon'ble Mr. *Conlan*, with Mr. *Abdul Majid*, for the appellants), while admitting that a valid tender made to one of the three joint decree-holders would be a sufficient compliance with the terms of the decree, contended that on the facts found the respondents had made no valid tender to Jamna Prasad. He also contended that even if a valid tender had been made, the Court executing the decree was bound by the last clause of section 258 of the Code of Civil Procedure to disregard it, because it had not been certified to the Court as required by that section.

Mr. *S. Amir-ud-din* for the respondsnts. The finding of the appellate Court on the question raised by the appellants is that "the amount of the instalment in question was sent in time to the decree-holders, but they improperly refused to take it." That is a finding conclusive between the parties to the appeal, the soundness of which cannot be questioned in second appeal. There was, moreover, no default on the part of the respondent in paying the instalment for 1305 Fasli. That instalment was remitted to the decree-holders ten days before it was payable. The amount of the money-order was tendered to Jamna Prasad, one of the decree-holders, by the Postmaster, but he refused to accept the tender. [87] Jamna Prasad's refusal is fatal to the claim now made by the decree-holders. The decree-holders were not entitled to raise any question as to the validity of the tender made to Jamna Prasad. Two previous instalments that had been remitted in the same manner were

valid tender had been made A finding in the affirmative would have been equivalent for the purposes of this case to recording a payment as certified The Court would then have taken up the application for execution, and would have been bound to reject it in pursuance of its finding that a valid tender, equivalent to payment, had been made In the present case there was only one proceeding, but this can make no difference In our opinion there is nothing in section 258 which prevented the Court from trying the question whether a valid tender was made, or from giving effect to its finding that a valid tender was made We dismiss this appeal with costs

1901 JULY 29 — APPELLATE CIVIL — 24 A 85= A W N 1901, 168

Appeal dismissed

24 A 90 (=A W N 1901, 188)

APPELLATE CIVIL

Before Mr. Justice Burkitt and Mr Justice Chamier

HAJIKHAN (*Defendant*) v BALDEO DAS (*Plaintiff*) *
[3rd August, 1901]

Practice—Pleadings—Failure of plaintiff to establish case set up by him—Right to succeed upon facts found differing from those alleged

The plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to the plaintiff, that the tenancy had commenced some eleven years before suit, and that for the last three years the defendant had ceased to pay rent, and had recently denied the plaintiff's title

The defendant denied that the plaintiff was the owner of the house or that he had leased it to the defendant He pleaded also that he had been in adverse possession for more than twelve years

The plaintiff failed to prove the allegation of tenancy set up by him, and it was not shown that the plaintiff had been in possession within a period of twelve years from the institution of the suit

Held that, under the circumstances stated above, it being on the failure of the plaintiff's case as to tenancy, for the plaintiff to prove that he had possession within twelve years, the plaintiff was not entitled to a decree

Nathu Khan v *Gayani Kuar* (1), *Ali Husain* v *Ali Bakhsh* (2) and *Balmakund* v *Dalu* (3) referred to

[Dist. 25 All 498, 10 C L J 321, Ref 25 All 256]

[91] The plaintiff in this case came into Court alleging that he was the owner of a certain house, that ten or eleven years before suit he had leased the house in question to the defendant at a monthly rent, that for three years before suit the defendant had paid no rent, and a few months before suit he had denied the title of the plaintiff

The defendant in his written statement denied that the plaintiff was the owner of the house or that he had leased it to the defendant He pleaded that he had been in adverse possession for more than twelve years, and that the suit was barred by limitation

The Court of first instance (Munsif of Aligarh) found that the lease set up by the plaintiff was not proved, but that the house belonged to the plaintiff and that the defendant was in possession of it with the plaintiff's consent and that his possession was within twelve years from the date of suit That Court gave the plaintiff a decree for possession, disallowing his claim for rent

* Second Appeal No 581 of 1900 from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 21st May, 1900, confirming a decree of Babu Parmatha Nath Banerji, Munsif of Koel, dated the 10th March 1900

(1) (1893) I L R 15 All 186
(2) Weekly Notes, 1883, p 176.
(3) Weekly Notes, 1901, p. 157

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APPELLATE CIVIL.

24 A. 85= A. W. N. 1901, 168.

had to go to the Post Office for the money, and on this account it is said that there was no valid tender. Now it is admitted on the pleadings that the instalments for 1303 and 1304F. were remitted by money-order, and were accepted without objection by the decree-holders. If, when the arrival of the money-order was notified to Jamna Prasad, he had said that he would not accept the money-order, it would, under the rules in force, have been returned at once by the Post Office to the sender, who might then have had time to pay the money into Court, or to the appellants in cash at their door; but by saying that he would take the money after inquiry, he induced the Post Office to refrain from returning the money to the sender, or notifying to him that the money had been refused.

We are inclined to think that the receipt by the appellants of the instalments for 1303 and 1304F. by money-order without [89] objection was sufficient authority to the respondents to send subsequent instalments in the same manner; but apart from that it is clear that Jamna Prasad, by his action in delaying the return of the money to the respondents, deliberately deceived them. In the case of *Polglass* v. *Oliver* (1), a tender was made in country bank notes, which the creditor was not bound to accept. He made no objection on that account, but claimed a larger sum. It was held that he could not subsequently object to the character of the tender, because if he had objected at once on that ground, it would have given the debtor an opportunity of getting other money and making a valid tender, but by not doing so and claiming a larger sum he had deluded the debtor. There are other decisions to the same effect. The principle on which those cases were decided applies to the present case. Here the appellant, Jamna Prasad, obviously acted in bad faith. If he wished to object to the character of the tender, he should have done so definitely and at once. He was admittedly acting for all the appellants. Jamna Prasad's action must be held to amount to waiver of the objection which he might have made to the character of the tender, and the appellants are estopped from now setting up any objection to the tender on that ground.

We cannot accede to the contention that the Court was bound to disregard the tender because it had not been certified to the Court. Neither the second nor the third clause of section 258 of the Code of Civil Procedure in terms applies to such a case as this, for no actual payment of money was made which could be certified to the Court; but as tender is, for some purposes, equivalent to payment, it may have been the duty of the respondents to inform the Court of the tender. Assuming that section 258 applies to such a case as this, we consider that the requirements of the section were sufficiently complied with by the respondents. They had 90 days within which to inform the Court of the tender having been made. They filed a petition well within that time in answer to the appellant's application for execution. In it they stated what had taken place, and asked that the application for execution might be rejected. It is true that they did not ask for the issue of a notice to the appellants, [90] as required by the section, but, in fact, notice was served upon the appellants' pleader. If, along with their petition of objections, the respondents had filed a separate application, expressly referring to section 258, it would obviously have been the duty of the Court to decide, first, whether a

(1) (1831) 37 R. R. 623.

1901 Aug 8.

APPELLATE CIVIL

24 A. 90= A W N 1901, 188

[93] of the house for more than twelve years, and that the suit was barred by limitation Both the Courts below have disbelieved the evidence as to the alleged lease, but they have passed a decree in favour of the plaintiff for possession on the ground, apparently, that the defendant has not proved twelve years' adverse possession Mr *Ghulam Mujtaba*, on behalf of the defendant, relying upon the decision of this Court in *Naiku Khan* v *Gayani Kuar* (1) contends that as the plaintiff failed to prove the case stated in his plaint, the suit should have been dismissed On the other hand, counsel for the plaintiff has referred us to the judgment of Tyrrell, J, in *Ali Hussain* v *Ali Bakhsh* (2) and to the judgment of Aikman, J, in an unreported case—S A No 634 of 1899, *Balmakund* v *Dalu*, decided on July 10th last (3)

I am most unwilling to bind a plaintiff too closely to his plaint in a case of this kind, and I agree with the opinion expressed by Aikman, J, that a suit like the one before us should not be dismissed merely because the plaintiff fails to prove that he leased the premises to the defendant, and that if a Court sees that the plaintiff is entitled to the relief which he claims, although on grounds other than those put forward in his plaint, the Court should give that relief, if the defendant would not thereby be taken by surprise

In the present case, however, if the plaintiff s allegation about the lease be eliminated, the suit must be regarded as one for the possession of immoveable property of which the plaintiff has discontinued possession He alleges that he discontinued possession less than twelve years before the suit, but this is denied by the defendant It was for the plaintiff to prove that he had been in possession within twelve years before suit Counsel for the plaintiff does not suggest that, apart from the evidence which has been disbelieved by both the Courts below, there is any evidence on the record that the plaintiff was in possession within twelve years before suit Looking at the record of the first Court I find that he sought, by means of the evidence as to the grant of a lease, both to prove his possession within limitation [94] and to prevent the defendant from disputing his title It is contrary to the practice of this Court to remand a case in order to give a plaintiff a second opportunity of proving his case, except for special reasons, and I see no reason why such a course should be adopted in this case This is not a case in which the Court can see that the plaintiff is entitled to the relief which he claims on a ground other than that stated in his plaint Nor is it a case in which any evidence tendered by the plaintiff has been wrongly excluded There is no ground whatever for the admission of fresh evidence On the evidence now on record the plaintiff's case fails, and should have been dismissed I therefore concur in the order proposed by my learned colleague, namely, that this appeal should be accepted and the suit dimissed with costs

BY THE COURT —The appeal is allowed, and the decrees of the Lower Courts are set aside with costs

Appeal decreed

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(1) (1893) I L R 15 All 186
(2) Weekly Notes, 1889, p 176
(3) Since reported Weekly Notes 1901, p 157

1901 AUG. 3.

APPELLATE CIVIL.

24 A. 90= A. W. N. 1901, 188.

On appeal by the defendant the lower appellate Court (Additional Subordinate Judge of Aligarh) coming to similar conclusions of fact upheld the decree of the Court of first instance.

The defendant appealed to the High Court.

Maulvi *Ghulam Mujtaba* for the appellant. The plaintiff having failed to prove the specific title upon which he based his claim cannot be allowed to succeed upon a different title. The plaintiff failed to prove that the relationship of landlord and tenant ever existed between himself and the defendant, and the lower Courts were wrong in giving him a decree simply because the defendant was unable to substantiate his plea of adverse possession. I rely on *Naiku Khan* v. *Gayani Kuar* (1).

Mr. *Kashi Prasad* (holding the brief of Mr. *S. S. Singh*) for the respondent relied on the decision of Tyrrell, J., in *Ali Husain* v. *Ali Bakhsh* (2), and contended that the plaintiff having been found to be the owner of the house of which the defendant was in occupation, and that defendant being found to have no title either as lessee or licensee or by virtue of adverse possession for more than twelve years, the Court below was right in giving him a decree for possession.

[92] Judgment was as follows:—

BURKITT, J.—In this case the plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to the plaintiff; that the tenancy had commenced some eleven years before; that for the last three years the defendant had ceased to pay rent, and had denied the plaintiff's title. Both the Courts have found that the allegations as to the tenancy are untrue, and have found that the relationship of landlord and tenant has not been shown to have existed between the plaintiff and the defendant. They have therefore dismissed the suit, so far as it was founded on the allegation of tenancy, but have given the plaintiff a decree for possession as owner. Now it seems to me that this decree cannot be supported on the allegations of the plaint. The only way the plaintiff stated himself to be in possession of the property in suit was by alleging that the defendant was his tenant. Had the tenancy been proved, it would have followed that the plaintiff was in possession through his tenant. But it has been found that the defendant was not his tenant. The position therefore is this, that the plaintiff has failed to prove possession over the disputed premises within twelve years before suit. It is alleged, of course, that he was in possession before the commencement of the alleged lease to defendant; of such possession there is not a scrap of evidence, and I am of opinion that in a case like this, where plaintiff's principal allegation has been proved to be untrue, we should not send down an issue to the Lower Court to enable him to establish a subsidiary line of attack. I would therefore allow this appeal, setting aside the decrees of the Lower Court, and dismiss his suit with costs.

CHAMIER, J.—The plaintiff's case was, that he was the owner of the house in suit; that ten or eleven years before the suit he had leased it to the defendant at a monthly rent; that for three years before suit the defendant had paid no rent, and that a few months before the suit he had denied the title of the plaintiff.

The defendant in his written statement denied that the plaintiff was the owner of the house, or that he had leased it to the defendant. He pleaded that he had been in adverse possession

(1) (1893) I. L. R. 15 All. 186. (2) Weekly Notes, 1889, p. 176.

Held by the Judicial Committee that there was no evidence of any representation on which to found an estoppel and even assuming that the arrangement made by the Settlement Officer amounted to a contract between the then claimants and the widow, such contract was not binding on the plaintiffs The then claimants were only expectant heirs with a *spes successionis* The plaintiffs claimed in their own right as heirs of the last male owner when the succession opened and it could not be held that a person so claiming was bound by a contract made by every person through whom he traced his descent.

On the whole case the Judicial Committee held (reversing the decision of the High Court) that the plaintiffs had made out the title they set up

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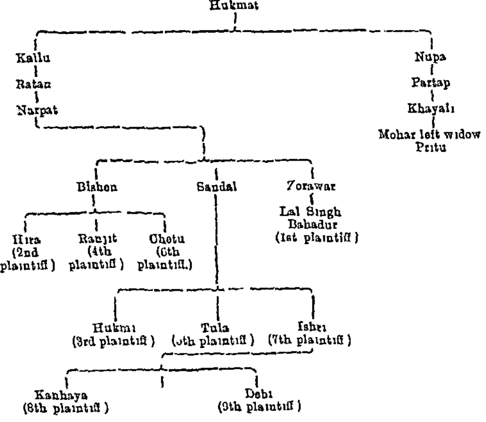
24 A 94=29 I A 1=12 M I A 86=6 C W N 169=8 Sar 152=4 Bom L R 233

[Fol 23 Mad 120 9 C L J 453=13 C W N 544 19 M L T 1=32 I C 50 Ref 13 M L J 323 8 O C 349 23 Mad 330=1 M L T 183=16 M L J 307 10 O C 277 31 Mad 366=3 M L T 355=18 M L J 309 13 C W N 544=9 C L J 453 50 I C 498=36 M L J 193=17 A L J 536=29 C L J 539=21 Bom L R 610=23 C W N 777=1919 M W N 262=42 Mad. 523=26 M L T 5=46 I A 72 53 I C 651=30 C L J 56=23 C W N 1025 60 I C 635=(1920) M W N 679 D 63 P R 1905=2 P L R 1906]

APPEAL from a decree (23rd December, 1898) of the High Court at Allahabad, reversing a decree (31st January, 1896) of [96] the Subordinate Judge of Dehra Dun and dismissing the appellants suit with costs.

In their suit, the appellants, claiming as heirs in the male line of one Mohar Singh, sought to recover on the death of his widow, Pritu, certain jungle lands called mahal Guljawari, which were in possession of the defendants under a grant from her

Mohar Singh died at some date considerably before 1847 He left a widow, Pritu but no issue The plaintiffs claimed to be the collateral heirs of Mohar Singh, as shown in the following pedigree —



24 All. 94 (=29 I.A. 1=12 M.I.A. 56=6 C.W.N. 169=8 Sar. 182=4 Bom. L.R. 233.

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24 A. 94=29 I. A. 1=12 M. I. A. 56=6 C. W. N. 169=8 Sar. 182=4 Bom. L. R. 233.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson and Lord Lindley.

BAHADUR SINGH AND OTHERS (*Plaintiffs*) *v.* MOHAR SINGH AND OTHERS (*Defendants*). [21st June and 8th and 30th November 1901.]

[*Appeal from the High Court, North-Western Provinces, Allahabad.*]

Title--Evidence and proof of Title—Effect of arrangement made by Settlement Officer between the widow in possession and the ancestors of the plaintiff—Recognition of relationship and heirship—Act No. I of 1872 (*Indian Evidence Act*), *section* 32, *clauses* (5) *and* (6)—*Evidence of pedigree—Statements* post litem—*Estoppel.*

The plaintiffs claimed certain lands on the death in 1892 of the widow of the last male owner as his collateral heirs. The last owner was, they alleged descended in the same degree from a common ancestor as the persons of whom the plaintiffs were themselves descendants in the direct line. These persons had made a similar claim through the common ancestor in 1847, when the settlement of the estate with the widow was being made, alleging themselves to be her husband's reversionary heirs (the widow being then in possession of the lands in dispute). On that occasion (it being uncertain whether she had an absolute or only a life estate in the property, though she claimed to be the absolute owner) she was asked by the Settlement Officer who would be her heirs on her death. Her reply was:—"If the claimants undertake to pay the [95] debt which is due by me on account of revenue or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death; but so long as I am alive I have every sort of power in respect of my estate"; and the estate was settled with her, the claimants accepting her conditions. In the record-of-rights showing the shares in the estate as prepared under Regulation IX of 1833 at the time of settlement the widow stated:—"As to the appointment of lambardar the claimants who are own brothers will become the owners of this estate in equal shares, provided they pay the present and future debts and remain obedient to me, and one of them whom the Collector will think fit will be appointed lambardar." At a further settlement made in 1866 the widow stated:—"I have no heir to succeed me after my death, therefore I cannot propose anything in regard to the office of lambardar."

Held by the Judicial Committee that the statements made in 1847 amounted to an admission by the widow of relationship and recognition of the plaintiff's ancestors as her sucessors, a recognition on her part both that her husband's heirs were entitled to succeed her, and also that she was not prepared to contest their claim to be such heirs. The statements were unintelligible on any other footing, and unless the claimants were the heirs they had no interest in the proceedings. Neither their acceptance of her conditions, nor her subsequent statement that she had no heirs, detracted from this effect of the proceedings of 1847; the latter statement was strictly accurate if (as their Lordships found was the fact) she had only a Hindu widow's estate in the property.

The principal oral evidence consisted of statements made by the plaintiffs as to their descent, the information as to which they had received from their ancestors. Objection was taken that such of these statements as were made since 1847 were inadmissible in evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872) as being *post litem.* The Judicial Committee held that they were admissible, the heirship of the then claimants not being really in dispute at that time.

The widow had in 1862 made an alienation of the property to the defendants and it was objected to the plaintiffs' claim that they were estopped by what took place in 1847 from disputing her power of alienation as absolute owner of the property.

the presence of the parties After perusing the papers on the record and hearing the statement of the parties it appears that both the parties, i e, the (husband of the) person now in possession and the claimants are the descendants of a common ancestor, and the person now in possession is a widow having no heir or child Although the claimants are the descendants of a common ancestor, yet they were never in possession of the share in dispute a fact admitted by the claimants themselves Having regard to the fact that the claimants have been out of possession from of old their claim for possession and right to settlement was disallowed and the person now in possession, who was present with Nathu, her general attorney, was asked to state who would be the owner of her estate after her death She replied — If Zorawar, Bishan and Sandal the claimants, who are own brothers, undertake to pay the debt which is due by me on account of the revenue of this Dain or which may hereafter be due by me and if they are obedient to me and I am thoroughly satisfied with them, they will be the owners of my estate after my death But so long as I am alive, I have every sort of power in respect of my estate As the statement of the person now in possession seemed just and proper, the claimants were directed that if they had a claim to the estate they should act according to the conditions now stated by the person now in possession before the Court, and that thus they could be the owners of her estate after her death that during her lifetime she was to remain the owner of her estate in every respect and that they could not in any way interfere with her estate without her consent Accordingly, the claimants *agreed to act according to the conditions alleged by the person now in possession* and requested that their names might be entered in the settlement wajib ul arz (village administration paper) so that no dispute should arise in future It is therefore

ORDERED

'That for the reason given above the claimants claim to have the settlement made with them as zamindars during the lifetime of the person now in possession be considered disallowed an •
[99] person now in possession a mentio •
claimants, with Sandal their third brother,
alleged by her, be entitled to her estate be made in the wajib ul arz (village administration paper)

The administration paper was as follows —

" RECORD-OF RIGHTS showing the shares in Dain Adhoiwala, pargana Sanaur district Dehra Dun, as prepared under Regulation IX of 1833, at the time of settlement in 1848 "

• • •

•

one (of them) whom the Collector will think fit for lambardarship will be appointed lambardar '

At the settlement proceedings in 1866, the settlement of the zamindari with Pritu was confirmed On that occasion she stated —

" I have no heir to succeed me after my death therefore I cannot propose anything in regard to the office of lambardar '

The oral evidence so far as it is material is sufficiently stated in Their Lordships judgment The principal witnesses Hira and Bahadur stated that they are in possession of the rest of the property held by Pritu

The issues settled were (1), are the plaintiffs entitled to sue? (2) what was the position of Pritu with respect to the property in dispute, i e, had she possession with the interest of a Hindu widow merely or was she in possession as absolute owner? (3) did Pritu convey the property to Major Delane? (4) If so, and her position be found to be that of a Hindu widow, was the transfer justified on the ground of necessity, and is it binding on the plaintiffs?

On the 31st of January, 1896 the Subordinate Judge gave a decree in favour of the plaintiffs On the first issue he found that they had made out their title satisfactorily, relying chiefly for this finding on the transaction of 1848, which was proved by documents filed by the defendants,

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The plaintiffs alleged that on the death of Mohar Pritu acquired the rights of a Hindu widow in his estate, and the Guljawari then passed to her with his other property. On the 29th of November 1862 Pritu granted to the predecessors of the defendants for Rs. 1,000 a lease of three jungles, of which Guljawari was one with the right of cutting wood. On the 15th of February 1867 she sold the same jungles to one Major Delane, subject to the rights [97] of the lessees. He obtained mutation of names with the same reservation. Litigation ensued between Major Delane and the lessees, which was terminated by the sale by Delane of his rights to the lessees on the 23rd of May 1868. The defendants remained in possession until after the death of Pritu, which took place on the 3rd of March 1892.

The plaintiffs alleged that the defendants' lease expired on the 29th of November 1892; that they then stopped the defendants from cutting wood, on which in proceedings under the Specific Relief Act, the defendants obtained an order for possession under section 9 of that Act, and possession was given to them.

The defendants in their written statement denied the plaintiffs' right to sue. They alleged that Pritu had been turned out for misconduct, and had lost her right to inherit; that on the death of Mohar his aunt Nando took possession of the property; that on her death Pritu took forcible possession and became full owner by settlement proceedings in 1848. The transactions of the adverse claimants at the time of those proceedings were pleaded as constituting an estoppel to the present plaintiffs.

The defendants further asserted that the lease was valid by custom in Dehra Dun, and was a matter of necessity within the legal powers of Pritu if she had only a widow's estate; that they were now holding either under a valid sale from Major Delane or had obtained a good title by limitation: and they pleaded that they were purchasers for value in good faith, and if turned out were entitled to compensation.

These settlement proceedings which formed the documentary evidence in the case took place in 1847-48 and in 1866. The first zamindari settlement in Dehra Dun was made in 1847, and of the property now in dispute amongst other estates. On the 16th of February, 1847, Zorawar presented a petition to the Settlement Officer, Mr. Ross, in which he claimed that the settlement ought not to be made with Pritu, on the ground that Narpat, his father, and Khayali, the father of Mohar, were own brothers. A petition to the same effect was put in by Bishan on the 14th of May 1848 in which he represented that Pritu had been turned out of her home for misconduct. In the same year depositions were given by [98] Bishan and Zorawar in which they alleged that the zamindari of Dain Adhoiwala (which included the village of Guljawari now sued for) had been purchased jointly by their grandfather Ratan, and Mohar's grandfather who appears to have been known by the name of Chaini. A genealogical table showing the descent of both parties from a common ancestor was filed by Bishan. On the other hand Pritu's mukhtar gave a deposition in which he alleged that the property was purchased by Chaini alone, and that Mohar and Zorawar were only related as members of the same brotherhood. The result of the inquiry then made is shown in the following record of the proceedings of the Settlement Officer of the 9th of October 1848 :—

"To-day, at the time of the settlement of Dain in dispute, this case was brought forward along with the office report and that of the Tahsildar of Mahal in

the evidence proves the contrary As the plaintiffs have not established the title upon which they came into Court, their suit should have been dismissed We allow the appeal and setting aside the decree of the Court below dismiss the suit with costs '

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24 A 94=29 I A 1=12 M I A 56=6 C W N 169=8 Sar 162=4 Bom L R 233

From this decision the plaintiffs appealed to His Majesty in Council

The appeal came on for hearing on June 21st, and was heard *ex parte*, the respondents not appearing Previously to judgment being delivered, however, their Lordships granted an application by the respondents to be allowed to appear and be heard The case was re heard on the 8th of November

Mr *Mayne* for the appellants contended that on the evidence the plaintiffs had proved their title They had proved that they were collateral heirs of Mohar Singh, and that they were descendants of the claimants, Bishan and his brothers whose descent from a common ancestor with Mohar Singh was admitted in 1848 and made the basis of the *arrangement between them and Pritu recorded in the proceedings of* that year, and the plaintiff's claim is founded upon the relationship then set up and admitted

There was no evidence, no suggestion even, that there were any other collaterals of Mohar Singh in existence, and the evidence given by the plaintiffs was sufficient to throw on the defendants, who had no title, the burden of proving that there [102] were any heirs nearer than the plaintiffs The supposed inconsistency referred to by the High Court between the statements of Bishan and Zorawar that Narpat and Khayali and Chaini and Ratan were "own brothers,' is only apparently so, for the expression so translated, is one loosely applied to cousins And the fact that the grandfather of Mohar was in 1848 called Chaini and is now called Partab is not material, the same man being obviously referred to under each name It is submitted that the judgment of the High Court is against the weight of evidence, and should be set aside As to the admissibility in evidence of the proceedings of 1847 48 and of the pedigree sections 13 and 32, clauses 5 and 6 of the Evidence Act (I of 1872) were referred to

Mr *Cowell*, for the respondents, contended that the High Court had rightly decided that the plaintiffs had failed to establish the title they set up There is nothing in the proceedings of 1847 48 which evidenced or raised any presumption, as against the respondents, that the appellants were the collateral relations of Mohar Singh or entitled to inherit his estate The High Court find that the relationship then claimed was repudiated on behalf of Pritu She, however, then consented to the claimants' taking her estate after her death on certain conditions which appear to have been not complied with, for in 1866 Pritu stated that she "had no heirs to succeed her after her death ' The plaintiffs, it is submitted, do not prove descent from a common ancestor with Mohar Singh they do not produce the only genealogical table said to have existed in the family All that they do produce to show their descent is a table of descent said to have been copied from some other document The oral evidence as to their relationship is vague and unreliable The statements made by Hira and Bahadur are inadmissible in evidence under section 32 of the Evidence Act, clauses 5 and 6, as they say they heard what they state from others since 1847, they are statements made, therefore, after the question in dispute was raised The respondents hold under an alienation of the property made

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On the second issue, after rejecting the suggestion of Pritu's misconduct and expulsion, of which there was no evidence, he said :—" It appears to me indisputable that Pritu got possession of Mohar Singh's property as his widow. Nando appears to have looked after the estate, Pritu being then very young. On the death of Nando, Pritu assumed the [100] management herself." Further, he held that the plaintiffs were not estopped by anything done by their ancestors in 1848 from denying that she was then an absolute owner, and that Government in settling with her as zamindar was not granting new rights, but was merely restoring certain rights which had been for some time in abeyance. On the third issue he found that Pritu had sold the jungles in dispute to Major Delane who had conveyed them to the defendants; but on the fourth issue he held that her alienation was not justified by any proved custom, nor under the pressure of any such necessity as to constitute a valid alienation by a Hindu widow.

From this decision the defendants appealed to the High Court at Allahabad, a Division Court of which (KNOX and BANERJI, JJ.) on the 23rd of December, 1898, reversed the decree of the Subordinate Judge on the ground that the plaintiffs had not made out their title, which they were bound to do. The oral evidence they treated as quite insufficient. As to the documentary evidence they said :—

" As regards the documentary evidence, we may observe that it is not consistent with the genealogy now set up by the plaintiffs. It appears that in 1847 and 1848, upon the death of Musammat Nando, the paternal aunt of Mohar Singh. Bishan, Zorawar and Sandal, the ancestors of the present plaintiffs, claimed the estate in the Court of the Settlement Officer. Zorawar stated in his petition, dated 16th February, 1847, that his father Narpat and Khayali, the father of Mohar, were own brothers. In his deposition he said that his grandfather Ratan and Chaini, the grandfather of Mohar Singh, were cousins. Bishan stated in his deposition, dated 14th August, 1848, that Chaini, the ancestor of Mohar, and Ratan were 'own brothers.' There is no mention of Chaini in the pedigree now set up, and no pedigree appears to have been produced in the proceedings in which the above statements were made. The relationship then claimed was repudiated on behalf of Musammat Pritu, who said that Zorawar and Mohar were only members of the same brotherhood. The Settlement Officer was no doubt of opinion that Pritu's husband and the claimants were descended from the same common ancestor, but he did not decide what the relationship was. It appears that Pritu stated that Zorawar, Bishan and Sandal would be the owners of her estate after her death, provided they paid her debts, present and future, and gave her satisfaction. This statement is regarded by the Court below as an admission of relationship and recognition by Pritu of the plaintiffs' ancestors as her heirs and successors. We are unable to take the same view of the statement of Pritu as the learned Subordinate Judge. It seems to us that in order to avoid further disputes, Pritu consented to those persons taking her estate after her on the condition that they should pay her debts and remain [101] obedient to her. If they were her heirs and were recognized by her as such, she was not competent to impose any such condition and those persons would not have submitted to it. It appears that this condition was not complied with, for we find that in the record-of-rights and village administration paper of 1866 Pritu distinctly stated that she had no heir after her death. In the face of this statement we cannot hold that she admitted the plaintiffs to be her heirs.

" Upon a careful consideration of the evidence, oral and documentary, we are of opinion that it is not sufficient to prove the relationship claimed by the plaintiffs. It may be that plaintiffs are distantly related to Mohar Singh; but unless they can establish that they are his next reversioners, they cannot succeed in the suit, and this they have, in our judgment, failed to do. The defendants, it is true, do not point to any particular person as the heir to Mohar Singh ; but that circumstance cannot help the plaintiffs. As the plaintiffs have come into Court and their title is denied by the defendants, they were bound to prove their title by clear and satisfactory evidence, and in our opinion they have not been able to do so. It is urged that they are in possession of the remainder of the estate left by Pritu ; but

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The learned Judges seem to find some contradiction to the entry made at the settlement of 1847-48 in the statement made by Pritu in the record-of-rights and village administration paper of 1866-67—"I have no heir to succeed me after my death. Therefore I cannot propose anything in regard to the office of lambardar."

This of course is strictly accurate if Pritu had only a widow's estate. Bishan, Sandal and Zorawar had claimed and the appellants now claim as heirs of Mohar and not as heirs of Pritu. This can hardly have been overlooked by the learned Judges.

The only oral evidence which need be noticed is that of two of the plaintiffs and appellants, Hira and Bahadur. Hira is a son of Bishan and he states the descent of his father and mother from the common ancestor in the same way as was stated in 1847 except that he calls Mohar's grandfather Partab instead of Chaini. He says he learnt the particulars of his family from his elders. He also says that he found an old genealogical tree in the house, but for some reason it was not produced, and the respondents do not appear to have pressed for its production. If it had been produced it would of course have been treated with suspicion. The learned Judges comment on his evidence because he does not know whether the father of Mohar Singh had any other son (it is not suggested that he had) or what was the name of the husband of Nando, the paternal aunt of Mohar, which seems a little hypercritical and also on the non-production of his genealogical tree.

Bahadur is the grandson of Zorawar, from whom he says he obtained information about his family pedigree. He also speaks of the names of ancestors being called out on the occasion of marriages and says that in performing the ceremonies of *sradh* and *tarpan* the names of the father, grandfather, and of all the ancestors he can remember are repeated. He adds a detail in the descent of Mohar from Hakumat Singh, *viz.*, that Nupa who was Mohar's great-grandfather had three sons Chaini, Partab and Chaila. This may account for the differences in the name of Mohar's grandfather in the pedigree of 1847 and that in the [107] present suit. One brother may have been mistaken for the other. The variation is not a mark of untrustworthiness, but rather points to a more careful investigation.

There is also evidence that Pritu in her life-time was on good terms with the appellant's family, and that Hira performed her funeral rites.

Both Hira and Bahadur were cross-examined at great length; but there is no suggestion throughout the cross-examination of any other person as a possible heir, nor is there any attempt to attack any particular link in the chain.

It is of course for the plaintiffs to make out their title and they can only succeed on the strength of their own title. But their Lordships think that the appellants have given admissible evidence, which in the absence of any counter-evidence and in the circumstances, sufficiently supports their title.

Mr. *Cowell* suggested that all statements made to the witnesses Hira and Bahadur since the year 1847 were inadmissible under section 32 (5) of the Indian Evidence Act as being made *post litem*. It does not, however, appear that the heirship of the then claimant was really in dispute at that time. Such a construction of the Act would practically exclude any attainable evidence in the present case.

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were own brothers, Zorawar described them as cousins It is however, apparent throughout these proceedings that the term "brothers is used in a loose sense What is meant by both deponents is that they were members of one family Zorawar in his deposition says "now my right is this that Mohar Singh died leaving only his wife , and the ground on which they sought immediate possession was that Pritu had forfeited her estate by misconduct There is not a trace on these documents of the effective assertion of any title by Pritu otherwise than as widow of Mohar, and indeed the deposition of her mukhtar Sahib Singh shows what her title was Their Lordships think it plain that the three brothers were then claiming as the heirs of Mohar and in no other character

Mr Ross, Superintendent of the Settlement Department, in his record of the proceeding before him, stated that after perusing the papers and hearing the statement of the parties it appeared that both the parties, *i e*, the husband of the person now in possession (Pritu) and the claim ants were the descendants of a common ancestor, and that Pritu was a widow having no heir or child He further stated that Pritu being asked to state [105] who would be the owner of her estate after her death replied —" If Zorawar, Bishan and Sandal, the claimants, undertake to pay the debt which is due by me on account of the revenue of this Dain or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death, but so long as I am alive I have every sort of power in respect of my estate Mr Ross seems to have advised or put pressure on the claimants to act according to the conditions alleged by Pritu and made an order accordingly

The record of rights showing the shares in Dain Adhoiwala as pre pared under Regulation IX of 1833 at the time of settlement in 1848 is as follows —" As to the appointment of lambardar—after my death Zorawar, Sandal and Bishan who are own brothers will become the owners of this estate in equal shares, provided they pay the present and future debts and remain obedient to me, and one of them whom the Col lector will think fit for lambardarship will be appointed lambardar

These proceedings at least show that the claim of kinship now put forward is not a recent invention, but was made nearly fifty years before the commencement of the present suit, and was not then seriously con troverted, if it was not in terms admitted The learned Judges in the High Court decline to regard the statement of Pritu as an admission of the relationship or recognition of the appellant s ancestors as her succes sors The whole proceeding however, is unintelligible on any other footing Pritu could not designate her successors or bind the reversion after her death On the other hand unless the brothers were assumed to be the then heirs of Mohar they had no interest in the matter What ever was said or done is not of course conclusive upon the respondents or perhaps standing alone very strong evidence in favour of the appel lants, but their Lordships think it was a recognition on her part both that her husband s heirs (which is the character in which the three brothers claimed) were entitled to succeed her and also that she at any rate was not prepared to contest their claim to be such heirs The rather unintelligible conditions which the three brothers were induced by Mr Ross to acquiesce in as the price [106] of a recognition of their title to succeed Pritu do not seriously detract from the general effect of the proceedings in 1847 48

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rejected; but the Subordinate Judge, instead of confirming the sale, set [109] it aside, on the ground that only one of the decree-holders auction purchasers had put in the receipt under the second clause of section 294, and directed a re-sale, and this notwithstanding that the other decree-holder admitted that the receipt had been presented on his behalf also. On appeal to the District Judge the order of the Subordinate Judge was set aside and an order passed confirming the sale. From this order the judgment-debtor appealed to the High Court on the sole ground that no appeal lay to the District Judge.

Held, that the order passed by the Subordinate Judge was appealable as an order passed under section 244 of the Code of Civil Procedure.

In this case Sri Ram and Damodar Das obtained a decree against one Makka, in execution of which certain immoveable property of the judgment-debtor was put up for sale. The decree-holders obtained permission to bid at the sale, and eventually became the auction-purchasers. The property was knocked down to the two decree-holders jointly. An application was then made to the officer conducting the sale by one of the decree-holders, auction purchaser, but purporting to act in the name of and on behalf of the other auction purchasers as well, asking that the purchase money should be set off against the amount due under the decree, and to that extent satisfaction of the decree should be entered up; he at the same time paid the auction fees. This application was made under the second clause of section 294 of the Code of Civil Procedure. A receipt for the amount for the purchase money was given to the officer conducting the sale and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held. The judgment-debtor subsequently made an application under section 311 of the Code to the Subordinate Judge, asking to have the sale set aside. That application was rejected. The Subordinate Judge. however, did not confirm the sale, but on the contrary set it aside and directed a re-sale on the ground that the presentation of the receipt by one only of the decree-holders, auction purchasers, was insufficient, even though the other admitted that the receipt had been presented on his behalf also.

On appeal to the District Judge the order of the Subordinate Judge was set aside and the sale confirmed. The judgment-debtor thereupon appealed to the High Court, his sole ground of appeal being that the order of the Subordinate Judge setting aside the sale was not appealable to the District Judge.

[110] Maulvi *Ghulam Mujtaba* for the appellant.

Pandit *Sundar Lal* (with Babu *Jogindro Nath Chaudhri* and Babu *Parbati Charan*) for the respondents.

BURKITT and CHAMIER, JJ.—The facts of this case are somewhat peculiar. The respondents in the present appeal, *i.e.* Sri Ram and Damodar Dass, obtained a decree against the appellant Makka, in execution of which certain immoveable property was sold. The decree-holders obtained permission to bid at the sale, and eventually became the auction purchasers. The property was knocked down to the two decree-holders jointly. An application was then made to the officer conducting the sale by one of the decree-holders auction purchasers, but purporting to act in the name of, and on behalf of the other auction purchaser as well, asking that the purchase money should be set off against the amount due on the decree, and to that extent satisfaction of the decree should be entered up; he at the same time paid the auction fees. This application was made under the second clause of section 294 of the Code of Civil Procedure. A receipt for the amount of the purchase money was

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This appeal was orginally heard *ex parte*, and the only question on which their Lordships were called upon to pronounce an opinion was whether the appellants had sufficiently proved their kinship Subsequently the respondent obtained leave to appear and put in a case and their Lordships having heard the respondent are now in a position to dispose of the whole case

The only additional point argued by Mr *Cowell* on the respondent s behal ... by what took place in 1847 48 fr ... the property This argument fails ... evidence of any representation on which to found an estoppel, and even assuming that the arrangement made by Mr Ross amounted to a contract between the then claimants and Pritu, such a contract is not binding on the apppellants According to Indian law the claimants of 1847 were but expectant heirs with a *spes successionis* The appellants claim in their own right as heirs of [108] Mohar when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent

Their Lordships have already intimated that they will humbly advise His Majesty that the order appealed from be reversed and that the decree of the Subordinate Judge should be restored

The respondents will pay the costs of this appeal including those of the first hearing

Appeal allowed

Solicitors for the appellants—Messrs *Barrow, Rogers* and *Nevill*

Solicitors for the respondent—Messrs *Ranken, Ford, Ford* and *Chester.*

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APPELLATE CIVIL

Before Mr Justice Burkitt and Mr Justice Chamier

MAKKA (*Judgment debtor*) v SRI RAM AND ANOTHER (*Decree holders*) * [2nd August 1901]

Execution of decree—Joint decree—Sale in execution—Purchase by decree holders—Receipt for part of decretal money given by one decree holder on behalf of both—Sale set aside—Appeal—Civil Procedure Code, sections 244, 294, 311

... immoveable property of ...

officer conducting the sale and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held The judgment debtor subsequently made an application under section 311 to the Subordinate Judge, asking to have the sale set aside That application was

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* Second Appeal No 575 of 1900 from a decree of F E Taylor, Esq, District Judge of Shahjahanpur dated the 7th March 1900 reversing an order of Babu Nihala Chandra Subordinate Judge of Shahjahanpur dated the 18th November 1899

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[112] APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Blair.

CHANDI PRASAD (*Defendant*) v. MAHARAJA MAHENDRA MAHENDRA SINGH (*Plaintiff*).*
[13th August, 1901.]

Res judicata—Civil Procedure Code, section 13—Assignment of the Government revenue of a village divided into "khatas"—Claim for interest on revenue in arrears—Decision as to one khata res judicata in respect of other khatas.

The plaintiff was assignee of the Government revenue of a certain village. The village was divided into *khatas*, but the title to the revenue in respect of each and every *khata* was one and the same. The plaintiff sued to recover arrears of revenue due in respect of *khata* No. 29 with interest. On his right to receive interest being disputed, it was held that a previous decision of a competent Court between the same parties, but dealing with a claim for interest due on arrears of revenue payable in respect of *khata* No. 47, operated as *res judicata* as to the claim with regard to *khata* No. 29. *Ex parte Ador* (1). *Madhavi* v. *Kelu* (2), *Kunji Amma* v. *Raman Menon* (3) and *Balkishan* v. *Kishan Lal* (4) referred to.

[Fol. 30 All. 470=A. W. N. 1908, 192=5 A. L. J. 407; Dist. 2 I. C. 853.]

THE plaintiff in the suit out of which this appeal arose was the assignee of the Government revenue payable in respect of a certain village. The village was divided into a number of "khatas," and in the present suit the plaintiff claimed arrears of revenue due in respect of khata No. 29, with interest on such arrears Both the Court of first instance and the District Judge on appeal decided in favour of the plaintiff that interest was payable; but on appeal by the defendant to the High Court it was held (5) that, as no interest on arrears of revenue was recoverable by Government, an assignee from Government could be in no better position, and that the plaintiff was therefore not entitled to recover interest on the arrears claimed by him. The respondent thereupon raised the further question whether his right to recover interest on arrears was not concluded in his favour by a former judgment between the same parties. In that former case the respondent had sued the appellant for arrears of revenue in respect of another khata of the same village, namely, No. 47, and for interest on such arrears. The Court of first instance (Assistant Collector) held that interest was not allowable; but on appeal the District Judge took a different view and held that the plaintiff was entitled to the interest [113] claimed. That decree was not appealed and became final as between the parties to the present suit. The question of *res judicata* thus raised led to a difference of opinion between the Judges composing the Bench by which the appeal was heard. In accordance with Section 575 of the Code of Civil Procedure the judgment which prevailed was that of Aikman, J., who held that the former decision made the plaintiff's claim for interest a *res judicata*. From this judgment the defendant appellant preferred an appeal under section 10 of the Letters Patent.

Pandit *Madan Mohan Malaviya*, for the appellant.

Munshi *Ratan Chand*, for the respondent.

* Appeal No. 42 of 1900, under section 10 of the Letters Patent.

(1) (1891) 2 Q. B. D. 574.
(2) (1892) I. L. R. 15 Mad. 264.
(3) (1891) I. L. R. 15 Mad. 494.
(4) (1888) I. L. R. 11 All. 148.
(5) Weekly Notes, 1900, p. 173.

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given to the officer conducting the sale and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held The [illegible] made an application under section 311 to [illegible] ve the sale set aside That applica [illegible] expected then, that the Subordinate Judge, as provided by section 312, would have at once passed an order confirming the sale He did not adopt that course, because he discovered that one only of the auction purchasers decree holders had put in the receipt under the second clause of section 294 The learned Subordinate Judge held that the presentation of a receipt by one only of two joint decree holders was insufficient He therefore set aside the sale and directed a re sale, notwithstanding that the other decree holder admitted that the receipt had been presented on his behalf also

On appeal to the District Judge that officer set aside the order of the Subordinate Judge and passed an order confirming the sale In this appeal the only point taken before us is, that no appeal lay to the District Judge The learned vakil for the [111] appellant first of all contended that the order was purely interlocutory This however, he did not seriously press, and we do not think there is anything in it His second and third contentions were, that the order was not appealable under section 588, nor was it appealable under section 244 Now the facts show that an application was made under the second clause of section 294 , such an application can be made only by a person who is a decree holder , the fact that the person who made the application had become an auction purchaser is immaterial , he is still none the less a decree holder The point which the Subordinate Judge had to decide was, *whether the receipt put in by one decree holder, acting both for himself* and the co decree holder, was one which should be accepted, and on which part satisfaction of the decree should be entered up In our opinion this is eminently a case under section 244 , the question before the Court related undoubtedly to the execution and part satisfaction of the decree, and the parties before the Court were the parties to the suit, *i e*, the decree holder and the judgment debtor, and they were disputing with one another in that capacity as to the part satisfaction of the decree It is absolutely immaterial, in our opinion, that one of the parties on one side happened to be also the auction purchaser In our opinion the order passed by the Subordinate Judge was a decree under section 244 of the Code of Civil Procedure, within the meaning of that word as defined in section 2 of that Code, and was therefore appealable to the District Judge In this view it is unnecessary for us to consider the contention of the respondent that the appeal to the District Judge might be considered an appeal under section 588, clause (16), from an order under section 312, setting aside a sale of *immoveable property*

For the above reasons we dismiss this appeal with costs

Appeal dismissed

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24 A. 112= A. W. N. 1901, 177.

due out of *khata* No. 29, the matter in issue in the previous suit cannot be said to be directly and substantially in issue in the present suit. In other words, according to him, identity of subject-matter is a material ingredient in all questions of *res judicata*, and where the subject-matter in both the suits is not identical, it would not be safe for Courts of Justice to hold that an issue, however apparently the same in [115] both cases, was in reality the same. Other considerations might easily be conceived to arise which would alter the whole aspect of the two cases and make them materially different. In his argument he adopted the reasoning which appears to have had great weight with our brother Banerji. He asks us to consider whether if two bonds are executed by the same debtor in favour of the same creditor on exactly similar terms with no point of difference between them, and if in a suit brought on the basis of one of the bonds the question arose whether under the terms of that bond interest was payable, a decision on that point would operate as *res judicata*, were the same question to arise upon a suit brought on the second bond. The fallacy which underlies this argument appears to us to be that in the case of the two bonds two separate titles exist, and the holder of the bonds when litigating upon bond *A* is not litigating upon the same title as when he litigates upon bond *B*. Now such circumstances are widely different from those which we have to consider in the present appeal. The title under which the plaintiff claims the arrears of revenue, whether they accrued due on *khata* No. 29, or on *khata* No. 47, is one and the same title. Putting aside, however, the case of the two bonds, we really have to come back to consider whether under the Statute Law in India identity of the subject-matter is or is not material whenever a plea of *res judicata* has to be considered. In coming to a conclusion upon this we cannot fail to take notice of the difference between the language in which Section 2 of Act No. VIII of 1859, and that in which Section 13 of Act No. XIV of 1882, is couched. There is no express allusion to the subject-matter in Section 13. The result or the fruit of the litigation at which the parties are aiming is no longer a matter for consideration of the Courts. What is to be considered is, if the metaphor may be extended, the root of the difference between them, and the Courts are now forbidden to try any issue in which the matter directly and substantially in issue in the subsequent suit had been directly and substantially in issue in the former suit. This is more in accordance with the principles on which the rule of *res judicata* is founded. Those principles are two in number—the one, public policy, that it is in the interest of the State that there should be an end of litigation; and [116] the other, the hardship on the individual that he should be vexed twice for the same cause. The root of the matter between the parties, whether it related to *khata* No. 29 or to *khata* No. 47 is the liability of the defendant to pay interest on arrears of Government revenue. The defendant put that into issue in the previous suit of 1897. He was unsuccessful in the litigation which then ensued. Can he, or should he now be allowed to reopen that litigation merely because he says that since that suit was decided there is another plot of land, the revenue of which, is held under the same title and under precisely the same circumstances under which the revenue of the former parcel was held, but as it is a different parcel, I ask now to be allowed to commence a new litigation in the hopes that the Court may arrive at a different conclusion with regard to parcel *B* from that at which it arrived with regard to parcel *A*? There

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KNOX, ACTING, C. J. and BLAIR, J.—This case has been argued with great force and ability by the learned vakil for the appellant. The matter which is before us for determination is whether the liability of the appellant to pay interest on certain arrears of land revenue over a particular area is or is not *res judicata*. No other point is before us. In order to understand what led up to the present plea it is only necessary to set out that the respondent in a previous suit instituted a claim for arrears of Government revenue to which he alleged that he was entitled and which arose out of what is known as *khata* No. 47 in mauza Fateh pura. In addition to the arrears of Government revenue which he claimed, he also sued for interest. The respondent is assignee of Government revenue in mauza Fatehpura, and apparently this mauza consists of several *khatas*. In that suit the present appellant was defendant. He contested *inter alia* the liability to pay interest. His contention was that arrears of Government revenue did not carry interest with them. The Government could not have claimed interest, and an assignee of Government revenue was in no better position and therefore could not claim interest. The issue whether the defendant was liable to pay interest on arrears of assigned land revenue was heard and determined, and the final determination was that the defendant was liable. In the suit out of which the present appeal arises the claim was for arrears due on account of *khata* No. 29 and not on account of *khata* No. 47. The same matter, namely, whether the appellant was liable to pay interest upon arrears of Government revenue, was put in issue. Curiously [114] enough, the appellant in his written defence expressly stated that the claim for interest was barred by Section 13 of the Code of Civil Procedure. The issue as framed by the Court of first instance runs thus :—"Is the plaintiff entitled to receive interest on the principal amount claimed, and has this point been previously decided ?" This issue was determined by that Court in the respondent's favour. The question was again raised by the appellant in appeal, and the lower appellate Court held that interest was payable. Neither of the Courts below in so many words touched upon the question of *res judicata*. Whatever determination there had been was in favour of the respondent ; and as he won in both Courts he was under no necessity of raising it. In this Court, however, the learned Judges came to the conclusion that interest was not payable, and the learned counsel for the respondent seems at once to have put forward the plea that this liability had been in issue, had been previously heard and determined, and could not be put in issue again. The learned Judges before whom the plea was raised held different views. The result was that the order of our brother Aikman, which affirmed the decree of the Court below, prevailed. But as our brother Banerji differed from him, the matter was open to appeal and has resulted in the appeal which is now before us.

The learned vakil for the appellant admitted in his argument that in both the suits, namely, that which was decided by the District Judge on the 1st of June, 1897, and that out of which the present appeal has arisen, the parties are the same they are litigating under the same title ; and the Court in which the issue was previously raised was a Court of jurisdiction competent to try the suit in which the issue has now been subsequently raised. He however, contends that inasmuch as the suit of 1897 was for arrears of revenue due out of *khata* No. 47, and the present suit is for arrears of revenue

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"present suit, *viz.*, the title of the *tarwad* or of the *devasom*, was one "[118] within the cognizance of the Subordinate Court, and it having "been decided in the former suit, we do not think that the plaintiffs are "entitled, by merely adding the Raja of Cochin as a party defendant, to "call upon the District Court to decide an issue which has already been "decided by a Court of concurrent jurisdiction." Now this is precisely what we hold in the present appeal. It is the matter in issue by which we are to be guided in deciding whether a plea of *res judicata* should or should not prevail. The matter in issue here, namely, the liability to interest upon arrears of Government revenue having been decided in the former suit, we do not think that the defendant is entitled, by merely pleading that the fraction to which the matter in issue refers in the present suit is not the same fraction to which it referred in the previous suit, to call upon the Courts to decide an issue which has already been heard and determined by a Court of competent jurisdiction. Lastly, he referred us to the case of *Balkishan* v. *Kishan Lal* (1). As we understand that judgment, it is against the appellant. We should be prepared to hold that where the previous judgment negatives the liability, the main obligation itself, the defendant cannot re-agitate the same question of liability by saying that it refers to another portion of the property over which the whole liability, whatever its nature may be, is one and the same. It is always a serious matter to perpetuate a wrong decision, and we can quite understand our brother Banerji's reluctance to affirm the liability which in his view has been wrongly imposed by the Judge of Agra. But where the provisions of the law are so clear and emphatic as in section 13 of the Code of Civil Procedure, we find no option but to follow them. The question, moreover, arises whether it is not a more serious matter that opportunities should be given for protracted litigation than that a judgment apparently wrong should be affirmed. For these reasons we hold that the question of liability of the defendant to pay interest on arrears of land revenue is *res judicata*, and is a bar to the re-determination of that issue. The appeal is dismissed with costs.

Appeal dismissed.

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24 A. 119 (=A. W. N. 1901, 183.)

[119] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

BELA BIBI (*Defendant*) *v.* AKBAR ALI (*Plaintiff*).*
[13th August, 1901.]

Pre-emption—Muhammadan Law—Mortgage by a successful pre-emptor of the pre-empted property to a stranger—Pre-emptive rights of decree-holder not thereby destroyed.

The plaintiff in a pre-emption suit having obtained a decree for possession, in order to provide the means of paying the pre-emptive price mortgaged the property, the subject of the suit, to a stranger. *Held* that, whatever rights the mortgage to a stranger might or might not give rise to in the future, the successful plaintiff did not by that transaction forfeit the fruits of her decree. *Rajjo* v. *Lalman* (2) distinguished. *Ram Sahai* v. *Gaya* (3) referred to.

[Ref. 2 I. C. 855.]

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* Second Appeal No. 788 of 1900, from a decree of J. H. Cumming, Esq., District Judge of Azamgarh, dated the 14th April, 1900, confirming a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 9th February, 1900.

(1) (1888) I. L. R. 11 All. 148.
(2) (1882) I. L. R. 5 All. 180.
(3) (1884) I. L. R. 7 A. 107.

would be no end to the litigation which might ensue if in respect of each parcel the litigation might be reopened Both the principles upon which the plea of *res judicata* rests would be violated if we allowed this contention to prevail It is not as if the respondents were able to say to us there exists with regard to plot No 47 a fact which did not exist in the case of plot No 29, and which so materially alters the circumstances of the case that the matter directly and substantially in issue in the two cases is only apparently and not in reality the same Again, it would be different if the appellant were able to say that the matter directly and substantially in issue in the former suit fell short of going to the very root of the title upon which the claim rests Neither of these assertions are or can be made in the present case The previous judgment affirms positively the title of the plaintiff to recover interest upon arrears of the Government revenue which has been assigned to him in respect of mauza Fatehpura, and the plaintiff cannot now reagitate the same question of liability upon the pure and simple incident that the subject matter of the present suit is geographically distinct from the subject matter of the previous suit

The learned vakil called our attention to the case *Ex parte Ador* (1) In our opinion that case lends no support to the [117] appellant's contention It is one of a highly exceptional character, and from it no general conclusions can be drawn adverse to the principle of *res judicata* The debtors had guaranteed the repayment of a loan of £1 000 with interest The loan was to be repaid by a gradual amortisation of 20 per cent from a given date The first annual instalment was due in April, 1890, but before that date the debtor Ador had become a bankrupt, and a receiving order had been made against him From that date the status of the parties was essentially altered Instead of the creditor being entitled to gradual repayment as stipulated in the guarantee, he was under the bankruptcy law entitled to immediate payment The order by which it was contended that the claim of the creditor for interest was precluded by the principle of *res judicata* was an order rejecting his claim to interest for a short period before and up to the receiving order From that moment the status of the parties was materially altered, their rights were substantially modified by the provisions of the law of bankruptcy, and their claim had ceased to be based upon and limited by their purely contractual relation The creditor was therefore suing under a different title and was not prevented in the fresh litigation from reopening the question of the debtor's liability to pay interest In the words of the judgment of the Court "the point before the Court now is a totally different one and ought to be decided on its merits, although that course renders it necessary to reconsider the construction of the letter in question," that is, of the letter which had received a different construction in the previous order

He also referred us to *Madhavi* v *Kelu* (2) Undoubtedly there is a portion of the judgment in that case which is in his client's favour, but we notice that the learned Chief Justice, who was a party to that decision, was also a party a month later to the decision in *Kunji Amma* v *Raman Menon* (3), in which (at p 497) he laid down that "It is the matter in issue in the suit that forms the essential test of *res judicata*"—*Pahlwan Singh* v *Risal Singh* (4) The matter in issue in the

(1) (1891) 2 Q B D 574
(2) (1892) I L R 15 Mad 264
(3) (1891) I L R 15 Mad 494
(4) (1881) I L R 4 All 55.

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held as to Musammat Bela Bibi that she had forfeited her rights by reason of the mortgage of December [121] 6th, 1899. The Court also rejected the claim of Maula Bakhsh, finding him guilty of collusion. A decree for pre-emption of the whole property was given in favour of Akbar Ali on payment of a certain sum. The decree did not purport to set aside or in any way to interfere with the decree obtained by the appellant on November 14th, 1899. From that decree three appeals were taken before the District Judge, namely, one by Musammat Bela Bibi and two by Maula Bakhsh.

In Musammat Bela Bibi's appeal the District Judge held that her pre-emptive rights were superior to those of Akbar Ali, but found that she had forfeited them by executing the mortgage of December 6th, 1899.

On second appeal to this Court Musammat Bela Bibi contends, among other matters which need not now be referred to, that the lower appellate Court was wrong in holding that she had forfeited her pre-emptive rights. For the respondent in support of the decree of the lower Court it was objected, under section 561 of the Code of Civil Procedure, that the Court below was wrong in holding that the appellant possessed a right of pre-emption superior to that of the respondent Akbar Ali. I will dispose of this matter first. I am of opinion that the District Judge is right, and for the reasons given by him, in holding that Musammat Bela Bibi had a preferential right. Indeed, as pointed out above, Akbar Ali must be taken to have admitted this in his plaint, where he stated that in respect of this same property Musammat Bela Bibi's father had a right of pre-emption superior to that held by his predecessor in title. The vakil who appeared for the respondent laboriously and valuably spent much time in addressing us on the interpretation to be put on the words "hissadar karibi" in a wajib-ul-arz relating to a pure zamindari village, quite ignoring and not contesting the finding of the lower appellate Court that the village had been partitioned into thokes and sub-divisions of thokes, and therefore could not be considered to be pure zamindari. His arguments therefore do not require any notice. As to Musammat Bela Bibi's appeal, I notice that the decisions of the two lower Courts that she had forfeited her pre-emptive rights are largely founded on the case of *Rajjo* v. *Lalman* (1). [122] In my opinion that case has no bearing whatever on the question here. In that case Musammat Rajjo was the plaintiff in a pre-emption suit, who before suit had mortgaged to third parties the property which she subsequently sought to recover by right of pre-emption. It was held by this Court as between the pre-emptor and the vendor and vendee, that in consequence of having executed that mortgage she had disqualified herself from enforcing her pre-emptive rights. In the case now under appeal Musammat Bela Bibi is not the plaintiff, nor has she asked the Court to grant her a pre-emptor's decree for possession of the disputed share. She had already obtained that relief by the decree in her own suit. The plaintiff is Akbar Ali, a person who possesses a right of pre-emption, but one which is inferior to that of the appellant. He it is who has asked the Court in this case to give him a pre-emptor's decree for possession of the property. The case cited above does not apply to the facts of this case, and I am not inclined to extend further the principle on which that case depends. The respondent had of course to get

(1) (1882) I. L. R. 5 All. 180.

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THE facts of this case are fully stated in the judgment of Burkitt, J

Pandit *Moti Lal Nehru* and Maulvi *Muhammad Ishaq*, for the appellant

Moulvi *Ghulam Mujtaba* (for whom Pandit *Baldeo Ram Dave*), for the respondent

BURKITT, J —This is one of three appeals in a pre emption suit against a decree of the District Judge of Azamgarh declaring that the appellant Musammat Bela had forfeited her pre emptive rights, and giving a decree for possession of the pre empted property in equal shares to two other rival claimants, one of whom is the respondent, Mir Akbar Ali

The property, the subject of the pre emption claim, consists of a 4 pie share which belonged to one Waris Ali On October 20th, 1898, Waris Ali conveyed that property by sale to one Muhammad Ali who is admittedly a "stranger

Thereupon on October 2nd, 1899, the appellant Musammat Bela Bibi instituted a pre emption suit against the vendor and vendee, and obtained a decree by consent on November 14th, 1899 The decree was for possession of the pre empted property on payment of the sale consideration, Rs 975, within a limited period to the vendee Not having so much ready money available Musammat Bela Bibi on December 6th, 1899, mortgaged the pre empted share for Rs 1 500, paid the Rs 975 into Court [120] on December 8th, 1899, and was put into possession of the pre-empted share on January 7th, 1900

Meanwhile the respondent Akbar Ali had on October 5th, 1899, instituted a suit for possession by pre emption of the same property Among the defendants he impleaded Musammat Bela Bibi and another rival pre emptor one Maula Bakhsh

The summons to appear and defend the suit was not served on Musammat Bela Bibi till three days after November 14th, which was the date on which she obtained her decree for possession of the pre empted property

In Akbar Ali's plaint there is only one paragraph which affects the appellant Musammat Bela Bibi That is the 5th paragraph, in which the respondent charges Musammat Bela Bibi with having instituted a collusive pre emption suit, as, he says, her father had done on a previous occasion. This is the only reference in the plaint to the appellant It is to be noticed that Akbar does not allege that he possessed a pre-emptive right superior or preferential to that of Musammat Bela Bibi Indeed he rather implies the contrary in the same paragraph, where he alleges that Musammat Bela's father had "a preferential right as against the plaintiff's (Akbar Ali's) ancestor ' in a former suit for this same property

In her written statement Musammat Bela Bibi asserted her superior right of pre emption, and denied the existence of any collusion between her and the vendee

On these pleadings the parties went to trial Five issues were fixed by the Court of first instance, but none of them raised the plea on which the decisions of the lower Courts are chiefly founded, namely, that Musammat Bela Bibi had forfeited her pre emptive right by the fact she executed the mortgage of December 6th, 1899, to raise the money to comply with the terms of her decree That document had not been executed at the date of Akbar Ali's suit, nor until after the pleadings in that suit had been filed and issue joined on the pleadings

Eventually the Court of first instance held that all three claimants for pre emption were on the same level and had equal rights, but further

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admitted that the appellant had a preferential right of pre-emption. At the present hearing the respondent appeared by other counsel who preferred to argue the point.

The wajib-ul-arz of the village provides that pre-emption may be claimed firstly, by *hissadar karibi* ; secondly, by co-sharers in the same thoke as the vendor ; thirdly, by co-sharers in other thokes ; and fourthly, by relations of the vendor.

The appellant and the vendor were co-sharers in the same sub-division of the thoke. The respondent Akbar Ali holds a share in a different sub-division of the thoke.

In villages of pure zamindari tenure where there was nothing to which such words as *karibi*, *nazdiki* and *mukaribat* could apply except to relationship with the vendor, it has been held that those words in the wajib-ul-arz applied to relationship—see, for example, *Gursaran* v. *Akhandanand* (1) and *Muhammad Sadi* v. *Muhammad Abdul Razzak* (2) ; but where that was not the case such words have been held to apply, not to relationship, but to holders of shares in the same sub-division of the village or tenure, in one case a *khata* and in another a thoke—see *Mahadeo Prasad* v. *Sahiba Bibi* (3) and *Balzor Rai* v. *Madho Rai* (4). In fact it is a question which must be decided in each case with reference to the terms of the particular wajib-ul-arz and the circumstances of the village and tenure.

In the present case it appears to me that the words *hissadar karibi* do not refer to relations of the vendor. They are provided for as a separate class. Having regard to the scheme provided by the wajib-ul-arz, I think that the word *karibi* refers to co-sharers who are near to the vendor in some sense other than relationship. In my opinion the lower appellate Court was right in holding that the appellant being a co-sharer of the vendor in the same sub-division of the thoke was a *hissadar karibi* as compared with the respondent, who is only a co-sharer in the same thoke.

The next question is whether the appellant has, as found by the Courts below, forfeited her right of pre-emption by having mortgaged the share in question to a stranger during the pendency of the suit brought by the respondent Akbar Ali.

[125] I have found some difficulty in arriving at a decision on this question.

What Bela Bibi did was this :—She sued the vendor and vendee for pre-emption, and after having obtained a decree she mortgaged the share in question in order to obtain funds wherewith to comply with the terms of the decree. So far it would appear on the authority of the decision of this Court in *Ram Sahai* v. *Gaya* (5) that she did nothing which could prevent her from claiming the property from the vendee. In fact in the present case she took out execution of the decree and obtained possession. But it is said that, as the suit of the present respondent against her was then pending, she brought herself within the rule laid down in *Rajjo* v. *Lalman* (6), in which it was held that a co-sharer in a village who had under the wajib-ul-arz a preferential right to the mortgage of a share in that village forfeited such right by mortgaging such share to a stranger in anticipation of the success of her suit to enforce that right. The

(1) Weekly Notes, 1890, p. 227.
(2) Weekly Notes, 1891, p. 137.
(3) Weekly Notes, 1887, p. 260.
(4) Weekly Notes, 1895, p. 78.
(5) (1884) I. L. R. 7 All. 107.
(6) (1882) I. L. R. 5 All. 180.

rid of the appellant s superior right but the only allegation he made against her in the plaint was that she had had instituted a collusive pre emptive suit By this allegation I presume he meant that the plaintiff when instituting her suit intended in some way with the connivance of the vendee to leave the property in the hands of the latter The only facts alleged in proof of this collusion are firstly that appellant s father did something of the kind some time ago in another suit This is really too absurd, and I am not a little surprised that the two lower Courts should have paid any attention to such an allegation Then it is said, appellant got a decree in her suit on a compromise without contesting the amount of the consideration money, and that therefore the suit was collusive There is in my opinion nothing in this matter It means no more than that the vendee knowing he had no case against appellant forebore to defend a hopeless suit, and that Mussamat Bela Bibi, rather than go to the trouble and expense of producing witnesses to prove a negative (namely that full consideration had not passed), accepted as correct the purchase money set forth in the deed of sale of October 20th, 1898 And further she admittedly paid that amount into Court, and was put into possession of the [123] disputed shares She may have paid a high price, but as she admittedly did pay it there is no more to be said In my opinion nothing has been established on which it is possible to find collusion between the appellant and the vendee As to the question of forfeiture I have shown above that the case of *Rajjo* v *Lalman* (1) is not in point It would, I think, be most dangerous to extend to the facts of this case the doctrine laid down in the case just cited I know of no case in which it has been held that a person in the position of the appellant, that is to say, one who has obtained a decree for possession of certain property on paying a certain sum, and who raised money on the security of that property to pay off the purchase money, thereby forfeits his pre emptive rights The plaintiff s act in raising money by a mortgage of that property is not inconsistent with the object for which the pre emption suit was brought The money was raised on mortgage for the purpose of perfecting the decree for possession she had already obtained, and which she perfected by paying the sum due and obtaining possession No doubt she borrowed the money and gave the mortgage while Akbar Ali s suit was pending But she had no knowledge of his suit for three days after she obtained the decree in her own suit Was she then bound, though knowing she had the superior claim, to put off all attempts to perfect her decree until the respondent's suit had been decided, and so forfeit the benefit of her decree by not paying up the purchase money within time? Had she acted in that manner, the two lower Courts would no doubt have treated her act as further evidence of collusion

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For the above reasons I am of opinion that the Courts below were wrong in holding that the appellant forfeited her pre emptive rights I would therefore allow this appeal, and, setting aside the decree of the lower Courts, I would dismiss the respondent's suit with costs in all Courts

CHAMIER, J —The first question which we have to decide in this case is whether the appellant Musammat Bela Bibi has a right of pre emption superior to that of the respondent Akbar Ali

This case came before me sitting alone and was referred by me to a Bench of two Judges At that hearing counsel for the [124] respondent

(1) (1882) I L R 5 All 180

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24 A. 127= A. W. N. 1901, 152.

24 A. 127 (=A. W. N. 1901, 152.)

[127] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

MEGH SINGH (*Defendant*) *v.* TIKA RAM (*Plaintiff*).*
[14th August, 1901.]

Act No. XII of 1881 (*North-Western Provinces Rent Act*), *section* 56—*Land-holder and tenant—Distraint—Hypothecation for rent of produce of land.*

Held, on a construction of section 56 of Act No. XII of 1881, that when the rent of a tenant is in arrears the land-lord is entitled to distrain any crop growing on the tenant's holding, no matter by whom that crop was sown. *Geetum Singh* v. *Buldeo Kahar* (1), and *Fatima Begum* v. *Hansi* (2) referred to.

[Ref. 4 A. L. J. 754.]

THE facts of this case were as follows:—Megh Singh levied a distress against Sewa Ram, Musammat Kishori and Chote Singh. Tika Ram contested it on the ground that the crops distrained were his, and could not be distrained for an arrear due from Sewa Ram and others. The Court of first instance (Assistant Collector) held that the distress was valid, and dismissed the claim, finding that the plaintiff was in the position, as regards the defendant, of a sub-tenant. The plaintiff appealed. The lower appellate Court (Additional District Judge of Agra) holding that even if the plaintiff was a sub-tenant, that would not entitle the defendant to distrain his crops, and that there had been no finding at to the ownership of the crops, remanded the suit for trial under section 562 of the Code of Civil Procedure. Against this order of remand the defendant appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gokal Prasad*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

BURKITT, J.—In my opinion the decision of the Officiating District Judge in this case is wrong. When the rent of a tenant (in this case an occupancy tenant) is in arrear, the land-lord is, I think, entitled to distrain any crop growing on the tenant's holding, no matter by whom that crop was sown. This seems to me to be the clear meaning of the words " the produce of all lands in the occupation of a cultivator shall be deemed to be hypothecated for the rent payable in respect of such land." In my opinion it makes no matter whether such crop was sown, as in this [128] case, by the sub-tenant of an occupancy tenant or by the occupancy tenant himself. This is the view that was taken by this Court in the case of *Geetum Singh* v. *Buldeo Kahar* (1) and in the observations of the late Chief Justice in the case of *Fatima Begam* v. *Hansi* (2). A similar rule has been adopted by the Board of Revenue. It may be that the wording of section 56 is open to some possible argument, but I am of opinion that that question is now covered by authority. I would allow this appeal, and, setting aside the order of the lower appellate Court, restore the decree of the Court of first instance with costs in all three Courts.

CHAMIER, J.—I concur on the ground that the question has been settled by the authorities to which my learned colleague has referred.

*First Appeal No. 190 of 1900 from an order of Lala Baijnath, B. A., Rai Bahadur, Additional Judge of Agra, dated the 22nd September 1900.

(1) (1872) 4 N.-W. P. H. C. Rep. 76. (2) (1887) I. L. R. 9 All. 244.

reasons for that decision seem to be that a right of pre emption being a personal right cannot be made the subject of sale or bargain of any kind, and that the plaintiff could not be allowed to complain of the infringement of a right which she herself had also infringed In the latter case in 7 Allahabad it was said that the principle established by the decision in *Rajjo* v *Lalman* (1) was that when a pre emptor in anticipation of his success in a pre emption suit transfers the "pre emptional property in any manner inconsistent with the object of the suit for pre emption, the plaintiff forfeits his right and his suit would be dismissed

There are several points in which that case differs from the one now before us —In the present case the appellant did not mortgage the share until she had obtained a decree for it against the vendee, and she is not a plaintiff complaining of the infringement of a right At the date of the respondent's suit he had no right (according to my interpretation of the wajib ul arz) to obtain a decree against the appellant It has been held that the right of a plaintiff suing for pre emption must remain firm up to the date of the decree [See *Ram Gopal* v *Piare Lal* (2)], but [126] it does not follow that a person having the best right to pre empt, who enforces that right and actually takes possession from the vendee should be compelled to surrender her acquisition merely because, after she has established her right, she mortgages the property to a stranger

On the other hand it may be said that where, as here rival pre emptors are parties to a suit, the pre emptor who is arrayed as defendant to the suit is none the less a claimant to the right of pre emption and that the rules which require a plaintiff not to deal with his right of pre emption apply with equal force to a defendant in such a case as this There is considerable force in this contention, but on consideration I have come to the conclusion that we should not hold that the appellant has forfeited her right of pre emption She obtained her decree for pre emption before notice of Akbar Ali s suit was served upon her She did not bargain with her right of pre emption but what she dealt with was the property which she had established her title to A person who establishes her right of pre emption by suit, and takes possession under the decree, and then proceeds to mortgage the property to a stranger cannot be called upon to surrender the property to a person having an inferior right of pre emption, though the mortgage in such a case may give rise to a fresh right of pre emption In the present case I think that Bela Bibi had arrived at a stage when she was entitled to deal with the property without thereby forfeiting her right to it

It was said that all the proceedings in Bela Bibi s suit were held in the interest of the vendee That was not the case put forward in the first Court The Subordinate Judge drew up a *rubkar* in which the allegations of the defendant Akbar Ali are set out They amount to nothing more than that Bela Bibi in exercising her right of pre emption was actuated by the desire to prevent Akbar Ali and others from pre empting the property

I concur in the order proposed by my learned colleague

BY THE COURT —The order of the Court is that this appeal be allowed, the decrees of the two lower Courts be set aside, and the suit of Akbar Ali be dismissed with costs in all Courts

Appeal decreed

(1) (1882) I L R 5 All 180

(2) Weekly Notes 1899 p 163

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24 A. 128= A. W. N. 1901, 189.

The Court of first instance (Munsif of Muzaffarnagar) held that the plaintiff had failed to prove Ram Chandar's adoption by Jawahri; but relying on the rule of law laid down in *Suraya Bukta* v. *Lakshminarasamma* (1), gave the plaintiff a decree, holding that "grandsons" not being included in the word "sons" the defendant as grandson of the brother of the propositus was not entitled to succeed in preference to the plaintiff, who was the son of the paternal uncle of the propositus.

The defendant appealed. The lower appellate Court (Subordinate Judge of Saharanpur) held that the defendant had a preferential right to succeed as against the plaintiff, and set aside the decree of the Munsif and dismissed the plaintiff's suit. The Subordinate Judge referred to the ruling in *Suda Singh* v. *Sarfaraz Kunwar* (2).

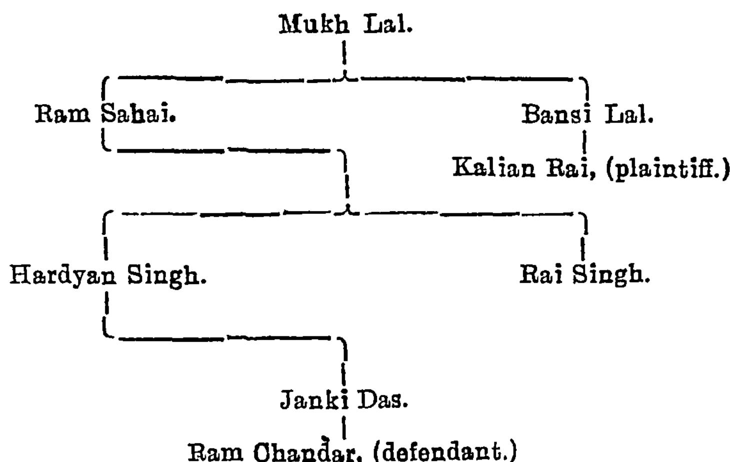
From this decree the plaintiff appealed to the High Court.

[130] Munshi *Jang Bahadur Lal*, for the appellant.

Mr. *S. S. Sinha*, for the respondent.

BURKITT and CHAMIER, JJ.—This appeal arises out of a suit brought by the appellant Kalian Rai against the respondent Ram Chandar for possession of the immoveable property of one Rai Singh, deceased.

The following genealogical table shows the relationship of the parties to the deceased:—



The parties are admittedly governed by the Hindu law of the Mitakshara school. The question which we have to decide is which of the parties (who are both equally near in degree to the propositus) has a preferential right to succeed—the plaintiff as the uncle's son of the deceased, or the defendant as the brother's grandson of the deceased.

The Munsif decided in favour of the plaintiff; but on appeal his decree was reversed by the Officiating Subordinate Judge. Hence this appeal by the plaintiff.

The Mitakshara provides that—

"On failure of the father, brethren share the estate."—Chapter II, section IV, verse 1.

"On failure of the brothers also, their sons share the heritage."—Ib., verse 7.

"If there be not even brothers' sons, gentiles (*gotraja*) share the estate: gentiles are the paternal grandmother and *sapindas* and *samanodacas*."—Section V, verse 1.

(1) (1881) I. L. R. 5 Mad. 291. (2) (1896) I. L. R. 19 All. 215.

BY THE COURT —The order of the Court is that the appeal be allowed, that the remand order of the lower appellate Court is set aside, and the decree of the Court of first instance restored, with costs in all Courts.

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Appeal decreed.

24 A 128 (=A. W N 1901, 189)

APPELLATE CIVIL

Before Mr. Justice Burkitt and Mr. Justice Chamier

KALIAN RAI (*Plaintiff*) v. RAM CHANDAR (*Defendant*) *

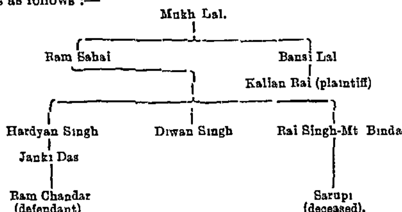
[15th August, 1901.]

Hindu Law—Mitakshara—Succession—Question of priority between the son of the paternal uncle of the deceased and his brother's grandson.

[illegible] school the grand- [illegible] uncle *Sam* [illegible] *ajunder Narain* [illegible] *Kooer* v. *Rajoo* [illegible] *Suda Singh* v. [illegible] *narasamma* (7) [illegible]

[Ref. 10 M L T 226, 37 All 604; 35 Bom 389, Appl 34 All 663, Not foll. 35 Mad 152, Fol 20 I C, 32]

THIS appeal arose out of a suit in which the plaintiff, Kalian Rai, laid claim to the estate of one Rai Singh the son of the [129] plaintiff's uncle The pedigree of the family, so far as it concerns the present suit, was as follows :—



The defendant Ram Chandar was thus the grandson of one of the brothers of Rai Singh The plaintiff alleged that Ram Chandar having been adopted by one Jawahri had no claim whatever to the estate of Rai Singh, to the whole of which he asserted that he himself was entitled The defendant denied that he had been adopted by Jawahri and contended that he was entitled to the entire property of Rai Singh, of which he said he had been in possession since the death of Musammat Sarupi, the daughter of Rai Singh

* Second Appeal No 267 of 1899, from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 6th January, 1899, reversing a decree of Pandit Kunwar Bahadur, Munsif of Mozaffarnagar, dated the 7th February, 1898

(1) S D A, L P 1855, p 382
(2) (1839) 2 Moo I A 132
(3) (1866) 6 W R C R 158
(4) (1870) 14 W. R. C R 208
(5) (1870) 13 Moo I A 373
(6) (1896) I L R 19 All 215
(7) (1881) I L R 5 Mad 291

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translated "sons" and "issue" in verses 4 and 5 of Sec. 5 of chap. II mean sons and other descendants of the sons and grandsons; that this was shown by the words "on failure of the father's descendants" in verse 4, and by the words "on failure of the paternal grandfather's line" in verse 5, and that to adopt the literal and stricter construction would be to cut off all the descendants below the grandson of the father, which would be inconsistent with other provisions of the Mitakshara.

In the case of *Kureem Chand Gurain* v. *Oodung Gurain* (1), Jackson, J., quotes the above opinion of Mr. Harrington with approval, and infers that he would have construed "brother's sons" as including brother's grandsons and proceeds, to state his own opinion that the word "sons" in the Mitakshara does, as a general rule, include all descendants in the male line who can offer funeral oblations.

In the case of *Oorhya Kooer* v. *Rajoo Nye* (2), the Court seems to have been of opinion that a brother's grandson was entitled to succeed in preference to the great-grandfather's great-grandson.

[133] The question was discussed at length in *Suraya Bhukta* v. *Lakshminarsamma* (3) by Sir Charles Turner, C. J., and Kindersley, J., who held that according to the Hindu law current in the Madras Presidency, a brother's grandson did not exclude a paternal uncle's son. They took the view that the word "sons" in the Mitakshara, chap II., sec. IV, verse 7, and sec. V, verse 1, should be construed literally and did not include grandsons. The learned Judges considered the opinion of Mr. Harrington quoted above to be an *obiter dictum*. They do not refer to the opinion expressed in the other cases cited above, and they seem to have been influenced to a considerable degree by the writings of commentators, whose works are not, as far as we are aware, accepted as authoritative in these provinces. Some passages in the judgment suggest that, in their opinion, no grandsons of collaterals are entitled to inherit. Such a rule would be inconsistent with the decision of the Privy Council in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (4) and *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (5) where the successful claimants were respectively fifth and sixth in descent from the common ancestor. Lastly, the judgment of the Madras High Court does not indicate what place should be assigned to the brother's grandsons if they do not come in immediately after brother's sons. Mr. Raj Kumar Sarvadhikari, in his work on the Hindu law, comes to the conclusion that brother's grandsons should come in immediately after the brother's sons and before the paternal grandmother (Tagore Law Lectures, 1880, pp. 648—651). Messrs. West and Bühler, Vol. I., p. 124, 3rd edition, dealing with the question of the order in which *gotraja sapindas* not mentioned by the Mitakshara are to be placed, observed that the principle suggested by Mr. Harrington of continuing each line of heirs down to the seventh person could easily be carried out in the case of the paternal uncle's line and those descended from the sons of remoter ancestors; but that it could not be carried out in the case of the father's line because the brother's grandsons could not be allowed to inherit before the maternal grandmother whose right to succeed immediately after the brother's sons was [134] clearly settled, and because the brother's grandsons would thereby take precedence of the remoter descendants of the deceased himself,

(1) (1866) 6 W. R. C. R. 158.
(2) (1870) 14 W. R C. R. 208.
(3) (1881) I. L. R. 5 Mad. 291.
(4) (1870) 13 Moo. I. A. 373.
(5) (1839) 2 Moo. I. A. 132.

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[131] " On failure of the paternal grandmother, the *gotraja sapindas*, namely, the paternal grandfather and the rest, inherit the estate '— Section V, verse 3

" Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons ' —Section V, verse 4

" On failure of the paternal grandfather's line, paternal great grandmother, the great grandfather, his sons and their issue inherit In this manner must be understood the succession of (other) *gotraja sapindas* " —Section V, verse 5

" If there be none such, the succession devolves on *samanodacas* "— Section V, verse 6

There has been considerable conflict of opinion as to whether the brother's grandson is entitled to succeed immediately after, and in default of the brother's son, and if not, what place should be assigned to him

The Viramitrodaya does not actually mention the brother's grandson , but inasmuch as the author considers that the degree of spiritual benefit conferred upon the deceased proprietor should determine the preferential right of claimants to inheritance, who are in the same degree, it may be supposed that he would have preferred the brother's grandson to the paternal uncle's son, for the former offers an undivided oblation to the father of the deceased As to how far this view of the author of the Viramitrodaya can be accepted, see the judgment of Knox, J in *Suba Singh* v *Sarfaraz Kunwar* (1) and the judgment in *Bhyah Ram Singh Bhyah Ugur Singh* (2)

Apararka in his commentary (as to which see West and Buhler on Hindu Law, 3rd ed , Vol I , p 18) takes the same view According to him it would seem that the brother's grandson should come in immediately after the brother's son (see Tagore's Law Lectures, 1880, pp 426, 428) Balam Bhatta does not appear to have dealt with the question specifically

Nanda Pandita places the brother's grandson just before the paternal grandfather (see Sacred Books, Vol VII p 68 and Tagore Law Lectures, 1880, p 503)

[132] It would not be of any use to examine the commentaries which are not accepted as authorites in the Benares school ; but as far as we are aware, one of them only, the Smriti Chandrika, denies the right of the brother's grandson, while all writers of the Bengal school, of course, agree that he comes in immediately after the brother's son and the Vyavahara Mayukha propounds a doctrine, according to which the parties to the present case might share the inheritance half and half

Turning to reported cases in the Indian Courts, we find that the earliest case in which the question is mentioned is that of *Sambhoo Dutt Singh* v *Jhootee Singh* (3) That was a case from Tirhoot, where the Mithila law prevails , but it does not appear that there is any difference between the Mithila and Benares schools on this question The learned Judges say in their judgment " the right of succession only ascends on failure of brothers, nephews, and grandnephews "

In the case of *Rutcheputty Dutt Jha* v *Rajunder Narain Rae* (4) Mr Harrington expressed the opinion that the words in the Mitakshara

(1) (1896) I L R 19 All. 215 at pp. 224, 225, 226.
(2) (1870) 13 Moo. I A 373
(3) S D A L P (1855) p. 332.
(4) (1839) 2 Moo I A. 132

1901 AUG. 15. authority for the view that "brother's sons" should be read as "brother's grandsons."

APPELLATE CIVIL. We are of opinion that no ground has been shown for disturbing the decree of the lower appellate Court, and we therefore dismiss this appeal with costs.

24 A. 128= A. W. N. 1901, 189.

Appeal dismissed.

24 A. 136 (=A. W. N. 1901, 183).

[136] APPELLATE CIVIL.

Before the Hon'ble Mr. Chief Justice Stanley and Mr. Justice Burkitt.

JHAMMAN LAL (*Decree-holder*) v. HIMANCHAL SINGH (*Judgment-debtor*).* [17th August, 1901].

Act No. XIX of 1873 (*N. W. P. Land Revenue Act, section* 205*B—Attachment of property of disqualified proprietor—Profits accruing after the release of the* corpus *by the Court of Wards.*

Held that the prohibition contained in the second paragraph of section 205B of Act No. XIX of 1873 does not apply to the rents and profits of property which may accrue after the release of the *corpus* from the superintendence of the Court of Wards. *Himanchal Singh* v. *Jhamman Lal* (1) referred to.

THIS appeal arose out of certain proceedings for the execution of a decree against the respondent. The appellant obtained a decree against the respondent on the 14th of July 1898, at which time the property of the respondent was under the superintendence of the Court of Wards. In September 1899 the respondent's property was released by the Court of Wards. Subsequently to the release of the respondent's property the appellant attempted to execute his decree against such property and against certain profits which had accrued while the property was under superintendence, but in this he was defeated.—See *Himmanchal Singh* v. *Jhamman Lal* (1). The appellant next sought execution of his decree by realization of certain profits of the respondent's property which had been attached in pursuance of a former application for execution, but not released from attachment at the time when the attachment of the *corpus* of the property and of other profits had been raised. The judgment-debtor applied to the Court executing the decree praying that the attachment on these profits also should be raised. In reply the decree-holder sought to differentiate the present claim from his former unsuccessful claims against the property of the judgment-debtor on the ground which was admitted to be based on fact, that the profits which were then sought to be taken in execution had accrued due since the release of the *corpus* of the property from the superintendence of the Court of Wards. The Court executing the decree (Subordinate Judge of Mainpuri), however, gave effect [137] to the judgment-debtor's application and refused execution. Against this order the decree-holder appealed to the High Court.

Mr. *Amir-ud-din*, Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellant.

Pandit *Moti Lal* and Munshi *Gulzari Lal*, for the respondent.

STANLEY, C. J. and BURKITT, J.—This appeal raises a very nice question upon the true construction and meaning of s. 205B of the N.-W. P. Land Revenue Act. The property of the defendant at the time

* First Appeal No. 182 of 1900 from a decree of Pandit Rajnath Saheb, Subordinate Judge of Mainpuri, dated the 14th July 1900.

(1) (1900) I. L. R. 22 All. 364.

such as the great grandsons The learned authors suggest that in order to meet the difficulty the brother s grandsons should either be considered co heirs with the paternal uncle s son, or placed just before the paternal grandfather 1901 AUG 15 — APPELLATE CIVIL — 24 A 128= A W N 1901, 189

Shama Charan Sircar in his Vyavastha Chandrika Vol I, p 178, finds a place for brother s grandsons immediately after brother s sons

It is admitted on all hands that the brother's grandson is a near *sapinda* of the deceased He is therefore certainly entitled to inherit, and the only question is where he should come in

Mr A C Mittra and Mr Golap Chandra Sirkar in their works on the Hindu law express the opinion that the brother s grandsons come in after the grandsons of the great great great great grandfather of the deceased Such a reading of the Mitakshara brings about a result completely at variance with its leading principle that the inheritance is to go to the nearest *sapinda*

Messrs West and Buhler seem rather to beg the question, where they say that the paternal grandmother must inherit in preference to the brother s grandsons If the word "sons" and "brother's sons" in the verses last referred to are read as including grandsons, the latter will exclude the paternal grandmother

Considering that the words "sons ' and "issue ' in other parts of the same chapter have been read as including "grandsons" and that "grandson ' has been interpreted as including great grandson in order to give effect to the rule that the inheritance shall go to the nearest *sapinda*, and that in other respects the chapters on succession in the Mitakshara have been held to have been intended rather as an outline than as an exhaustive enumeration of heirs, we think that we shall not be doing violence to the text if we follow the opinions of Mr Harrington and other Judges, and construe the words "sons and ' brother s sons as including grandsons But even if that is not permissible, we see no reason why the brother's grandsons should not come in as the first *gotraja sapindas* entitled to succeed after the paternal grandmother under verse 3 of section V

[135] With regard to Messrs West and Buhler s objection that this will let the brother s grandsons in before the great great grandsons of the deceased, we would observe that according to Mr Harrington s view a great great grandson of the deceased would take immediately after the great grandson, and even if that view is not correct, the remote descendants of the proprietor might well be regarded as less nearly akin than the grand nephews (See opinion of Mr Mayne in his work on Hindu Law p 679 6th edition) The fact is that it is almost impossible for a single family to contain more than four generations in direct descent, so that it is scarcely necessary to consider the great great grandson of the proprietor We think that the verses of the Mitakshara quoted at the beginning of this judgment show sufficiently clearly that near *sapindas* must be exhausted before the estate can go to remote *sapindas* It seems to us that whatever test of propinquity be applied, the brother s grandson is a nearer *sapinda* of the deceased than the paternal uncle s son It may be that the line of each ancestor of the deceased should be continued down to the seventh person , but in the present case it is not necessary to go as far as that All that we hold is that the father s line, as far down as his great grandson, must be exhausted before the grandfather or his line can come in There is also, as shown above, considerable

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not appear at the trial of the suit, and a plaintiff who has got an *ex-parte* decree) on proof of his title or on a failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. *Ram Kirpal* v. *Rup Kuari* (1) referred to.

Ref. 5 O. C. 251 ; 24 All. 282 ; 23 I. C. 286=12 A. L. J. 206; Fol. 75 P. R. 1905=193 P. L. R. 1905 ; D. 90 P. R. 1902=20 P. L. R. 1903 : Fol. 19 I. C. 244 ; 7 A. L. J. 401=5 I. C. 210.

ONE Gauri Shankar obtained a decree for money against Majid Ali. Gauri Shankar having died, one Behari Lal, alleging himself to be a brother of Gauri Shankar, and one Musammat Sonkali, alleging herself to be the widow of a deceased brother of Gauri Shankar, applied for execution. No decision was come to on that application, but it was struck off under circumstances which did not make the striking off a dismissal. After this Behari Lal and Sonkali again applied for execution by arrest of the judgment-debtor. Notice of that application was apparently [139] served, but Majid Ali made no appearance, and a warrant of arrest was issued against him in his absence. This warrant was, however, never executed, and the application for execution proved infructuous. A third application for exeecution was presented by Behari Lal and Musammat Sonkali making the same allegations of their relationship or connection with Gauri Shankar, and again praying for the arrest of Majid Ali. On this occasion Majid Ali did appear and objected to the right of Behari Lal and Sonkali to have execution of the decree. The objections were that neither of them was a member with Gauri Shankar of a joint Hindu family ; that Behari Lal had been born deaf and dumb, and, even if he was a brother of Gauri Shankar, no rights had devolved upon him, and that under section 4 of Act No. VII of 1889 the Court could not proceed upon the application for execution except upon the production by the applicants of probate or letters of administration or of one of the certificates referred to in that section. The first Court disallowed the objections and made an order for execution. The judgment-debtor appealed, and the lower appellate Court (District Judge of Gorakhpur) reversed the order of the Court of first instance and dismissed the application for execution. That Court held that Behari Lal was not a member of a joint family with Gauri Shankar, and that neither he nor Musammat Sonkali was entitled to have execution of the decree, and further that the objection under section 4 of Act No. VII of 1889 was a good one. Against this order the decree-holders appealed to the High Court.

Mr. *Abdul Majid*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

EDGE, C. J., and BLAIR, J.—Gauri Shankar obtained a decree for money against Majid Ali. Gauri Shankar died, and one Behari Lal, alleging himself to be a brother of Gauri Shankar, and one Musammat Sankali, alleging herself to be the widow of a deceased brother of Gauri Shankar, applied for execution. No decision was come to on that application, but it was struck off under circumstances which did not make the striking off of the application a dismissal. Afterwards Behari Lal and Musammat Sonkali, making the same allegations of relationship or [140] connection with Gauri Shankar, applied for execution of the decree by arrest of Majid Ali. Notice was issued to Majid Ali under section 248 of the Code of Civil Procedure. It has been proved that that notice was served, and indeed, as the Court proceeded to adjudicate on the

(1) (1883) I. L. R. 6 All. 269.

when the plaintiff obtained a decree against him on the 14th July, 1898, was under the superintendence of the Court of Wards In September, 1899, this property was released by the Court of Wards Subsequently the rents and profits of this and other shares in the property were collected by the Court of Wards, and in the year 1307 Fasli certain profits were collected which belong or are alleged to belong to the judgment debtor These accrued due after the release of his share of the property from superintendence, and it is contended by the decree holder that he is entitled now to *attach such rents and profits* *On the part of* the defendant it is contended that this case is governed by a decision of this Court in *Himanchal Singh* v *Jhamman Lal* (1) between the same parties In that case it was decided that the judgment debtor could not attach rents and profits of property which had been under the superintendence of the Court of Wards at the time the decree was obtained, and which represented rents and profits, that is, the rents and profits which accrued before the property was released from superintendence In the present case it will be observed that the rents and profits accrued after the property had been released from superintendence Examining the section of the Act, it appears to us that the only property which is pointed at in the section as being exempted from attachment is property actually under the superintendence of the Court of Wards, and does not include property such as rents and profits which accrue after the release of the corpus from superintendence We may observe that the question is far from being free from doubt, but we think that if the Legislature intended to [138] apply the section to a case of this kind the words should have been wider, and should have included not merely property or any part of property, but also "rent and profits" of the property For these reasons we are of opinion that the Court below is wrong in its decision and that the appeal should be granted

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It must be understood that our judgment is not to be taken as entitling the appellant to obtain payment from the Collector without a suit if the Collector contests the matter

Appeal decreed

24 A 138=(A W N 1897, 29.)

APPELLATE CIVIL

Before Sir John Edge, Knight, Chief Justice, and Mr. Justice Blair.

BEHARI LAL AND ANOTHER (*Decree holder*) v MAJID ALI (*Judgment-debtor*)* [13th January 1897]

Execution of decree—Principle of res judicata as applied to execution proceedings—Succession certificate—Act No VII of 1889 (*Succession certificate Act*), *section* 4

The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which, in that suit or in the execution proceedings in that suit, had been previously determined

The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts A defendant respondent can not avoid the application of the principle of *res judicata* by saying that he did

* Second Appeal No 1019 of 1894, from an order of V A Smith, Esq, District Judge of Gorakhpur, dated the 7th June 1894

(1) (1900) I L R 22 All 364

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that the principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. The defendant-respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit. The plaintiff who has got an *ex parte* decree on proof of his title, or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. In such cases the plaintiff could not sue again on the same cause of action, and it would be a curious [142] principle of law which would preclude the plaintiff from suing again on his cause of action, but would leave it open to the defendant to raise in any subsequent litigation between himself and the plaintiff the issues which must necessarily have been decided explicitly or implicitly to have entitled the plaintiff to the decree which he had obtained *ex parte*. Under these circumstances we hold that the effect of the adjudication and order passed upon the second application for execution was that Majid Ali cannot now dispute the right and competence of Behari Lal and Musammat Sonkali to have execution of the decree as representatives of Gauri Shankar. That, in our opinion, is the necessary result of the principle of *res judicata* as applied to this case.

But the principle of *res judicata* has no effect upon the provisions of section 4 of Act No. VII of 1889. That section prohibits a Court from passing a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled, to the effects of the deceased person or any part thereof, or from proceeding upon the application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except upon production of one or other documents specified in the section. It imposes a duty on the Court which the Court is bound to perform, no matter what the proceedings between the parties, or any agreement between the parties, may be. All that is clear in this case is that it cannot now be questioned that Behari Lal and Musammat Sonkali, as between them and Majid Ali, are entitled to have execution of the decree, of course subject to the provisons of section 4 of Act No. VII of 1889. Whatever title the Court may have assumed that they had, it is obvious that Musammat Sonkali at any rate, was not a member of the same joint family as Gauri Shankar. The Court below ought, instead of dismissing the application for execution, to have given reasonable time to the applicants to perfect their title by the production of one or other of the documents specified in section 4 of Act No. VII of 1889. We set aside the decree of the Court below and remand this case to that Court under section 562 of the Code of Civil Procedure to be disposed of according to law. We allow the appeal, but without costs.

Appeal decreed and cause remanded.

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application, it must be presumed, until the contrary is shown, that the Court was satisfied by proper evidence that the notice had been served Majid Ali did not appear On that second application the Court made an order for the issue of a writ for the arrest of Majid Ali Majid Ali could not then be found, and the warrant was never executed, and the
the 2nd of August, 1893
same allegations of their
presented another application for execution of the decree by the arrest of Majid Ali On this occasion Majid Ali did appear and objected to the right of Behari Lal and Sonkali to have execution of the decree The objections were that neither of them was a member with Gauri Shankar of a joint Hindu family, that Behari Lal had been born deaf and dumb, and, even if he was a brother of Gauri Shankar, no rights had devolved on him, and that under section 4 of Act No VII of 1889, the Court could not proceed upon the application for execution except upon the production by the applicants of probate or letters of administration or of one of the certificates referred to in that section The first Court disallowed the objection and made an order for execution The second Court held that Behari Lal was not a member of a joint family with Gauri Shankar, and that neither he nor Musammat Sonkali was entitled to have execution of the decree, and further that the objection under section 4 of Act No VII of 1889 was a good one, and allowing the objections dismissed the application

Of course it is obvious that, whether Musammat Sonkali's husband died before or after Gauri Shankar died, she was in no sense a co-parcener of Gauri Shankar, and in that sense not a member of a joint Hindu family conjointly with him, and that if she was a representative entitled to have the decree executed, section 4 of Act No VII of 1889 would apply in her case

[141] As to Behari Lal, the question appears to turn upon what would be the effect of the second application and the order for execution issued thereon Section 13 of the Code of Civil Procedure of course in terms does not apply to a case of this kind, but, as has been pointed out by their Lordships of the Privy Council in the case of *Ram Kirpal* v *Rup Kuari* (1) the principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings an issue which, in that suit or in the execution proceedings in the suit, had been previously determined Now Majid Ali had an opportunity to come before the Court on the second application and to raise these very objections We must presume, as the Court made an order for the issue of a warrant on that second application, that the Court rightly or wrongly did decide and determine the question as to the right of Behari Lal and Musammat Sonkali to have execution of the decree obtained by Gauri Shankar We must presume that the Court followed the procedure indicated by the Code of Civil Procedure in cases in which a defendant does not appear, and, as it made an order in favour of the applicants it is to be presumed that the Court was satisfied by evidence that these applicants were representatives of Gauri Shankar entitled to execute his decree It is immaterial for present purposes whether or not the Court came to a wrong decision on that point We think the decision probably was wrong, but we cannot decide the question It is obvious

(1) (1883) I L R 6 All 269.

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The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BANERJI, J.—The applicants have been convicted under sections 147 and 325, I. P. C. It appears that a plot of land No. 266 had a grove on it which belonged to one Bhuneshar Singh, a minor, under the guardianship of two ladies, Mussammat Rekha and Mussammat Ram Piari. It has been found that the land was sown with sugarcane on behalf of the ladies in the year 1308F., that Ram Ghulam Singh and others claimed to be the cultivators of that land on behalf of the zamindars, and that consequently a dispute arose between the party of the ladies and the party of Ram Ghulam Singh. The applicants are the servants of the ladies. On the 27th of January, 1901, the party of Ram Ghulam Singh came to the land and began cutting the sugarcane crop. The applicants, who were headed by Kali Singh, resisted Ram Ghulam Singh's party, and a lathi fight took place, in which two persons sustained grievous hurt. The applicants have been convicted of the offence of rioting in consequence of the part taken by them in the fight. It is urged on their behalf that they were exercising their right of private defence, and that consequently they were not guilty of any offence. On the finding of the Magistrate, which has been approved of and affirmed by the Sessions Judge, and having regard to the rulings of this Court, this contention must fail. The Magistrate has found that the applicants' party had resolved beforehand to make an assault under the pretence of cutting the [146] sugarcane, that they had gathered together at a karkhana under the leadership of Kali Singh, and that after holding a consultation they proceeded to the spot where Ram Ghulam Singh's party was cutting the crops, and there a fight took place. It was held in *Queen-Empress* v. *Prag Dat* (1), that "when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage with men who, on the other hand, are equally determined to vindicate by unlawful force their rights, or supposed rights, no question of self-defence arises." That ruling fully applies to this case, and having regard to it the plea of self-defence cannot be sustained. The learned counsel for the applicants referred to the ruling of the Bombay High Court in *Queen-Empress* v. *Narsang Pathabhai* (2). That case is, in my opinion, distinguishable, as it was decided with reference to its own peculiar circumstances, which were different from those of the present case. The ruling of the Calcutta High Court in *Pachkauri* v. *Queen-Empress* (3), upon which the learned counsel relies, no doubt supports his contention. There it was held that where a body of men who were rightfully in possession found it necessary to protect themselves from aggression on the part of the complainant's party, they were justified in taking such precautions as they thought were required and in so doing they could not be held to be members of an unlawful assembly. The view taken in that case is not in accord with that adopted in the ruling of this Court to which I have referred above, and I think I should follow the latter ruling. As the plea of self-defence fails the application must be dismissed. I see no reason to interfere with the sentence.

Petition dismissed.

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(1) (1898) I. L. R. 20 All. 459.
(2) (1890) I. L. R. 14 Bom. 441.
(3) (1897) I. L. R. 24 Cal. 686.

24 A 143 (=A W N 1901, 193)

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[143] REVISIONAL CRIMINAL

Before Mr. Justice Banerji

KING-EMPEROR v KALIJI *alias* KALI SINGH AND OTHERS.*
[15th August, 1901]

Act No XLV of 1860 (*Indian Penal Code*), *section* 147—*Riot—Private defence of property—Act No XLV of* 1860 (*Indian Penal Code*), *sections* 96 *et seq—Deliberate aggression by party entitled to possession*

Party *A* sowed a crop in a field to the possession of which apparently they were entitled Party *B* claiming the field and the crop as theirs, entered upon [illegible]

[Ref 35 Cal 368=12 C W N 384=7 Cr L J 256 7 C L J 359=3 M L T 385 A W N 1904, 113 Fol 3 O L J 14]

THE applicants in this case were convicted by a Magistrate of the first class of rioting and causing grievous hurt and sentenced to six months' rigorous imprisonment each, and the convictions and sentences were affirmed on appeal by the Sessions Judge The cause of the riot was a piece of land, formerly occupied by a grove, but which at the time of the dispute had been cleared and planted with sugarcane The owner of the land was one Bhuneshar Singh, who was a minor under the guardianship of two ladies, Musammat Rekha and Musammat Ram Piari The applicants were servants of the ladies, and the opposite parties in the riot were certain persons who claimed to be cultivators of the land on behalf of the zamindars On the 27th of January, 1901, the party of Ram Ghulam Singh came to the land and began to cut the sugarcane The applicants, who seem to have made up their minds to take this opportunity of attacking their opponents, watched Ram Ghulam Singh s party commence to cut the cane, and then retired to a neighbouring karkhana, whence, after holding a consultation, they issued and attacked the persons who were engaged in cutting the cane A riot ensued in the course of which one man was injured severely and another less seriously Before the trying Magistrate the plea of [144] self defence was raised on behalf of the present applicants, but without success, the Magistrate finding that the applicants' party had resolved beforehand to make an assault under the pretence of cutting the sugarcane, that they had gathered together at a karkhana under the leadership of Kali Singh, and that after holding a consultation they proceeded to the spot, where Ram Ghulam Singh's party were cutting the crops, and there a fight took place The applicants having appealed to the Sessions Judge and their appeal having been dismissed, applied to the High Court in revision, again urging that in acting as they had they were acting in the exercise of their right of private defence

Mr *Amir ud din*, for the applicants

* Criminal Revision No 475 of 1901

(1) (1898) I L R 20 All 459
(2) (1890) I L R 14 Bom 441
(3) (1897) I L R 24 Cal 686

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24 A. 146= A. W. N. 1901, 211.

denies that the plaintiff has suffered any damage. The Court of first instance gave the plaintiff a decree, assessing the damage at Rs. 113-12-0. Both parties appealed. On appeal the learned Subordinate Judge dismissed the suit, holding that it was barred by the provisions of article 29 of schedule II of the Indian Limitation Act, which provides a period of one year's limitation running from the date of the seizure for a suit for compensation for wrongful seizure of moveable property under legal process. The plaintiff comes here in second appeal. It is argued that the case is one which falls properly under article 42 of schedule II of the Limitation Act, which provides a period of three years' limitation for a suit for compensation for injury caused by an injunction wrongfully obtained, the time beginning to run from the date when the injunction ceases. It appears to me that it would be unjust to apply the provisions of article 29 to a suit of this nature when the plaintiff got back his property upwards of a year after the date of the seizure. Until he recovered his property, it was impossible for him to say whether the property had or had not been damaged. Again, the length of time during which the plaintiff is kept out of his property is an element in assessing the damage. This consideration leads me to think that article 42 should be applied to this case. It was owing to the action of the defendant that an injunction was issued by the Court which prevented the order for the release of [148] the property in the plaintiff's favour being carried out. The facts of this case are similar to those in the case of *Haji Pir Muhammad* v. *Thakur Das* decided by the Chief Court of the Panjab on the 2nd of February, 1881—*vide* number 40 of the Civil Judgments of 1881. The learned Judges there held that the continuance of the attachment under the order of the Court must be treated as an injunction under section 492 of the Code of Civil Procedure, and an injunction wrongfully obtained by the defendant. They accordingly applied article 42 to the case. It is quite true that the plaint in this case has not been artistically framed. Still it clearly sets forth the wrongful attachment of the soap, and alleges that "the defendant by means of continued litigation did not allow it to be released for sixteen months." As stated above, it was not until the date of the release that the plaintiff was in a position to estimate the damage which he had suffered. He instituted his suit within a little more than three months from the date of the release, and within six months of the date of the final dismissal of the defendant's suit under section 283. This being so, it appears to me impossible to hold that the plaintiff's suit was out of time. I allow the appeal, and, setting aside the decree of the Court below, remand the case to that Court under section 562 of the Code of Civil Procedure for disposal of the remaining grounds raised in the memorandum of appeal to it. The plaintiff will have the costs of this appeal in any event. The other costs will abide the result.

Appeal decreed and cause remanded.

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APPELLATE CIVIL

24 A 146= A W N 1901, 211

[146] APPELLATE CIVIL

Before Mr. Justice Aikman.

IDU MIAN (*Plaintiff*) v RAHMAT ULLAH (*Defendant*) *
[6th July, 1901]

Act No XV of 1877 (*Indian Limitation Act*), *Sch ii, arts* 29 *and* 42—*Limitation—Suit for compensation for wrongful seizure of moveable property under legal process—Suit for compensation for injury caused by an injunction wrongfully obtained*

[illegible] f his [illegible] The [illegible] owed [illegible] le of [illegible] dismissal of the defendant s appeal, obtained possession of the soap He then sued the defendant to recover damages for the loss of part and the deterioration of the rest of the soap while under the defendant s attachment *Held* that article 42, and not article 29 of the second schedule to the Indian Limitation Act, 1877, applied, and that the suit was not barred by limitation

[Ref 6 Bom L R 704, D 4 N L R 49]

THE facts of this case are fully stated in the judgment of the Court

Mr *Ishaq Khan* for the appellant

Mr *Amir ud din* for the respondent

AIKMAN, J —The following are the facts out of which this suit has arisen The respondent, Sheikh Rahmat ullah, held a decree against one Ghurbin, in execution of which, on the 18th of February, 1898, he attached upwards of twenty maunds of native soap as the property of his judgment debtor Idu Mian, the plaintiff in this case, intervened and claimed the soap as his own His objection was sustained, and the soap was ordered to be released from attachment Sheikh Rahmat ullah immediately instituted a suit under section 283 of the Code of Civil Procedure, to have it declared that the soap was the property of his judgment debtor, Ghurbin This suit was instituted on the 10th of August, 1898 On the same day Sheikh Rahmat ullah put in an application to the Court, asking that the order for the [147] release of the soap in Idu Mian's favour should not be carried out, and that the soap should be retained in the possession of the person to whom it had been made over until the decision of the suit which he (Rahmat ullah) had instituted The Munsif granted this application In the result the suit of Rahmat ullah under section 283 was dismissed on the 21st of December, 1898, and that decision was affirmed on appeal on the 23rd of March, 1899. The result of this litigation therefore, shows that the attachment of the plaintiff's soap by the respondent, Rahmat ullah, was wrongful It is admitted that Idu Mian did not get back his soap until the 17th of June, 1899 The plaintiff states that when he got it back, he found that it was not only diminished in quantity, but greatly deteriorated in quality He accordingly sues to recover Rs 273 11 0 for damages caused by this wrongful attachment The defendant

* Second Appeal No 742 of 1900, from a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 26th April, 1900, reversing a decree of Babu Chandi Prasad, Munsif of Rasra, dated the 30th January 1900

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in which, after setting aside the order, they added—" if it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law on fresh information received." So far the contention of the learned counsel, that further proceedings under section 110, when the first proceedings have come to an end, cannot be instituted except on fresh information received, is justified. In the present case the Magistrate of the District acted only upon the record of the previous proceedings, so that he cannot be said to have acted on fresh information so far as the present proceedings were concerned. The case above cited has been followed by this Court in the case of *Queen-Empress* v. *Ahmad Khan* (1). Here, too, the order reported to this Court was an order purporting to have been made under section 437 of the Code of Criminal Procedure, and it was held that that order was passed without jurisdiction.

On the other hand, this Court has held in *Queen-Empress* v. *Mutasaddi Lal* (2), and again in *Queen-Empress* v. *Ratti* (3), that proceedings of this kind are proceedings which are covered by section 437 of the Criminal Procedure Code. So far as I am concerned, it appears to me that the words " into the case of any accused person who has been discharged," which are used in section 437, are, with all due respect to those who have held otherwise, wide enough to cover cases falling under Chapter VIII (B). If those words do not cover proceedings under Chapter VIII (B), then I know of no provision of the law, or any principle of law, which would stand between a Magistrate instituting fresh proceedings, even if he was acting upon precisely the same facts and precisely the same information. I wish to guard myself against being understood to hold that I consider that such proceedings should be instituted lightly, or that a Magistrate should not enter upon them without very great care and caution. In the present instance the District Magistrate of [151] Bijnor certainly looked into the case, and apparently carefully. He came to the conclusion that more convincing proof of bad livelihood of the worst description could not be adduced. He accordingly, as Magistrate of the District, instituted fresh proceedings under section 110 and he did not purport to act under section 437 of the Criminal Procedure Code. He evidently looks upon the record as information sufficient to justify his taking action. He took fresh evidence. I have been asked to refer the case to two Judges in order that there may be an authoritative decision upon the point. I do not, however, think it necessary to delay passing orders. Even if the District Magistrate should require security, his proceedings can, if they are proceedings held without jurisdiction, be afterwards set aside. I do not for one moment go into the evidence one way or the other, but it is easy to conceive that a man who is a terror to the neighbourhood might work a good deal of mischief while or until this case could be decided; and up to the present, with the exception of one reported case of *Queen-Empress* v. *Ahmad Khan* (1) so far as I know, his power to do so has never been questioned in this Court. As I have shown, in *Queen-Empress* v. *Ahmad Khan*, (1) the Magistrate purported to act under section 437. In this case the Magistrate does not profess to have so acted.

I dismiss the application. *Application dismissed.*

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(1) Weekly Notes, 1900, p. 206.
(2) (1898) I. L. R. 21 All. 107.
(3) Weekly Notes, 1899, p. 203.

24 A 148 (=A W N 1901, 206) 24 All 150

REVISIONAL CRIMINAL

Before Mr Justice Knox

KING EMPEROR v FYAZ UD DIN * [1st October, 1901]

Criminal Procedure Code, sections 110 et seq and 437—Security for good behaviour—Power of District Magistrate to reopen proceedings on the same record after the discharge of the person called upon to show cause by a Magistrate of the first class

Held that it is competent to the Magistrate of the District, in the case of a person who has been called upon, under section 110 of the Code of Criminal [149] Procedure, by a Magistrate of the first class, to show cause why he should not furnish security for good behaviour, and has been discharged by such Magistrate under section 119 of the Code, to institute fresh proceedings against such person upon the basis of the record that was before the first class Magistrate *Queen-Empress* v *Mutasaddi Lal* (1) *Queen-Empress* v *Ratti* (2), *Queen Empress* v *Ahmad Khan* (3), and *Queen Empress* v *Iman Mondal* (4) referred to

[Fol 35 Bom 401=1 Bom Cr Cas 49=13 Bom L R 505=12 Cr L J 430=11 I C 614 Ref 36 All 147=12 A L J 167=15 Cr L J 39=22 I C 183 36 Mad 315=14 Cr L J 559=21 I C 159 64 I C 846]

THE facts of this case sufficiently appear from the order of the Court

Mr *A H S Hamilton* for the applicant

KNOX, J —This is an application by one Fyaz ud din, asking this Court to revise an order passed by the District Magistrate of Bijnor That order is dated the 2nd of September, 1901 It appears that the District Magistrate of Bijnor had before him certain proceedings which had taken place in the Court of Pandit Bisheshwar Dayal, a Magistrate of the first class Those proceedings were proceedings under section 110 of the Criminal Procedure Code Pandit Bisheshwar Dayal, after hearing the evidence on both sides, came to the conclusion that there were not, in his opinion, sufficient grounds, for the present at least, to bind over Fyaz ud din to be of good behaviour, and he accordingly discharged him under section 119 of the Code of Criminal Procedure

The District Magistrate of Bijnor, after looking through the record, instituted fresh proceedings after framing a fresh order under section 112 He did not profess to make the order under section 437 of the Criminal Procedure Code, but in the application before me it is contended that his order must have been made under that section It is now contended that the District Magistrate cannot institute fresh proceedings in the absence of fresh information The learned counsel for the applicant drew my attention to the case of *Queen Empress* v *Iman Mondal*, (4) In that case, according to the judgment, the order for inquiry purported to have been made under section 437 of the Code of Criminal Procedure, so that in this respect it differed from the case with which I have now to deal The learned Judges who decided that case have laid down that proceedings under section 110 of the Code of Criminal Procedure cannot be [150] regarded as on a complaint, nor can they be regarded as a case in which an accused person has been discharged But the important part in that judgment, so far as this case is concerned, was the final paragraph,

* Criminal Revision No. 659 of 1901

(1) (1898) I L R 21 All 107
(2) Weekly Notes, 1899, p 203
(3) Weekly Notes, 1900, p. 206.
(4) (1900) I L R 27 Cal 662

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(4), to have referred the applicant to this Court. As, however, [153] the proceeding has come to my knowledge, I have dealt with it under section 439, sub-section (1) of the Code of Criminal Procedure. For the reasons set forth above I am of opinion that the Magistrate of the first class had jurisdiction to make the order which he did; and I direct that the record be returned.

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24 A. 153 (=A. W. N. 1901, 204).

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

NIADAR (*Defendant*) *v.* BARU MAL AND OTHERS (*Plaintiffs*).*
[7th November, 1901.]

Act No. XII of 1881 (*N.-W. P. Rent Act*), *sections* 93, 95—*Act No. XIX of* 1873 (*N.W.P. Land Revenue Act*), *section* 102—*Jurisdiction—Civil and Revenue Courts—Suit to eject as a trespasser a person who claimed to be entitled to the holding of a deceased occupancy tenant—Res judicata.*

Upon the death of an occupancy tenant, a person who alleged that he was entitled to succeed to the deceased's occupancy holding, obtained from the revenue authorities, by means of an application under section 102 of the N.-W. P. Land Revenue Act, mutation of names in his favour, and also got into possession of the holding. The zamindars thereupon brought a suit in a Civil Court for his ejectment, on the allegation that he was a mere trespasser, who had no right whatever to succeed to the holding of their late occupancy tenant. *Held* that such suit was properly brought in a Civil Court, and could not have been instituted in a Court of Revenue, and the decision of the Revenue authorities allowing mutation of names in the defendant's favour could not operate as *res judicata* in respect of such suit. *Subarni* v. *Bhagwan Khan* (1) distinguished.

[Fol. 1 A. L. J. 9 ; (Suit to eject trespasser—Jurisdiction of Civil Court.)]

THE facts out of which this appeal arose were as follows. One Gulzara, an occupancy tenant, died in November 1899. Thereupon Niadar, the present appellant, applied to the revenue authorities under section 102 of Act No. XIX of 1873 for the entry of his name in respect of Gulzara's occupancy holding. An order was made for the entry of Niadar's name on the 11th of February, 1900, and he obtained possession of the holding. Upon this the zamindars brought a suit in the Civil Court to eject Niadar and recover possession of the holding on the ground that Niadar was a mere trespasser who had no right whatever to the land as the successor of Gulzara. The Court of first instance dismissed the suit, holding that it was not cognizable by a Civil [154] Court, and the plaintiffs' appeal was dismissed by the lower appellate Court on the same ground. The plaintiffs appealed to the High Court, and their appeal, coming before a single Judge of the Court, was decreed. (See I. L. R. 23 All., 360.) From this judgment the defendant appealed under section 10 of the Letters Patent.

Babu *Satya Chandar Mukerji*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

KNOX and BLAIR, JJ.—The point which has been contended, and very earnestly contended, before us by the learned vakil for the appellant,

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* Appeal No. 17 of 1901 under section 10 of the Letters Patent.

(1) (1896) I. L. R. 19 All. 101.

24 A. 151 (=A W N 1901, 203)

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REVISIONAL CRIMINAL

Before Mr Justice Aikman

KING-EMPEROR v MUNNA * [4th November 1901]

Criminal Procedure Code, sections 107 (2), 192—*Security for keeping the peace—Transfer—Power of District Magistrate to transfer proceedings instituted by him against a person not within his district*

Held that it was competent to a District Magistrate who had initiated proceedings under section 107 (2) of the Code of Criminal Procedure against a person not at the time within the limits of his jurisdiction to transfer such proceedings at a later stage to a Magistrate subordinate to himself, though such Magistrate was not competent to initiate such Proceedings

[Fol 31 I C 850 I S L R 2 Cr = 9 Cr L J 246 41 Mad 246 Ref 10 C W N 1035; 12 A L J 1136, Dist 37 All 20]

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Gorakhpur, arising out of the following facts One Munna Tiwari, a resident of the Gorakhpur district, had been called upon by the District [152] Magistrate of Basti, acting under section 107, clause (2) of the Code of Criminal Procedure, to show cause why he should not furnish security to keep the peace After proceedings had been thus instituted by the District Magistrate of Basti, he, professing to act under section 192 of the Code, transferred those proceedings to one of his subordinates, a Magistrate of the first class, who completed them, making an order for security against Munna Tiwari On an application for revision of this order, the Sessions Judge of Gorakhpur, being of opinion that such proceedings initiated under the circumstances above described could not be transferred, submitted the record to the High Court for orders

AIKMAN, J —In this case one Munna Tewari was called on to furnish security for keeping the peace It appears that he is a resident of the Gorakhpur district Proceedings were taken against him by the District Magistrate of Basti under the provisions of section 107, sub section (2) of the Code of Criminal Procedure, he not being then within the local limits of that Magistrate's jurisdiction After taking proceedings under that section the District Magistrate, professing to act under the provisions of section 192 of the Code of Criminal Procedure, transferred the case of which he had thus taken cognizance to a Magistrate of the first class subordinate to him, who passed the order for security In the referring letter of the [illegible]
as to whether the District [illegible]
section 107 (2), had any p[illegible]
not altogether free from difficulty But after consideration, I am of opinion that the intention of the Legislature was to limit the jurisdiction in regard to institution of proceedings in cases like the present to a Chief Presidency or District Magistrate, but that when such Magistrate has, in the exercise of his discretion, directed institution of proceedings, there is nothing in the law to prevent him from transferring the case to a Magistrate otherwise qualified to complete the proceedings In this case it appears that a previous application for revision had been made to the District Magistrate The learned Sessions Judge ought therefore, with reference to the provisions of section 435, sub section

* Criminal Reference No 771 of 1901

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the persons who were about to eat. This action made the food which had been served impure; the guests refused to eat it, and the party broke up in confusion. Moti Lal and Bachcha were tried by a Magistrate and convicted of the offence of mischief punishable under section 426 of the Indian Penal Code. The Magistrate imposed a fine of Rs. 40. The convicts applied in revision to the Sessions Judge, who, being of opinion that section 426 did not apply to the case, reported the case to the High Court for orders.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—Moti Lal Mallah and Bachcha Mallah have been convicted by a Magistrate of an offence under section 426 of the Indian Penal Code, and sentenced to a fine of Rs. 40 each, or in default to be imprisoned for one and a half months. The [156] matter came in revision before the Sessions Judge, and he was of opinion that the facts disclosed no offence within the meaning of section 426. The facts, as found, are, that at a certain feast, which had been precluded by recitals from some religious books, after such recitals, the Brahmans having first taken their food, a number of persons of the same caste as the persons who have been convicted, took their seats to the south—whether south of a room or courtyard does not appear. That for some reason unexplained, Moti Lal Mallah and Bachcha Mallah wanted the persons who were seated to move from the south to the north. They refused to do so—the refusal likewise is unexplained. The food which was going to be eaten was on the spot, and the two persons convicted threw a shoe on the adjacent ground, the effect of which would be to render the food impure from the point of view of Hindus of the caste of the persons who were there assembled. They were thus, on account of their conscientious scruples, unable to eat it. It is quite manifest that section 426 can have no application to this state of facts. It deals only with a physical injury from a physical cause. It has been suggested by Mr. *Porter* that the case may fall within one of two other sections. The first is section 298, which renders punishable the uttering of words or sounds, or making gestures, or the placing of any object with the intention of wounding the religious feelings of any person. In my opinion this case is outside the scope and tenour of section 298. My attention has been called to the possibility that the facts of this case may fall within the purview of section 504. That section refers to an insult intentionally inflicted, and which was likely to result in a breach of peace. I doubt very greatly whether the intent here was an intent to insult. It was an intent to deprive these persons of an expected feast, and the insult, if any, would have been incidental and not intentional. However, these persons who have been convicted have not been charged under section 504, and I have no materials before me on which I could find that the facts fell within the provisions of that section. I therefore set aside the sentence under section 426, and order that the fines, if paid, be returned, and if the accused have been confined, that they be at once released.

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is whether the suit out of which this appeal has arisen is, or is not, one governed by the precedent of *Subarni* v *Bhagwan Khan* (1) 1901 Nov 7

We agree with our brother Banerji that the present suit was not one governed by that precedent In the present suit the application originally made to the Revenue Courts was an application on plain paper, headed and marked as being one under section 102 of Act No XIX of 1873 No person was cited as a defendant all that the application stated was, that the applicant had been in joint occupancy of an occupancy holding together with the deceased, that he had succeeded to the holding, and was in possession of it that the patwari had wrongly refused to report the case for mutation of names, and prayed that mutation of names might be effected in his favour There was, as is usual in these cases, a fringe of irrelevant matter tending to obscure the point in issue The Revenue Court, however, dealt with it as an application under section 102, and passed its order under section 102 There was not, as in the case of *Subarni* v *Bhagwan Khan*, (1) any request to be put in possession of the occupancy holding the law has not made any provision as the learned vakil rightly admitted, whereby orders passed under section 102 of Act No XIX of 1873 can be treated as judgments of a Civil Court The case before us differs thus *toto cœlo* from the case of *Subarni* v *Bhagwan Khan* (1)

APPELLATE CIVIL

24 A 153= A W N 1901, 204

We dismiss this appeal with costs

Appeal dismissed

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24 A 155 (=A W N 1901, 212)

[155] REVISIONAL CRIMINAL

Before Mr Justice Blair

KING EMPEROR *v* MOTI LAL AND ANOTHER * [15th November, 1901]

Act No XLV of 1860 (*Indian Penal Code*) *sections* 426, 298 501—*Mischief—Wilful pollution of food served at a caste dinner*

Certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them when certain other members of the caste came and after telling those who were seated to move to another place which they refused to do threw down a shoe amongst the men who were seated The persons who threw the shoe were convicted of mischief on the ground that their action had polluted the food and had from a Hindu religious point of view rendered it unfit to be eaten On reference by the Sessions Judge it was *held* that this conviction was wrong neither could the accused be convicted under section 298 nor under section 501 of the Indian Penal Code on the facts found

THIS was a reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Benares The facts of the case were as follows A member of the Mallah caste was giving a feast to the brotherhood After certain religious ceremonies had been performed and the Brahmans had been fed, the members of the caste were sitting down to take their food Some of the party had already taken their seats and food had been served to them, when two Mallahs, Moti Lal and Bachcha, appeared on the scene They first asked the people who were seated to get up and move elsewhere, and when they declined to do so, Moti Lal and Bachcha threw down a shoe on the ground in front of

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* Criminal Reference No 705 of 1901

(1) (1896) I L R 19 All 101

1901 Nov. 20. — APPELLATE CIVIL. — 24 A 157.

THE COURT (STANLEY, C. J., and BURKITT, J.), after discussing the evidence as to the adoption, came to the conclusion that no adoption of Bindraban by Hori Lal had in fact taken place. This being the case, the defendant could not claim to have the suit dismissed on the strength of his own title to the property as part of the estate once of Hori Lal. On the question whether the plaintiff had such an interest in the property as would support a suit for recovery of possession against a person who, having no better title than himself, had ousted him, the Court found as follows:—

There remains then one matter for our determination. The property in dispute admittedly belonged to Hori Lal, and is now in the possession of the defendant. Neither the plaintiff nor the defendant belongs to the family of Hori Lal, and neither of them occupies the position of a reversioner to Hori Lal. Can a suit in ejectment under such circumstances be maintained by the plaintiff as the heir of Balkishan or of Bindraban, both of whom were mere trespassers? Has a trespasser, whose title by prescription has not matured, such an estate as would entitle his heir to maintain a suit in ejectment against a party who has ousted him from possession and who is not the true owner? This question is the subject of legal decision. In the case of *Asher* v. *Whitlock* (1) it was held that a person in possession of land without other title has a devisable interest, and that the heir of his [159] devisee can maintain ejectment against a person other than the true owner who has entered upon the land. In that case a party had, in the years 1842 and 1850, enclosed a piece of land from the waste of a manor and built upon it. He occupied the land until his death in 1860. By his will he devised the land to his wife during widowhood, and after her death or re-marriage, whichever event should first happen, to his only daughter in fee. The widow remained in possesson with her daughter, and in 1861 the widow married the defendant. Early in 1863 the mother died, and the daughter died shortly afterwards. The defendant remained in possession, and a suit to eject him was brought by the heir-at-law of the daughter, and was determined in favour of such heir. This decision was approved of by their Lordships of the Privy Council in the case of *Sundar* v. *Parbati* (2) and it seems to us to govern the present case. In the case of *Brindaban Chunder Roy* v. *Tara Chand Banerjee* (3) it was held that such an interest in land was capable of being sold in execution. The law appears to be that a person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable.

For the foregoing reasons we allow the appeal. We set aside the judgment and decree of the lower Court, and give a decree in favour of the plaintiff appellant for possession of the property in suit with costs in both Courts.

Appeal decreed.

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(1) (1865) L. R. 1 Q. B. 1.
(2) (1889) I. L. R. 12 All. 51.
(3) (1873) 20 W. R. C. R. 114.

[157] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

GOBIND PRASAD (*Plaintiff*) v MOHAN LAL (*Defendant*) *

[20th November 1901]

Possession—Nature of interest in immoveable property acquired by virtue of mere possession

A person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable *Asher* v *Whitlock* (1), *Sundar* v *Parbati* (2) and *Brindaban Chunder Roy* v *Tara Chand Banerjee* (3) referred to

[Fol 27 All 169=1 A L J 625=A W N 1904, 222 2 Pat L J 61 2 Lah L J 271 Ref 3 A L J 424=A W N 1906, 184 29 I C 210 1 Bur L J 165 2 Pat L J 280 137 P L R 1902=78 P R 1902 29 All 52=3 A L J 775=A W N 1906, 264 Dist 49 I C 767]

IN the suit out of which this appeal arose the plaintiff claimed possession of a house situated in the city of Benares He claimed the property as heir of one Balkishan, the son of Bindraban, who died on the 6th July, 1893 The property originally belonged to one Hori Lal who died childless more than thirty years ago, leaving a widow, Musammat Jhunna For a number of years prior to the death of Jhunna, Bindraban, who was a natural son of one Batuk, the brother of Jhunna, lived with Hori Lal and Jhunna, and, it is alleged by the defendant, was adopted by Hori Lal Jhunna made a will, dated the 3rd December, 1880, whereby she purported to leave to Bindraban all the moveable and immoveable properties then in existence After the death of Jhunna, Bindraban remained in undisturbed possession of the property in suit until his death on the 6th July, 1895 whereupon his son Balkishan became possessed of it Balkishan died on the 6th September, 1895, and thereupon Musammat Gaura, the widow of Bindraban and mother of Balkishan, entered into and remained in possession until her death on the 12th Semptember, 1895 She made a will, dated the 10th September, 1895, whereby she purported to leave the property in dispute to the defendant, who was the nephew of Bindraban, being the son of Bindraban's sister, Musammat Kungi The plaintiff therefore as uncle of Bindraban would have been heir to Bindraban and to [158] Balkishan if the adoption of Bindraban by Hori Lal set up by the defendant was not proved, but if the adoption was proved he would have had no title to the property, being a stranger to the family of Hori Lal

The Court of first instance (Subordinate Judge of Benares) found that Bindraban had been adopted by Hori Lal, and that consequently he had no interest in the property, and accordingly dismissed the suit

The plaintiff thereupon appealed to the High Court

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant

Pandit *Moti Lal* and Pandit *Madan Mohan Malaviya*, for the respondent

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* First Appeal No 147 of 1898 from a decree of Babu Nil Madhab Rai, Subordinate Judge of Benares, dated the 21st March 1898

(1) (1865) L R 1 Q B 1

(2) (1890) I L R 12 All 51

(3) (1873) 20 W R, C R 111.

1901 Nov. 21. — APPELLATE CIVIL. — 24 A. 160= A. W. N. 1901, 207.

Pandit *Moti Lal* and Babu *Satya Chandra Mukerji* (for whom Munshi *Gulzari Lal*), for the respondent.

STANLEY, C. J. and BURKITT, J.—This is an appeal from a judgment of the Subordinate Judge of Agra allowing the plaintiff's claim, which was for a declaration that arrears of maintenance, due to her, and also future maintenance, were charged upon certain properties under a decree made in the year 1865. The plaintiff is the widow of one Damodar Das who was one of the sons of Joti Prasad, a well-known Agra banker, who died in his father's lifetime some time before the year 1865. In the suit of 1865, his widow, the present plaintiff, claimed delivery of possession of certain *zamindari* property as having been the separate property of her deceased husband. That property on the hearing of that suit was found not to have belonged to her husband, and the claim for possession was dismissed: but the learned Judge, having regard, as he says in his judgment, to the decision of the Sadr Court, in the case of *Sheo Buksh Singh and others*, dated the 29th February, 1864, (1) decided that the plaintiff should get a maintenance allowance from the defendant. In the case to which he referred, it was decided that the Courts were "competent to assign maintenance to a widow of a deceased Hindu who cannot by law inherit her husband's property, and that in fixing the amount reference must be had to the value of the estate from which maintenance is claimed, and that not more than one-third should ever be [162] assigned" of the annual profits of the family estates. Acting upon that decision the learned Judge thought fit to award to this lady maintenance at the rate of Rs. 120 a month. The language in which the maintenance is given is as follows:—"The plaintiff should get maintenance allowance from the defendants with reference to the income of the property, and for the sake of her satisfaction and (here the decree is torn) the plaintiff should get Rs. 120 a month from the defendants." It appears that the allowance so given has fallen into arrears, and the plaintiff's claim against the defendants in the persent suit is to have it declared that the maintenance is a charge upon the properties, delivery of possession of which was claimed, but was refused by the Court in the suit of 1865. These properties have been sold to *bonâ fide* purchasers, but it is said by the plaintiff that the purchasers had knowledge that the widow had a claim to maintenance, and are therefore liable to pay the arrears, and also future maintenance. For the purposes of our judgment we may assume that they had this knowledge. The first question then is, whether or not, by the decree of 1865, maintenance was expressly charged upon the property of the then defendants, which is the property now sought to be made liable. It appears to us that there are no words in this decree which could possibly be regarded as creating a charge. The words "with reference to the income of the property" were evidently used in connection with the case decided by the Sadr Court to which we have referred, and in which it is stated that the allowance of maintenance ought to be made with reference to the income of the property. In other words, the income of the property was to be taken as a basis for estimating the amount of maintenance to which the widow was properly entitled. There is no charge created either in express words or by implication. It would appear that the words in the decree, "with reference to the income of the property," are copied from the

(1) S. D. A. N. W. P. 1864, Vol. 1. p. 228.

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[160] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

THE BHARTPUR STATE (*Defendant*) v GOPAL DEI (*Plaintiff*) *
[21st November, 1901]

Hindu Law—Hindu widow—Widow's right to maintenance—Maintenance not a charge on the joint family property unless made so by a decree or by agreement

maintenance *Sheo Buksh Singh* v *Mussumat Gunneshee Koonwar* (1), *Lakshman Ramchandra Joshi* v *Satyabhamabai* (2) and *Ram Kunwar* v *Ram Dai* (3) referred to

[Ref 10 C W N 1074=4 C L J 476 12 C W N 100, N Fol 55 I C 28 Ref 3 Lah 55]

THE suit out of which this appeal arose was one brought by a Hindu widow to recover arrears of maintenance and for a declaration that certain immoveable property in the possession of the defendants was charged with the payment of the plaintiff s maintenance The plaintiff was the widow of one Damodar Das, the son of Joti Prasad, a wealthy banker of the city of Agra In the year 1865 the plaintiff had sued her husband for maintenance on the ground that he was possessed of certain separate property In that suit the Court found that Damodar Das was a member of a joint Hindu family, and that the property, with reference to which the suit had been brought, was not his separate property The Court, however, having regard to the position of the family, gave the plaintiff a decree for maintenance at the rate of Rs 120 per mensem This maintenance allowance was paid for many years, but the family got into difficulties and its property was sold up, and amongst other items the villages which had been in the possession of Damodar Das at the time of the plaintiff s suit in 1865 The plaintiff s maintenance ceased to be paid and hence the present suit

The Court of first instance (Subordinate Judge of Agra) decreed the claim, holding that the meaning of the judgment and decree of 1865, which decreed the widow's claim to maintenance "with reference to" the income of the property in the hands of her husband, was that the claim for maintenance should be a [161] charge on the property into whosoever hands it might come, and that the defendants had constructive if not actual notice of the widow's claim

An appeal was preferred to the High Court by one of the defendants who had purchased some of the property at auction sale, and it was contended that on a proper construction of the decree of 1865 no charge was created on the property, and that even if this defendant had knowledge of a claim for maintenance on the part of the widow, that was not sufficient to bind the property in his hands

The Hon'ble Mr *Conlan* (for whom Mr *W K Porter*) and Mr *D N Banerji* (for whom Dr *Satish Chandra Banerji*), for the appellants

* First Appeal No 191 of 1898, from a decree of Maulvi Siraj ud din Ahmad, Subordinate Judge of Agra, dated the 24th June 1898

(1) S D A N W P 1864, Vol I, p 228
(2) (1877) I L R 2 Bom 494
(3) (1900) I L R 22 All 326.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BRIJ MOHAN LAL (*Plaintiff*) *v.* SHIAM SINGH (*Defendant*)*
[27th November, 1901],

Arbitration—Award—Suit for specific enforcement of award—Case in which compensation in money considered impossible to assess.

The defendant leased a village to the plaintiff for a term of five years. In the second year of the lease disputes arose between the parties, which they agreed to submit to arbitration. On the questions submitted to him, the arbitrator delivered an award, which was to the effect—(1) that the lessee should surrender possession at a fixed time within the term of the lease, (2) that the lessee should pay the sum of Rs. 800 to the lessor, and (3) that as to arrears of rent due from the tenants, the lessee should obtain decrees and execute a conveyance of them to the lessor, who was to pay to the lessee the aggregate amount of the decrees.

The other terms of the award having been performed, the lessee sued for specific performance of the remainder. He filed with his plaint a number of decrees obtained by him against the tenants together with a sale-deed conveying those decrees to the defendant, and prayed that the defendant might be ordered to accept the conveyance and pay the amounts of the decrees.

Held that even if the award were bad, the defendant having acted on it and accepted the benefits it gave him, had precluded himself from impeaching it; also that the case was not one in which it was possible to assess compensation in money for the breach of the particular condition in the award, and that the plaintiff was entitled to specific performance of the award, and this was directed in terms of the order made in the case of *Bell* v. *Denver* (1).

[Ref. 51. I. C. 999.]

THE facts of this case are fully stated in the Judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Moradabad dismissing the plaintiff's suit.

[165] The facts of the case are clear and practically undisputed. The only difficulty we feel is as to the form of the order we ought to pass.

The facts are as follows:—

On July 1st, 1897, the defendant-respondent, who is zamindar of Mauza Pipalsana, granted a lease of that village for a term of five years —1305—1309 F. (1897—1902 A. D.)—to the plaintiff, Brij Mohan, and one Mangal Sen, at an annual rental of Rs. 3,200. Mangal Sen appears to have surrendered his interest in the lease to Brij Mohan. We have no concern with him in this case.

In the year 1898, in consequence of the new settlement, disputes arose between the plaintiff and the defendant about the rental (*jama*) payable by the latter. The parties agreed to refer these disputes to the arbitration of one Pandit Murari Lal of Sherkot, and accordingly on January 31st, 1899, they executed and registered a formal submission to arbitration.

Pandit Murari Lal prepared an award on April 7th, 1899. This award he published on the same day by registering it, and he had it handed to the defendant-respondent, Shiam Singh.

* First Appeal No. 113 of 1901, from a decree of Babu Mata Prasad, Subordinate Judge of Moradabad, dated the 13th April 1901.

(1) (1886) 54 Law Times Reports, 729.

judgment of the learned Judge In it he says —"I rule for plaintiff to recover from the defendants maintenance with reference to the income of the property" If there has been no express charge of maintenance upon the property, then it is manifest upon the authorities that the plaintiff's contention cannot prevail In the case [163] of *Lakshman Ramchandra Joshi* v *Satyabhamabai* (1), West, J, discussed the authorities at length, and held that there was no authority for the doctrine which makes the claim of widows not entitled to a share of property, in case of partition, a real charge on the inheritance, that in all cases it is a claim to maintenance merely, not interfering (so long as it has not been reduced to certainty by a legal transaction) with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit It was also decided in that case that "the mere circumstance that the purchasers had notice of the widow's claim is not conclusive of the widow's rights against the property in their hands' The question came before a Bench of this Court in the case of *Ram Kunwar* v *Ram Dai* (2), and it was held by Banerji and Aikman, JJ, that ' the maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement, and that the widow's right is liable to be defeated by a transfer of the husband's property to a *bonâ fide* purchaser for value, even with the knowledge of the widow's claim for maintenance, unless the transfer has further been made with the intention of defeating the widow's claim ' In fact a widow's right to receive maintenance is one of an indefinite character, which, unless made a charge upon the property by agreement or by a decree of the Court, is only enforceable like any other liability in respect of which no charge exists For these reasons we are of opinion that the learned Subordinate Judge was in error in deciding that the decree in this case made the arrears of maintenance a charge upon the property On this point, therefore, the appeal must be allowed

It is argued, however, by the respondent's vakil that the present appellant, *viz*, the Bhartpur State, is not entitled to maintain the appeal inasmuch as the Bhartpur State has, as we understand him, no legal existence It is sufficient for us to say that the Bhartpur State was, by the plaintiff herself, made a party to the suit as defendant, and a decree was obtained against it It seems to us that it does not lie in the mouth of the plaintiff [164] under those circumstances to raise this technical question The Bhartpur State then having appealed, and having succeeded in the appeal, under section 544 of the Civil Procedure Code, the judgment which we shall pass will be for the benefit of all the other defendants Our order accordingly is, that we allow the appeal, set aside the judgment and decree of the lower Court, and direct that the suit stand dismissed with all costs

Appeal decreed

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(1) (1877) I L R 2 Bom 494

(2) (1900) I L R 22 All 326

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direction as to the sale of the decrees was a good and sensible decision, and, as to the rents, observed that the "question of rent for any particular year was not referred to the arbitrator, but the general question of arrears of rent was referred to him."

Appended to his plaint in the suit now before us, the plaintiff-appellant produced in Court a large number of decrees for arrears of rent against tenants for sums aggregating (with interest) to Rs. 6,750, and also a deed of sale executed by him, purporting to transfer those decrees to the respondent, and he prayed the Court to cause those documents to be handed over to the defendant-respondent, and to direct the latter to pay to him (plaintiff-appellant) the aggregate amount of those decrees with interest.

The defendant's reply chiefly consists of an allegation that the arbitrator acted in excess of his powers as to the tenant's rents, as he was empowered only to dispose of the rents accruing due in the years 1306—1309 F., and not those of the year 1305 F.

This contention has been accepted by the Subordinate Judge, who holds broadly that the arbitrator had power only to dispose of the question of rents "beginning from 1306 F." In this the lower Court is clearly wrong. In the submission to arbitration the words used are "who will be liable to pay the rents due by the tenants to the lessee, second party?" These words are perfectly general. There is no restriction whatever in them to the rents due for the kharif of 1306 F. We see no reason why we should import any such restriction. Evidently the lower Court has made the mistake of confusing the earlier portion of the agreement with the later. They refer to two quite distinct matters. The earlier portion empowers the arbitrator to decide what rental (*jama*) is to be paid to the lessor by the lessee for the years 1306 to 1309 F. only, and necessarily so for the first year (1305F.) of the term had passed, and the parties came to this agreement in 1306 F., the first of the years as to which there was a dispute. [168] But a decision as to the rental payable by the lessee under his lease is quite a different matter from a decision as to arrears of rent due by tenants to the lessee.

It was further urged for the respondent that this is a case in which adequate money relief could be allowed to the plaintiff, and that therefore specific performance should not be allowed. To this it is sufficient to reply that we know of no standard or measure of damages by which in this case we could estimate what compensation should be awarded to the appellant. The learned vakil who appears for the respondent was unable to assist us in this matter. It was also contended that the appellant could himself enforce in execution the rent decrees he has got. To this there is the evident reply that appellant, by the arbitration submission, contracted to abide by the terms of the award, which direct him to sell the decrees to the respondent. And as to the allegations in the 6th paragraph of the defendant's written statement we need say no more than they are nothing more than mere surmises. We are unable to agree with any of the remarks of the Subordinate Judge as to the position of an assi ee of a decree of a Rent Court, when asking a Rent Court to execute . We have no doubt that he would find no more difficulty in a rt than in a Civil Court.

ve thought it right thus to discuss *seriatim* the various points e respondent in the judgment of the lower Court, in his

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Turning now to the submission to arbitration agreement of January 31st, 1899, let us see what were the matters referred to the arbitrator to decide

They were four in number, namely—(1) what rental (*jama*) was to be paid by the appellant, the lessee, to the respondent, the lessor, for the years 1306—1309 F (1898—1902)? (2) the duration of the lease, i e, was the lessee to continue to hold for the unexpired portion of the lease? (3) in case the arbitrator should direct the lease to terminate within the term, then who was to be liable to pay the rents due from tenants to the lessee? and (4) in the same event, which party was to bear the expenses incurred in breaking up waste land?

In his award the arbitrator, inverting the order of the questions, decided (1) that the lease was to terminate with the kharif of 1306F, and that the lessee should surrender possession to the lessor from the commencement of the rabi of that year As regards the arrears of rent in cash and in kind due to the lessee from the tenants, the award directed that the lessee should [166] sue and obtain decrees against the tenants for the arrears due from them, and that on his executing a sale deed of those decrees to the respondent, the latter should pay to the appellant the amount entered in the decrees

In this manner the arbitrator disposed of the second and third of the four matters mentioned above As to the first and fourth, he found that a lump sum of Rs 800 was due to the lessor, Shiam Singh, and directed that the lessee appellant should pay him that amount Thus the award directed (1) that the appellant should surrender possession at a fixed time within the term, and (2) should pay Rs 800 to the respondent It further directed (3) that the lessor, the respondent here, on receiving a conveyance of decrees for arrears of rent, to be obtained by the lessee against the tenantry, should pay the amounts of those decrees to the appellant, the lessee As to the acts which were to be done by the appellant under the award, it is admitted that he surrendered possession to the respondent, as directed As to the payment of Rs 800, the respondent, in June 1899, sued the appellant in the Rent Court to recover that sum with interest In his plaint he recited the submission to arbitration and the award, and claimed the Rs 800 as being due to him by virtue of the award The lessee (defendant in the Rent Court) pleaded to the jurisdiction of the Rent Court and also alleged part payment Both these pleas were overruled, and the Assistant Collector, on September 28th 1899, gave a decree for the Rs 800 with interest and costs

By the present suit the appellant lessee seeks to compel the respondent lessor to do that which the award directs him to do The suit was dismissed in the Court below for reasons to which we shall presently allude But before going further, we desire to refer to some intermediate proceedings taken in the matter of this award

Some time early in 1900 (the date does not appear) the appellant lessee applied to the Court to have the award filed in Court under the provisions of section 525 of the Code of Civil Procedure That application was opposed by Shiam Singh on the allegation (among other objec
...ower in directing the sale to
... by the plaintiff, Brij Mohan
... der was made on April 2nd,
1900, directing the award to be filed in Court The Court held that the

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The plaintiff, a usufructuary mortgagee in possession, came into Court seeking a declaration that the mortgaged property was not saleable in execution of a decree for sale obtained by another mortgagee in a suit on a mortgage prior to his own, on the ground that to this suit the prior mortgagee had not made him a party. *Held* that in such a case the plaintiff had to prove, not only that he had obtained possession as a usufructuary mortgagee and was still in possession, but that his mortgage still subsisted and had not been discharged.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

STANLEY, C. J. and BURKITT, J.—This is an appeal from the decree of the Subordinate Judge of Farrukhabad, dismissing the plaintiff's suit. The facts are very simple. The defendant, who was first mortgagee of some property called mauza Piprauli, brought a suit on foot of his mortgage against the mortgagor, and on the 21st of April, 1897, obtained a decree for the sale of the mortgaged property in satisfaction of the mortgage debt.

The plaintiff in the present suit, who, with his brother, is in possession of the mortgaged property, claims that he and his brother are in such possession under, and by virtue of, a usufructuary mortgage, dated the 15th of March, 1889, and made in their favour by the mortgagor subsequent to the date of the defendant's mortgage. The plaintiff and his brother were not made parties to the defendant's suit, and they contend that the omission to make them parties was contrary to the provisions of section 85 of the Transfer of Property Act, and that the defendant is not therefore entitled to have a sale in execution of his decree. The plaintiff has instituted this suit accordingly, and in the prayer to his claim, seeks a declaration that mauza Piprauli is not saleable in execution of the defendant's decree, but no other [171] relief. In his written statement Debi Din alleged, among other things, that the amount of the plaintiff's mortgage has been satisfied by the usufruct, and that the plaintiff has no longer any concern in the mortgaged property.

No evidence was given by the plaintiff in the Court below to prove that his mortgage was subsisting. He contended that the burden of showing that his debt had been paid off lay on the defendant, while the latter maintained that the *onus* of proving that his mortgage was subsisting lay on the plaintiff. The learned Subordinate Judge decided in favour of the defendant's contention and dismissed the suit.

The plaintiff's mortgage was a *zar-i-peshgi* lease, which is in the nature of a usufructuary mortgage. The property was, by the deed of mortgage, granted to him for a term of five years, and the deed provided that the mortgagee should, out of the profits amounting to Rs. 451, pay the Government revenue, and after appropriating the interest on the advance made by him to the mortgagor, should pay the balance to the mortgagor. It was stipulated in the deed that if the mortgagor did not pay off the mortgage debt within the term of five years, the mortgage should continue as a security for the amount remaining due. The term of five years expired on the 15th of March, 1894; but under the last mentioned stipulation the mortgage would continue to be a subsisting security if the mortgage debt has not been satisfied. In our opinion the decision of the learned Subordinate Judge is correct. When a plaintiff seeks from the Court a declaratory decree, it lies upon him to make out

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written statement, and in the argument of his learned vakil. But we are unhesitatingly of opinion that it was not open to the respondent to take any of those pleas Admittedly, he willingly entered into the agreement of the 31st January, 1899. As far as the award was favourable to him he accepted it and acted on it. He accepted the surrender of the lease when 3½ years of the term were still unexpired He got the Rs, 800, or at least got a decree for it, on the strength of the award. Appellant has done all that the award directed him to do, even going to the expense of suing the tenants and getting decrees Under such circumstances we hold that even if the award were bad by reason of the arbitrator having exceeded his powers (which we hold is not the case), the respondent is precluded by his own conduct from impeaching it. He has chosen [169] to accept and act on it as if it were a good and binding award, he has taken all the advantages it gave him, and we cannot now allow him to say that he is not bound by it

In our opinion the decision of the lower Court on the merits of the case is wholly wrong and must be set aside. We therefore allow this appeal, and we set aside the judgment and decree of the lower Court with costs in both Courts.

We have had some difficulty in settling the form of the order we should pass in directing specific performance in favour of the appellant. We have been unable to find any case exactly in point in the Indian Law Reports. We have, however, been referred to the case of *Bell* v. *Denver* (1) which is on all fours with the present case. Adopting the form of the order made by North, J., in the case just cited, we declare that the plaintiff-appellant is entitled to specific performance on the part of the defendant-respondent of the award of April 7th, 1899, so far as the same remains unperformed, and it appearing that the plaintiff-appellant, in pursuance of the said award, has obtained decrees against tenants for arrears of rent aggregating to Rs. 6,354-15-0 and has executed a valid sale-deed of the said decrees in favour of the defendant-respondent, and has deposited the same in this Court for delivery to the defendant respondent, and has, through the learned vakil who appeared for him in this appeal, undertaken to render to the defendant-respondent such assistance on his part as may be necessary (if any) for obtaining execution by the defendant-respondent of the above mentioned decrees, we direct that the said sale-deed be delivered from Court to the defendant-respondent or to his vakil, and we give a decree in favour of the plaintiff-appellant for the sum of Rs. 6,354-15-0 to be paid to him by the defendant-respondent.

Appeal decreed.

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24 A. 170

[170] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

CHITTA SINGH (*Plaintiff*) v. DEBI DIN (*Defendant*)*
[5th December, 1901].

Act No. 1 of 1877 (Specific Relief Act), Section 42—Declaratory decree—Burden of proof—Usufructuary mortgagee in possession seeking a declaration that the property is not saleable in execution of a decree on a prior mortgage.

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* First Appeal No 251 of 1899, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Fatehgarh, dated the 20th July 1899

(1) (1886) 54 Law Times Reports, 729

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is before the Court, inasmuch as the application under section 592 of the Code of Civil Procedure was not made by the plaintiff in person, nor by an advocate, vakil or attorney of this Court, and reliance is placed upon the decision of this Court in the case of *Shiam Karan* v. *Raghunandan Prasad* (1), in which it was held that the presentation of an appeal by a person who is not an advocate, vakil or attorney of the Court, nor a suitor, is not a valid presentation in law, having regard to section 8 of the Letters Patent of the High Court. In this case the plaintiff is a *pardah-nashin* lady, and under section 404 of the Code of Civil Procedure, it is provided that notwithstanding anything contained in section 36, an application to sue *in forma pauperis* is to be presented to the Court by the applicant in person, unless he is exempted from appearing in Court under section 640 or section 641. Admittedly here the plaintiff is entitled to the exemption contained in section 640 as a *pardah-nashin* lady. In such a case, therefore, under section 404, she may present an application by a duly authorized agent, who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person. It is admitted here that the petition was presented by a duly authorized agent, though not by an advocate, vakil or attorney of the Court; and we are of opinion that, having regard to the provisions of section 404, the appeal was properly presented, and that the case is not governed by the decision to which we have referred. We therefore disallow the preliminary objection.

As regards the merits of the appeal, it has been admitted by the learned vakil for the respondents that he cannot resist the appeal, the Subordinate Judge having made a mistake in not awarding possession of the share of the property to which the decree referred. We therefore modify the decree by directing, in addition to the declaration of title, that the plaintiff be put in possession of the property specified in the decree.

The appeal will be allowed with costs.

Appeal decreed.

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24 A. 174 (=6 C. W. N. 362=29 I. A. 40=4 Bom. L. R. 159=8 Sar. 247.)

[174] PRIVY COUNCIL.

PRESENT:

Lord Davey, Lord Lindley, and Sir Ford North.

MOTI CHAND AND OTHERS (*Plaintiffs*) *v.* GANGA PRASAD SINGH AND ANOTHER (*Defendants*). [30th November, 1901.]

[*On petition from the High Court of Judicature at Allahabad.*]

Privy Council, Practice of—Case below appealable value in Court of first instance—Civil Procedure Code (Act No. XIV of 1882), *sections* 596, 600—*Addition of interest for purpose of valuation of subject-matter of suit—Special leave to appeal—Substantial question of law—Rule as to applications for special leave to appeal in Indian cases.*

Before a case can be certified as a fit one for appeal to His Majesty in Council, the condition prescribed in section 596 of the Civil Procedure Code as to the amount of the subject-matter of the suit in the Court of first instance *and* the amount in dispute on the appeal must both be fulfilled. The word "and" in that portion of the section cannot be read as "or"

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(1) (1900) I. L. R. 22 All. 331.

his title affirmatively This is not a case in which a party in possession is defending his title, but one in which a party in possession sets the Court in motion, and seeks a declaration establishing his title against a third party In such case a plaintiff is in the same position as any other plaintiff and must make out his case Here the plaintiff had, or ought to have had, the means of satisfying the Court that his mortgage was still subsisting, and if he has failed in doing so, he cannot expect the Court to exercise the discretionary jurisdiction conferred upon it by section 42 of the Specific Relief Act, and to make a declaration, which would be based upon an assumption merely and not upon proved facts, that the property is not [172] saleable in execution of a decree which, so far as the evidence before the Court goes, may be a perfectly valid and binding decree The plaintiff was bound to satisfy the Court that he had an interest in the property, and that by not making him a party to the suit for sale the defendant had failed to comply with section 85 of the Transfer of Property Act

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We think that the learned Subordinate Judge was quite correct in the view which he took, and we must affirm his judgment and dismiss the appeal with costs

Appeal dismissed

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Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

WAZIR UN NISSA (*Plaintiff*) v ILAHI BAKHSH AND OTHERS (*Defendants*)* [5th December, 1901]

Letters Patent section 8—Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor—Presentation by agent of a pardah nashin woman—Civil Procedure Code, sections 610, 401, 592

Where an appeal *in forma pauperis* by a *pardahnashin* woman, who had sued as a pauper in the Court of first instance was presented, not by an advocate, vakil or attorney of the Court, nor by the appellant in person, but by her duly authorized agent, it was *held* that this was a good presentation, section 8 of the Letters Patent notwithstanding *Sham Karan* v *Raghunandan Prasad* (1) distinguished

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Sundar Lal*, for the appellant

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the respondent

STANLEY, C J and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Dehra Dun, in a pauper suit, by which he declared the plaintiff entitled to a one seventh share of her father's estate In her claim the plaintiff asked for a decree for possession of one seventh of her father's property, but the learned Judge only gave her a declaratory decree A preliminary objection has been raised to the hearing of this appeal, on the ground that no proper memorandum of appeal [173]

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* First Appeal No 231 of 1898 from a decree of L Stuart, Esq., Subordinate Judge of Dehra Dun, dated the 20th June 1898

(1) (1900) I L R 22 All. 331

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by the defendants and registered by them after they had pretended to identify some one behind a pardah as Rachhpali, who was not there. We have no doubt that the defendants were guilty of fraud in all they did in connection with that bond. We find upon the evidence that as the plaintiff, Damodar Das, knew that he was taking a bond which was intended to defraud Rachhpali, and further that he distinctly favoured, if he did not instigate the execution of this bond, he was a party to the fraud by which he finds himself hoisted, and it is not for him to complain that the transaction has now resulted in loss to himself. The execution and registration of the deed were in our opinion false to his knowledge. We cannot assist him in such a case."

Against this decree the plaintiffs applied to the High Court for leave to appeal to the Privy Council, but the High Court [176] refused to certify that the case fulfilled the requirements of section 596 of the Code of Civil Procedure because the claim and decree in the original Court were for less than Rs. 10,000.*

In the petition for special leave to appeal, the plaintiffs submitted that the order of the High Court refusing to certify the case as a fit one for appeal was wrong, on the following grounds: (1) because the suit in the original Court claimed a sum of money consisting, 1st of a defined sum of Rs. 8,477, and, 2ndly, of the further contingent sum of interest thereon until realization; (2) because the decree of the original Court had ascertained the interest so as to make the entire sum due at the date of the decree Rs. 9,496, with a further ascertained sum of Rs. 570 payable annually until realization; (3) because before the decree of the High Court the entire sum claimed in the original Court had been ascertained as reaching a sum of Rs. 10,636 with further contingent increments.

Mr. *Mayne* for the petitioners contended on the above grounds that the amount of the subject-matter in the suit in the Court of first instance was above Rs. 10,000, and that the High Court ought therefore to have certified the case as a fit one for appeal under section 596 of the Code of Civil Procedure. *Ram Kirpal Shukul* v. *Rup Kuar* (1), and *Joogulkishore* v. *Jotendro Mohun Tagore* (2) were referred to. The Judicial Committee have a discretion to grant leave to appeal in cases where the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree; *Gooroo Persad Khoond* v. *Juggat Chunder* (3). In the exercise of that discretion special leave might be granted in this case although there is no substantial question of law. [The following cases were referred to by Lord Davey during the argument, with reference to the addition of interest to a decree to bring it up to the appealable amount, and to making an application to the Court below before coming to the Privy Council. *Gooroo Persad Khoond* v. *Juggut Chander* (3) per Turner, L. J., at page 167 of the report, *Mutusawmy Jagavera Yettapa Naiker* v. *Venkateswara Yettia* (4) *per* Lord [177] Chelmsford, L. C., at page 319 of the report, and *Bank of New South Wales* v. *Owston* (5) at pages 274, 275 of the report.]

1901, 30th November:—The judgment of their Lordships was delivered by LORD DAVEY:—

In this case their Lordships think that the High Court took a correct view of section 596 of the Civil Procedure Code, and rightly held that the case did not comply with the conditions prescribed in that section.

* *See* Weekly Notes, 1901, p. 19.

(1) (1881) I. L. R. 3 All. 633.
(2) (1882) I. L. R. 8 Cal. 210.
(3) (1860) 8 Moo. I.A. 166.
(4) (1865) 10 Moo. I. A. 313.
(5) (1879) L. R. 4 A. C. 270.

Where a case is otherwise unappealable the rule of the Judicial Committee is not to give special leave to appeal unless there is some substantial question of law of general interest involved

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In this case the Judicial Committee laid down a rule to be followed in future in Indian cases that where a party applies to the Committee for special leave to appeal the matter being under the appealable value he should first have applied to the Court below for a certificate under section 600 of the Code of Civil Procedure that the case is otherwise a fit one for appeal to His Majesty in Council But this rule will not bind the Judicial Committee not to grant such leave in any special case although that course has not been followed

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Semble—The amount of the subject matter of a suit in the Court of first instance for the purpose of an appeal to His Majesty in Council is the amount for which a decree is recovered including interest up to the date of the decree Interest subsequent to decree cannot though ascertainable be added for the purpose of bringing the value up to the appealable amount of Rs 10 000

[Fol 18 M L T 366=2 L W 1057=1915 M W N 916=31 I C 46 39 Mad 843 Ref 31 Cal 305 10 C L J 336=4 I C 459 13 C W N 1127=3 I C 787 10 I C 444=13 C L J 681 42 Cal 35 61 I C 131 62 I C 959 63 I C 492 10 O C 308 Rel 16 I C 422 3 Pat L J 317 44 Cal 119]

PETITION by the plaintiffs for special leave to appeal from a decree (10th July 1900) of the High Court at Allahabad by which a decree (16th June 1898) of the Subordinate Judge of Azamgarh was reversed and the suit dismissed with costs

The suit was brought to recover from the defendants Rs 8 477 with interest until the date of realization as damages for fraud

The petition stated that in the plaint the following facts were alleged as constituting the cause of action The plaintiffs who were bankers had monetary dealings with the defendants which resulted in decrees obtained against them in 1885 1886 and 1887 for sums amounting to Rs 4 400 Pending the litigation the first [175] defendant executed a fictitious deed of gift of his property in favour of his daughter in law Rachhpali the wife of the second defendant his son that during execution of the decrees the defendants induced the plaintiffs to accept in lieu of their claim a registered mortgage of this property by Rachhpali and to strike off the execution claims When the bond was sued on a defence was set up that it was a forgery and it was found so to be

The defendants in their written statement asserted that the gift to Rachhpali was valid that the bond alleged to be executed by her was obtained through the instrumentality of the plaintiffs and that the defendants did not commit any fraud nor give any inducement to the plaintiffs to have the document executed The Subordinate Judge found that the plaintiffs were innocent of any fraud in obtaining the bond and that the defendant had throughout the whole transaction practised fraud upon and deceived the plaintiffs into accepting a forged bond in lieu of their claim under the decrees As the result of his findings he gave a decree for principal and interest up to the date of the decree a sum of Rs 9 496 with further interest at 8 annas per cent up to date of realization and costs amounting to Rs 1 193

From this decree the defendants appealed to the High Court and that Court on the 10th of July 1900 reversed it and dismissed the suit with costs In their judgment the High Court said —

' We agree with the Subordinate Judge so far that we are satisfied that the bond of 28th November 1887 was a forgery Rachhpali was no party to it. It was signed

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taken. As a rule, however, they think that that course ought to be followed.

Application for special leave refused.

Solicitor for the petitioners:—Mr. *T. C. Summerhays.*

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[179] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BANSIDHAR (*Defendant*) v. GAYA PRASAD (*Plaintiff*).*

[10th December, 1901.]

Mortgage by conditional sale—Prior and puisne mortgages—Payment by puisne mortgagee, defendant in prior mortgagee's suit for foreclosure, of amount due on the prior mortgage—Application by such puisne mortgagee for an order absolute for foreclosure—Application refused—Separate suit by puisne mortgagee for foreclosure —Act No. IV of 1882 (*Transfer of Property Act*), *section* 74—*Civil Procedure Code, section* 244.

In July, 1889, one Fateh Chand executed a mortgage by conditional sale of a certain village in favour of Bansidhar and Kunj Bihari Lal. In October, 1889, Fateh Chand executed a second mortgage of the same village, also by way of conditional sale, in favour of Bansidhar and Anant Ram. In October, 1891, Anant Ram transferred his interest in the second mortgage to Gaya Prasad. In September, 1893, Bansidhar and Kunj Bihari instituted a suit for foreclosure of their mortgage. To that suit Raj Kumar, the son of the original mortgagor, and Gaya Prasad were made defendants. On the same date Gaya Prasad instituted a suit for foreclosure under the puisne mortgage of October, 1889. On the 22nd December foreclosure decrees were passed in both suits, and six months' time was allowed for redemption. The time allowed for redemption was extended from time to time, and ultimately, on the 3rd of January, 1896, Gaya Prasad paid into Court the sum which was due to the mortgagees on the mortgage, of July 1889, which sum was drawn out by the mortgagees. Subsequently to this payment into Court Gaya Prasad applied to the Court in the suit on the prior mortgage, and prayed that the right of the defendant in that suit to redeem the mortgaged property might be extinguished and an order absolute for foreclosure granted in the applicant's favour. This application was refused, on the ground that Gaya Prasad was only entitled to bring a suit for foreclosure and "had not acquired the status of a decree-holder," and that while he was a defendant, he could not execute the decree as a decree-holder and could not get a decree for absolute foreclosure. There was no appeal from this order, but Gaya Prasad submitted to it and brought a separate suit for foreclosure.

Held that under the above circumstances no such separate suit for foreclosure would lie.

Kedar Nath v. *Lalji Sahai* (1), *Oudh Behari Lal* v. *Nageshar Lal* (2) and *Ajudhia Pershad* v. *Baldeo Singh* (3) referred to.

[Dist. 27 All. 403=2 A. L. J. 23=A. W. N. 1905, 11; Rev. 27 All. 325 (P.C.)=2 A. L. J. 336=9 C. W. N. 577=2 C. L. J. 173=7 Bom. L. R. 427=15 M. L. J. 191=32 I. A. 123; Ref. 26 All. 504=A. W. N. 1904, 103; 27 All. 400=A. W. N. 1904, 284=2 A. L. J. 13.]

THE facts of this case are fully stated in the judgment of the Court.

[180] Pandit *Moti Lal Nehru*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

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* First Appeal No. 215 of 1898 from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Mainpuri, dated the 23rd June 1898.

(1) (1889) I. L. R. 12 All. 61.
(2) (1890) I. L. R. 13 All. 278.
(3) (1894) I. L. R. 21 Cal. 818.

The section is in these terms "The amount, or value of the subject-matter of the suit in the Court of first instance, must be Rs 10,000 or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum, or upwards" Their Lordships think that the High Court were quite right in saying that the word 'and' means "and" and not "or" In the present case the amount or value of the subject matter of the suit in the Court of first instance, construing that in the manner most favourable to the proposed appellant, was at the outside the amount for which he recovered his decree which was below Rs 10,000 amounting, in round numbers, I think, to about Rs 9,500 only That really disposes of the question, because it does not fulfil both conditions

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But then Mr Mayne suggests that their Lordships ought to give special leave to appeal Now, the practice of this Board in advising His Majesty to exercise His prerogative, and to give special leave to appeal, is well known, and this Board does not advise His Majesty to exercise His prerogative in that manner unless there is some substantial question of law of general interest involved In the present case there does not appear to be any such question of law involved It appears to their Lordships that what is decided in the Court below is very fully stated in the petition It appears to have been a mere question of fact The Court below thought that the plaintiffs were entitled to a decree The High Court, not differing from the view of the facts taken by the Court below, thought that it also appeared from evidence that the plaintiffs were so far *particepes criminis* in the fraud which was alleged that they could not recover against the other parties to the fraud, and on that ground [178] they allowed the appeal Their Lordships cannot say, and Mr Mayne very fairly could not say, that that involved any question of law at all, much less a substantial question of law of general interest They therefore cannot see their way to advise His Majesty to grant the prayer of the present petition

Their Lordships desire only to make one further observation, and it is this that where a party in an Indian case (and this observation is confined to Indian cases) comes to this Board and asks for special leave to appeal, the matter being under the appealable value, their Lordships think that he should first apply to the Court below for a certificate under the second part of section 600 namely, "that it is otherwise a fit one for appeal to Her Majesty in Council" Section 598 prescribes that "Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of", and section 600 prescribes what must be stated in the petition, namely, "that the case fulfils the requirements of section 596, or that it is otherwise a fit one for appeal to Her Majesty in Council" Their Lordships think it is a good rule to lay down, that where a party comes for special leave to appeal the case being under appealable value and therefore not an appeal as of right, he should in the first instance apply to the High Court for leave to appeal, on the ground that it is otherwise a fit one for appeal to His Majesty in Council Their Lordships believe that no rule to that effect has been laid down in any previous case, and they, therefore, would not act upon it in the present case, but their Lordships desire it to be considered that in future that rule will be followed, without of course binding this Board not to advise His Majesty to exercise His prerogative in any special case, although that course has not been

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was no appeal from this order. Gaya Prasad acquiesced in it and brought the present suit.

The appellant, Bansidhar, alone of the defendants, has defended the suit, and his principal defence was that the suit does not lie, inasmuch as a decree for foreclosure of the property in question has already been passed in a suit to which the plaintiff, Gaya Prasad, is a party, and that the questions sought to be raised in this suit were determinable on an application for execution in the former suit under section 244 of the Civil Procedure Code, and not by a separate suit.

The Subordinate Judge did not accede to this contention, but gave a decree for foreclosure in favour of the plaintiff-respondent, holding that the decree passed in favour of Bansidhar and Kunj Bihari Lal in suit No. 123 of 1893 had, under section 86 of the Transfer of Property Act, been fully satisfied by the payment made by Gaya Prasad, and that "after the satisfaction of the prior debt there remained no dispute between the decree-holders" [182] (*sic*). We presume by this last paragraph that he intended to convey that between the original decree-holders and the representatives of the mortgagor there remained no dispute for determination. We do not clearly understand the reasons assigned by the learned Subordinate Judge for his judgment, but we presume that he meant by it that, inasmuch as the plaintiffs, the prior mortgagees, had been paid off, there was no party interested as a decree-holder before the Court who could enforce execution of the decree, and that consequently section 244 of the Code of Civil Procedure had no application. This is the most favourable construction for the respondent which we can put upon the language of the judgment. Is this view correct? It seems to us clear that Gaya Prasad, who, as second mortgagee, was a party to the suit, when he paid off the claim of the plaintiffs, acquired under section 74 of the Transfer of Property Act all the rights and powers of the first mortgagees, the decree-holders, in respect of the mortgaged property, and in effect stepped into the shoes of the plaintiffs, so far as regarded the enforcement of their rights. He practically became the decree-holder in place of the original decree-holders. The suit was not thereby terminated, nor did the plaintiffs cease to be parties to it, although they ceased no doubt to have any substantial interest in its further prosecution. It still remained for the Court to adjust the rights and liabilities of all parties to the suit in respect of the mortgaged property and in respect of costs; and if necessary for that purpose, to make and enforce an absolute order for foreclosure. The right which belonged to the plaintiffs to have the primary decree effectually worked out by execution passed to Gaya Prasad by virtue of section 74 of the Act above referred to, he having satisfied the claim of the plaintiffs. With the change of interest so caused the suit continued to be a subsisting suit. If this is not the effect of the section, and if payment under it terminates a suit, it is obvious that serious loss in costs and time would be incurred by puisne mortgagees—parties to the suit—who might be desirous of redeeming or of enforcing their claims, inasmuch as in order to redeem or enforce their claims, they would be obliged to institute separate suits, and the costs incurred by them in the earlier suit would be thrown away. If, as we [183] think, the suit continued as a subsisting suit after the payment of the plaintiff's claim, and if Gaya Prasad acquired a right to prosecute the suit with a view to protect his own

STANLEY, C J and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Mainpuri, passed in favour of the plaintiff, Gaya Prasad The suit was brought for foreclosure of the village Patara in the district of Mainpuri under a mortgage by way of conditional sale, without giving the mortgagor and puisne mortgagees an opportunity of redeeming, and in the alternative, for foreclosure giving a right of redemption to some of the defendants and also claiming, in case a decree for foreclosure should not be granted, recovery from the defendant, Bansidhar, of a sum of Rs 7,546 8 0 and interest

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The Subordinate Judge gave a decree for foreclosure

The facts are shortly as follows :—

On the 20th of July, 1889, one Chaudhri Fateh Chand executed a mortgage by conditional sale of the village Patara in favour of the appellant and of one Kunj Bihari Lal to secure repayment of a sum of Rs 7,101 and interest

On the 22nd of October, 1891, Chaudhri Fateh Chand executed a second mortgage of the same village also by way of conditional sale, in favour of the appellant and of one Anant Ram to secure repayment of a sum of Rs 10,000 and interest

On the 1st of October, 1891, Anant Ram transferred his interest in this mortgage to the respondent, Gaya Prasad On the 27th of September, 1893, the appellants, Bansidhar and Kunj Bihari Lal, instituted a suit, No 123 of 1893, for foreclosure, under their mortgage of the 20th of July, 1889, against Chaudhri Raj Kumar, the only son of the mortgagor, Chaudhri Fateh Chand, who was then dead, as the principal defendant, and also against the respondent, Gaya Prasad, as a puisne incumbrancer

On the same date Gaya Prasad instituted a suit for foreclosure under the puisne mortgage of the 22nd of October, 1889 On the 22nd of December, 1894, foreclosure decrees were passed in both these suits, and six months' time was allowed for redemption The time for redemption was extended from time to time until ultimately, on the 3rd of January, 1896, Gaya Prasad, the respondent in the present suit, in order to prevent an order absolute for foreclosure being passed against him, paid into Court the [181] sum which was then due to the mortgagees on foot of the mortgage of the 20th of July, 1889, namely, the sum of Rs 15,093 This money was subsequently drawn out of Court by the appellants, Bansidhar and Kunj Bihari Lal, the motgagees

Having paid the amount so due, Gaya Prasad acquired all the rights and powers of the first mortgagees in respect of the mortgaged property by virtue of section 74 of the Transfer of Property Act He thereupon, on the 3rd of August, 1897, made an application to the Court in the first mentioned mortgage suit and prayed in it that the right of the defendant in that suit to redeem the mortgaged property might be extinguished, and an order absolute for foreclosure granted in his (the applicant's) favour The learned Subordinate Judge, by an order dated the 6th November, 1897, refused this application on the ground, as he says in his judgment, that Gaya Prasad, by paying off the mortgage debt and so becoming the representative of the mortgagees under section 74 of the Act to which we have referred, was only entitled to bring a suit for foreclosure, and "had not acquired the status of a decree holder," and that while he was a defendant he could not execute the decree as a decree holder, and could not get a decree for absolute foreclosure There

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has been passed against him. It does not, therefore, lie in the respondent's mouth now to say that the appellant has not a right to appeal.

The decision of the Subordinate Judge in the former suit refusing to give Gaya Prasad an order absolute for foreclosure was a wrong decision, and would most certainly have been set aside on appeal, but Gaya Prasad submitted to and acquiesced in it, and he must take the consequences.

For the foregoing reasons we are of opinion that this suit is not maintainable. We hold that it is barred by the provisions of sections 244 of the Civil Procedure Code, and that the plaintiff-respondent has mistaken his remedy, and should have appealed against the order of the 6th of November, 1897, instead of instituting a separate suit. We therefore allow this appeal. We set aside the decree of the lower Court as against all the persons impleaded as defendants, and we direct that the suit do stand dismissed.

[185] The case is a hard one upon the respondent, for in bringing the suit he followed the ruling of the Subordinate Judge after the latter had refused to give him an order to which he was entitled. The appellant was represented at the hearing of that application, and must have acquiesced in, if he did not support, the ruling.

Under these circumstances we do not think that this is a case in which costs should be awarded to the appellant, and we accordingly make no orders as to the costs of this appeal.

Appeal decreed.

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24 A. 185 (=A. W. N. 1902, 7.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DELHI AND LONDON BANK, LIMITED (*Plaintiff*) *v.* BHIKARI DAS AND OTHERS (*Defendants*).* [19th December, 1901.]

Act No. IV of 1882 (*Transfer of Property Act*), *section* 74—*Mortgage—Rights of prior and puisne incumbrancers inter se.*

The puisne mortgagees instituted a suit on their mortgage without making the prior mortgagees parties thereto, and got a decree for sale on the 6th April, 1895, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st September, 1896.

The prior mortgagees instituted a suit on their mortgage without making the puisne mortgagees parties thereto, and got a decree for sale on the 11th December, 1894, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st November, 1896, and obtained possession thereof on the 21st January, 1897.

The puisne mortgagees then sued the prior mortgagees, claiming possession of the property purchased by the latter on payment of the actual purchase-money, or of the sum which was due upon their mortgage at the date of the institution of their suit.

Held—(1) that the puisne mortgagees were entitled to be put into possession on payment to the prior mortgagees of the sum which was actually due upon the prior mortgage at the date upon which the prior mortgagees purchased, and (2) that such possession was, as to the property included in their own mortgage, proprietary; but, as to the property not so included, possession as mortgagees only; they were not entitled to the rights of the prior mortgagees as purchasers of the equity of redemption.

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* First Appeal No. 238 of 1898 from a decree of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Shahjahanpur, dated the 15th August 1898.

interests, then it is clear upon the authorities in this Court that the application which was made by him for an order absolute for foreclosure was proper, and the only application he could make, and was an application in execution under section 244 of the Code of Civil Procedure and ought to have been granted

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In the case of *Kedar Nath* v *Lalji Sahai* (1), it was held by a Full Bench of this Court that the order mentioned in section 87 of the Transfer of Property Act, i e, an order absolute for foreclosure, is an order in execution of the primary decree for foreclosure, and is appealable as a decree under section 244 read with section 2 of the Civil Procedure Code This decision was followed by a Full Bench of this Court in the case of *Oudh Behari Lal* v *Nageshar Lal* (2) A different view upon this question was taken by the Calcutta High Court in the case of *Ajudhia Pershad* v *Baldeo Singh* (3), which has been followed by that Court in several later decisions We however are bound by rulings of the Full Bench of this Court. The learned advocate for the respondent, recognizing that the decisions of this Court were against him on this question had recourse to an ingenious argument He says that in suit No 123 of 1893, the suit in which his client, Gaya Prasad, paid the amount of the prior mortgagee's claim, Bansidhar was not a party in the capacity of a puisne incumbrancer, but in that of a prior mortgagee only, and that, inasmuch as his claim in that suit as a prior mortgagee was satisfied, the suit came to an end so far as he was concerned, and no claim which he had as puisne mortgagee could have been determined in that suit, and that a separate suit became necessary for the purpose of having the questions decided, which are raised in the present litigation We wholly fail to appreciate this contention Bansidhar was first mortgagee and also a puisne incumbrancer He could not as first mortgagee sue himself as a puisne mortgagee, and therefore he was not named a party defendant as well as a plaintiff, but he made his co mortgagee in the puisne mortgage a defendant, as such puisne mortgagee, so [184] that all persons who had an interest in the mortgaged property might be represented before the Court The personality of a plaintiff to a suit of this kind cannot be split up so as to enable him or any other party to say that he was before the Court in respect of one interest which he possessed in the mortgaged property and not of another If, instead of an order for foreclosure, an order for sale had been made, and the property had been sold and conveyed to a stranger, could Bansidhar have afterwards been listened to, if he contended that the sale was not binding on him as a puisne mortgagee, inasmuch as he was not a party to the suit as a puisne mortgagee, but only as a first mortgagee? Clearly not So here when Bansidhar sought the aid of the Court as a plaintiff in the enforcement of his right as first mortgagee, he necessarily submitted for the Court's adjudication all questions arising in regard to his rights or liabilities generally in respect of the mortgaged property

But another point has been made by the learned pleader for the respondent He argues that, inasmuch as the mortgagor has not appealed from the decree which has been passed in this suit, the appellant has no *locus standi* for appealing An obvious answer to this is, that the plaintiff respondent made the appellant a party to the suit, and that a decree

(1) (1889) I L R 12 All 61
(2) (1890) I L R 13 All 278
(3) (1894) I L R 21 Cal 818

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contention was not, however, seriously pressed. It appears to us perfectly clear on the authorities that the prior mortgagees were entitled on redemption to be paid the sum which was actually due to them for principal and interest at the date when they obtained possession of the property under their purchase. The Bank also contends that it is entitled not merely to a decree for proprietary possession of the property comprised in its mortgage, but also to a decree for proprietary possession of the residue of the property which was not included in that mortgage. The respondents say that the Bank is not entitled to any modification of the decree in this respect. The Bank contends that, inasmuch as it paid the first mortgagees the full amount of their claim, it was entitled, under section 74 of the Transfer of Property Act, to all the rights and powers of the first mortgagees in the mortgaged property; and that, inasmuch as the mortgagor's interest in the property had passed to the mortgagees upon their purchase made on the 31st of September, 1896, the Bank was entitled to stand in the shoes of the mortgagees, and to have their rights not merely as mortgagees, but also as purchasers of the equity of redemption, that is, of the mortgagor's interest. The respondents, on the other hand, contend that when the Bank paid the entire mortgage debt due to the first mortgagees, the Bank merely placed itself in the position of the first mortgagees who were so redeemed, and acquired a right to treat the mortgagor as its mortgagor, and to hold that portion of the [188] property, in which it would have no interest but for the payment as a security only for any surplus payment it may have made. The sale by the first mortgagees was impeached in this suit by the Bank, and is undoubtedly invalid in law as against the puisne incumbrancers, inasmuch as they were not impleaded in the suit which resulted in the sale. It appears to us that the Bank, though it impeaches this sale, yet seeks in the appeal, which is now being prosecuted, to obtain an advantage under it to which it is not entitled. The sale by the first mortgagees was undoubtedly not binding upon the puisne mortgagee, inasmuch as the Bank was not impleaded as required by the provisions of section 85 of Transfer of Property Act. This being so, the Bank retained its ordinary right as a puisne mortgagee to redeem the property. Having elected to redeem the property and having paid off the prior mortgagees' claim, the Bank undoubtedly acquired, under section 74 of the Act to which we have referred, all the rights and powers of the first mortgagees; but, in the words of the section, "as such," *i.e.*, "mortgagees." But the section does not give the Bank any right or interest which the first mortgagees may have acquired otherwise than as such mortgagees. This, it appears to us, left outstanding the equity of redemption in the property which was not included in the Bank's mortgage. The mortgagor's equity of redemption either passed to the first mortgagees under the sale made to them or it did not. If it did pass to them, they acquired it at the auction-sale held in execution of their decree, as purchasers and not as mortgagees. If it did not pass to them the equity of redemption remains outstanding in the mortgagor who has not been made a party to this suit. We are of opinion, therefore, that the contention which has been so ably put forward by Mr. *Malaviya* is correct, and that the rights of the parties, as they have been presented to us by him, are consonant with the principles which govern the relations of mortgagors and successive mortgagees in cases in which their respective rights and obligations are involved. We, therefore, hold that the contention of the Bank in

[Ref 25 All 446=23 A W N 150 10 O C 133=2 I C 836, C3 I C 738 Fol 26 All 185=A W N 1903, 219] 1901 DEC 19

THE facts of this case are sufficiently stated in the judgment of the Court APPELLATE CIVIL

Mr *W M Colvin* (for whom Babu *Durga Charan Banerji*) and Mr *D N Banerji*, for the appellants 24 A 185= A W N 1902,7

[186] Pandit *Sundar Lal* (for whom Pandit *Madan Mohan Malaviya*), Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*) and Munshi *Jang Bahadur Lal*, for the respondents

STANLEY, C J, and BURKITT, J —This is an appeal and a cross appeal from a decree of the Subordinate Judge of Shahjahanpur The suit was brought by the appellant Bank for possession of certain zamindari property situate in several villages on the ground that the defendants had acquired no right to it under a purchase made by them on the 21st of November, 1896, and in the alternative for redemption of the property on payment of the sum of Rs 4,500, which sum represents the purchase money paid by the respondents on the occasion of their purchase, or a sum of Rs 7,450, which was the amount of the defendants' mortgage at the date of the institution of their suit The facts are shortly these One Suraj Mal borrowed Rs 12,000 from the appellant Bank, and by way of security for the payment of this sum and interest, executed a deed of mortgage on the 16th of July 1892 On foot of this mortgage the Bank instituted a suit for recovery of the moneys due to them, and obtained a decree for sale of the mortgaged property on the 6th of April, 1895, and at the sale, which was subsequently held in pursuance of that decree on the 21st of September, 1896, the Bank purchased the property which was included in its mortgage It appears that Suraj Mal had, so long ago as the 29th of May, 1882, mortgaged the property which was comprised in the plaintiff's (the Bank s) mortgage with other property to one Narain Das, whose representatives the defendants are The defendants instituted a suit on foot of their mortgage, and obtained a decree for sale of the mortgaged property on the 11th of December, 1894, and at the auction sale they themselves purchased the property for a sum of Rs 4,500 This was on the 21st November 1896, and they got possession on the 21st of January 1897 Contrary to the provisions of section 85 of the Transfer of Property Act, the plaintiff Bank did not implead in their suit the defendants respondents, nor did the latter implead the Bank in the suit which they instituted The present suit has been instituted by the Bank, as we have stated, to have it declared that the defendants acquired no right to the property under their purchase, and in the alternative for redemption The [187] Subordinate Judge passed a decree in favour of the Bank, and directed that on payment of a sum of Rs 13, 638 10 0, which was the amount then actually due to the respondents for principal and interest on foot of their mortgage at the date of their purchase, the Bank should have proprietary possession of the property included in its mortgage, and possession as mortgagee of the property which was not included in that mortgage, but which was included in the respondents' mortgage, and which had passed to them under their purchase The Bank has appealed against this decree on two grounds First on the ground that it should not have been directed to pay a larger sum for redemption of the property than the actual amount of the purchase money, namely Rs 4 500, or, at least, the sum for which the respondents had instituted their suit This

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contention was not, however, seriously pressed. It appears to us perfectly clear on the authorities that the prior mortgagees were entitled on redemption to be paid the sum which was actually due to them for principal and interest at the date when they obtained possession of the property under their purchase. The Bank also contends that it is entitled not merely to a decree for proprietary possession of the property comprised in its mortgage, but also to a decree for proprietary possession of the residue of the property which was not included in that mortgage. The respondents say that the Bank is not entitled to any modification of the decree in this respect. The Bank contends that, inasmuch as it paid the first mortgagees the full amount of their claim, it was entitled, under section 74 of the Transfer of Property Act, to all the rights and powers of the first mortgagees in the mortgaged property; and that, inasmuch as the mortgagor's interest in the property had passed to the mortgagees upon their purchase made on the 31st of September, 1896, the Bank was entitled to stand in the shoes of the mortgagees, and to have their rights not merely as mortgagees, but also as purchasers of the equity of redemption, that is, of the mortgagor's interest. The respondents, on the other hand, contend that when the Bank paid the entire mortgage debt due to the first mortgagees, the Bank merely placed itself in the position of the first mortgagees who were so redeemed, and acquired a right to treat the mortgagor as its mortgagor, and to hold that portion of the [188] property, in which it would have no interest but for the payment as a security only for any surplus payment it may have made. The sale by the first mortgagees was impeached in this suit by the Bank, and is undoubtedly invalid in law as against the puisne incumbrancers, inasmuch as they were not impleaded in the suit which resulted in the sale. It appears to us that the Bank, though it impeaches this sale, yet seeks in the appeal, which is now being prosecuted, to obtain an advantage under it to which it is not entitled. The sale by the first mortgagees was undoubtedly not binding upon the puisne mortgagee, inasmuch as the Bank was not impleaded as required by the provisions of section 85 of Transfer of Property Act. This being so, the Bank retained its ordinary right as a puisne mortgagee to redeem the property. Having elected to redeem the property and having paid off the prior mortgagees' claim, the Bank undoubtedly acquired, under section 74 of the Act to which we have referred, all the rights and powers of the first mortgagees; but, in the words of the section, "as such," *i.e.*, "mortgagees." But the section does not give the Bank any right or interest which the first mortgagees may have acquired otherwise than as such mortgagees. This, it appears to us, left outstanding the equity of redemption in the property which was not included in the Bank's mortgage. The mortgagor's equity of redemption either passed to the first mortgagees under the sale made to them or it did not. If it did pass to them, they acquired it at the auction-sale held in execution of their decree, as purchasers and not as mortgagees. If it did not pass to them the equity of redemption remains outstanding in the mortgagor who has not been made a party to this suit. We are of opinion, therefore, that the contention which has been so ably put forward by Mr. *Malaviya* is correct, and that the rights of the parties, as they have been presented to us by him, are consonant with the principles which govern the relations of mortgagors and successive mortgagees in cases in which their respective rights and obligations are involved. We, therefore, hold that the contention of the Bank in

this respect is not well founded The decision of the lower Court must, therefore, be affirmed, and the appeal dismissed with costs

Appeal dismissed

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24 A 185= A W N 1902, 7

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24 A. 189 (=A W N. 1902, 9)

[189] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

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SHEO PRASAD SINGH (*Objector*) *v* JALEHA KUNWAR AND ANOTHER (*Respondents*) * [19th December, 1901]

Act No I of 1894 (*Land Acquisition Act*) *sections* 31 *and* 32—*Land taken up for public purposes, such land being in possession of a Hindu widow holding in right of her deceased husband—How compensation in respect of such land should be allotted*

[illegible]

followed

IN this case certain land in mauza Saidpur, in the Ghazipur district, was taken up by Government under the Land Acquisition Act, 1894, for the Bengal and North-Western Railway The land in question belonged to two Hindu widows who held the usual Hindu widow's estate in it, and were not the absolute owners Compensation was duly allotted in respect of the land in question, when one Sheo Prasad Singh, who alleged himself to be the next reversionary heir, applied to stop the compensation from being paid over to the widows The case was made over under section 18 of the Land Acquisition Act to the District Judge, who decided in favour of the widows The reversioner appealed to the High Court

Mr *Muhammad Ishaq*, for the appellants

Babu *Bishnu Chandra Moitra*, for the respondents.

[Diss 11 C L J 533]

STANLEY, C J and BURKITT, J —The question in this appeal arises under the Land Acquisition Act Certain property was taken over by Government, the present owners of which are two Hindu widows whose husbands owned the property A party, representing himself to be the reversionary heir, has objected to the payment of the compensation money to the widows on the ground that they were not parties competent to alienate the land within the provisions of section 31 of the Land Acquisition Act It is clear that this section contemplates a present power to alienate, and it is also well settled that Hindu [190] widows cannot, of their own free will, alienate property except for special legal necessities This was so decided in the case of *Sheoratan Rai* v *Mohri* (1) We consider that the decision in that case was perfectly correct and governs the present case, and we must therefore allow the appeal, and pass an order under the provisions of section 32 of the Land Acquisition Act, directing that the compensation money awarded shall be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or if such purchases cannot

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*First Appeal No 204 of 1898 from a decree of Kunwar Bharat Singh, District Judge of Ghazipur, dated the 29th July 1898

(1) Weekly Notes, 1899, p 96

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be effected forthwith, then in such Government or other approved securities as the Court shall think fit, and we direct that the payment of interest, rent or other proceeds of any such investment be made to the respondents as the persons for the time being entitled to the land. The appeal is allowed with costs.

Appeal decreed.

24 A. 190 (=A. W. N 1902, 1).

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ABU SAYID KHAN (*Defendant*) v. BAKAR ALI AND ANOTHER (*Plaintiffs*).*
[21st December, 1901.]

Muhammadan Law—Waqf—Waqf of money held to be valid.

Held, that according to the Muhammadan Law a waqf of moveable property may be validly constituted. *Fatima Bibee* v. *Ariff Ismailjee Bham* (1) dissented from.

[Dist. 10 C. W. N. 449: Ref. 9 Bom. L. R. 1337; 2 C. L. J. 166; Diss. 33 Mad. 118: 6 M. L. T. 307.]

IN the suit out of which this appeal arose, the plaintiff claimed, as heir to one Fakhr-ud-din, deceased, first, a declaration that he was such heir; and secondly, a declaration that a document called a deed of endowment, dated the 10th of March, 1892, and registered on the 11th of March, 1892, was null and void and had no effect as against the plaintiff. After the filing of the plaint, one Abu Sayid Khan, the mutawalli of the endowed property, was added as a defendant, the suit having been originally brought against Ahmadi Begam, the widow of Fakhr-ud-din alone. At a subsequent date, the original plaintiff having died, the names of his two sons, Bakar Ali and Muzaffar Ali, were substituted in the plaint, and the plaint was amended [191] by the addition of a prayer for a further declaration that "the appointment of Abu Sayid Khan as a mutawalli being totally null and void, he has no right to the property in dispute." There were other reliefs claimed, but these are not material for the purposes of this report.

The Court of first instance (Subordinate Judge of Cawnpore) decreed the plaintiff's claim in part. It found that the plaintiffs were not the only heirs of Fakhr-ud-din, but that the property of Fakhr-ud-din, which was not subject of a valid waqf, was inherited by the plaintiffs along with Ahmadi Begam. As to the waqf, it found that the claim was not maintainable, so far as the immoveable property therein included was concerned but that, inasmuch as moveable property could not, under the Muhammadan law, be made the subject of a waqf, the waqf so far was invalid, and the plaintiffs were entitled to it with Ahmadi Begam.

The defendant, Abu Sayid Khan, the mutawalli, appealed to the High Court against that part of the decree which declared the waqf-namah, so far as it related to the moveable property dealt with thereby, to be invalid.

Mr. *Karamat Husain* and Maulvi *Gulam Mujtaba*, for the appellant.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondent.

* First Appeal No. 276 of 1898 from a decree of Babu Bepin Behari Mukerji, Additional Subordinate Judge of Cawnpore, dated the 30th June 1898.

(1) (1881) 9 C. L. R. 66.

this respect is not well-founded The decision of the lower Court must, therefore, be affirmed, and the appeal dismissed with costs 1901 DEC 19

Appeal dismissed

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24 A 185= A W N 1902, 7

24 A. 189 (=A W N. 1902, 9)

[189] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

SHEO PRASAD SINGH (*Objector*) v JALEHA KUNWAR AND ANOTHER (*Respondents*) * [19th December, 1901]

Act No I of 1894 (*Land Acquisition Act*) *sections* 31 *and* 32—*Land taken up for public purposes such land being in possession of a Hindu widow holding in right of her deceased husband—How compensation in respect of such land should be allotted*

Where land which was taken up by the Government under the Land Acquisition Act for public purposes was held at the time by two widows holding the usual Hindu widow s life estate therein, it was *held* that the compensation awarded for such land should not be paid over to the widows but should be invested in land to be held on similar terms *Sheoratan Rai* v *Mohri* (1) followed

IN this case certain land in mauza Saidpur, in the Ghazipur district, was taken up by Government under the Land Acquisition Act, 1894, for the Bengal and North Western Railway The land in question belonged to two Hindu widows who held the usual Hindu widow's estate in it, and were not the absolute owners Compensation was duly allotted in respect of the land in question, when one Sheo Prasad Singh, who alleged himself to be the next reversionary heir, applied to stop the compensation from being paid over to the widows The case was made over under section 18 of the Land Acquisition Act to the District Judge, who decided in favour of the widows The reversioner appealed to the High Court

Mr. *Muhammad Ishaq*, for the appellants

Babu *Bishnu Chandra Moitra*, for the respondents

[Diss 11 C L J 533]

STANLEY, C J and BURKITT, J —The question in this appeal arises under the Land Acquisition Act Certain property was taken over by Government, the present owners of which are two Hindu widows whose husbands owned the property A party, representing himself to be the reversionary heir, has objected to the payment of the compensation money to the widows on the ground that they were not parties competent to alienate the land within the provisions of section 31 of the Land Acquisition Act It is clear that this section contemplates a present power to alienate, and it is also well settled that Hindu [190] widows cannot, of their own free will, alienate property except for special legal necessities This was so decided in the case of *Sheoratan Rai* v *Mohri* (1) We consider that the decision in that case was perfectly correct and governs the present case, and we must therefore allow the appeal, and pass an order under the provisions of section 32 of the Land Acquisition Act, directing that the compensation money awarded shall be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or if such purchases cannot

*First Appeal No 204 of 1898 from a decree of Kunwar Bharat Singh, District Judge of Ghazipur, dated the 29th July 1898

(1) Weekly Notes, 1899, p 96

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after setting forth the authorities of Muhammadan law on the subject, that these authorities were evidently not pointed out to the learned Judge who decided the case of *Fatima Bibee* v. *Ariff Ismailjee Bham.* (1) The learned counsel on both sides have addressed to us very able and erudite arguments, and have brought to our attention a number of authorities of Muhammadan law in addition to those referred to in Mr. Justice Ameer Ali's book. We have carefully considered those authorities. The conflict between them is bewildering. Some assert that such an endowment as the present is absolutely void; others, that it is valid when customary; and others again—and these are in the majority—that it is valid without any restriction. Not only is there a conflict between different jurists, but we find different and irreconcilable opinions attributed to the same jurists by different commentators. On page 267 of his Digest of Anglo-Muhammadan Law, Sir Roland Wilson observes :—" Authorities are conflicting as to money * * *, but the better opinion seems to be that it can be appropriated." After a long and careful consideration of the texts we have arrived at the same conclusion. Under the Muhammadan law, perpetuity is a necessary condition of a valid waqf: in other words, such things as perish in the using (to use Mr. Justice Wilson's expression), cannot be appropriated. Some of the Muhammadan authorities were of opinion that a condition of perpetuity could not attach to money, and that consequently money could not form the subject of a valid waqf. Others again, such as Zafar, held that no such objection could be offered to a waqf of money. We quote the following passage from Fatwa Qazi Khan, which is pronounced by Morley to be a work of equal authority with the Hidaya :—" It is related from Zafar that if a man should make a waqf of *dirhams* it would be lawful. On being questioned how that could be, he [194] replied that the *dirhams* could be given in *Muzarihat* (partnership in which one partner supplies capital, and the other labour), and the usufruct thereof be devoted to the purposes of the waqf." (Fatwa Qazi Khan, Volume IV, p. 309). The same appears to have been the opinion of Zuhri, as will appear from the following extract from the book Umdat-ul-Kari, a commentary on Sahib-ul-Bukhari by Allama Aini, Volume VI, p. 516 :—" Zuhri was asked whether a man who, having dedicated a thousand *dinars* in the way of God, made them over to his slave, a tradesman, for investment in some trade, and who made the usufruct thereof a *sadaka* (charity) to the poor, and to the relatives, could lawfully eat anything out of the usufruct of the said thousand (*dinars*), even if the usufruct had not been given in charity to the poor, he replied that he could not eat anything out of it." The author of Durri-Mukhtar was also of the same opinion, as the following extract shows :—" And, as is also valid the waqf (appropriation) of every 'moveable,' designedly made 'in which it is customary' among the people 'like spades and axes', but also *dirhams* and *dinars*. I say that an order was, on the other hand, issued to the Qazis (Judges) to give orders for it, *i.e.*, for the waqf of *dirhams* and *dinars*, as is mentioned in the *maruzat* of Mufti Abu Sand."

Different views are attributed to Imam Muhammad. According to some he held that the waqf of moveable was valid where such endowment was customary, but according to the Mujtaba he held it valid without any restriction. The opinion of Abu Yusuf, as well as of the author of the Hidaya, was against such an appropriation.

(1) (1881) 9 C. L. R. 66.

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BANERJI and AIKMAN, JJ —This is the appeal of the defendant in the suit which gave rise to first appeal No 187 of 1898, decided by us to day The only question which we have to consider in this appeal is, whether a waqf of moveable property is valid under the Muhammadan law The appropriator Fakhr ud din included in the deed of waqf exe cuted by him a sum of Rs 11,000, which he had deposited with a firm in Cawnpore The deed contains the following provisions in regard to the disposal of the said sum —" Rs 5,000, out of the endowed sum of Rs 11,000, will be spent in constructing a mosque with shops at a proper place The income of the shops will, according to the opinion of the mutawalli (Superintendent), be applied to wards the expenses of the said mosque, *i e*, on account of Imam (one who leads at prayer) and Muazzin (one who calls for [192] prayer), &c, and the mutawalli will contstruct a pucca well where it is required The remaining amount out of the endowed sum of Rs 11,000 and also the money which may remain after defraying all the aforesaid expenses out (of the income) of the endowed property through the good management of the mutawalli (Superintendent) shall all of it be kept in safe custody , and, it having been accumulated, shall be applied in purchasing proper immoveable property, which shall be added to the endowed property This practice will always continue The profits of the newly purchased property, as well as the property itself, shall be regarded as endowed property, and shall be applied in charitable and pious purposes recognized by the Muhammadan law as mentioned above The mutawalli (Superintendent) shall also pay (money) to the Hajis (pilgrims) out of this very income according to his own opinion '

It was contended on behalf of the plaintiffs that a waqf of such property is wholly void, and this contention has found favour in the Court below The learned Subordinate Judge, while pointing out that the opinion of the Muhammadan lawyers on this point was not unani mous, followed a ruling of the Calcutta High Court, *Fatima Bibee* v *Ariff Ismailjee Bham* (1) That ruling, no doubt, supports the conclusion arrived at by the learned Subordinate Judge, and, as far as we have been able to ascertain, it is the only reported case on the question which we have to determine

The case referred to was one in which shares in two companies at Rangoon had been made the subject of waqf It was contended that such endowment was invalid according to Muhammadan law Wilson, J, in disposing of the plea, made the following observa tions —" Property of this nature is modern in origin, and the old text can only be applied by way of analogy But there does not seem to me much difficulty in arriving at a conclusion Land, according to all the authorities, may be appropriated And the power has been, it is universally agreed, extended to certain other kinds of property, though the exact degree of the extension is a matter in difference among the authorities But it is agreed that it does not apply to such things [193] as perish in the using, under which head money appears to be in clud [illegible] to me clear that the [illegible] form of dividends cann[illegible] The correctness of this ruling has been questioned by Mr Justice Ameer Ali, in his work on Muhammadan law, p 271, 2nd edition, where he remarks,

(1) (1881) 9 C L R 66

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after setting forth the authorities of Muhammadan law on the subject, that these authorities were evidently not pointed out to the learned Judge who decided the case of *Fatima Bibee* v. *Ariff Ismailjee Bham.* (1) The learned counsel on both sides have addressed to us very able an erudite arguments, and have brought to our attention a number of author ties of Muhammadan law in addition to those referred to in Mr. Justi Ameer Ali's book. We have carefully considered those authorities. T conflict between them is bewildering. Some assert that such an endowm as the present is absolutely void; others, that it is valid when customa and others again—and these are in the majority—that it is valid wit any restriction. Not only is there a conflict between different ju but we find different and irreconcilable opinions attributed to the jurists by different commentators. On page 267 of his Digest of A Muhammadan Law, Sir Roland Wilson observes :—" Authorities ar flicting as to money * * *, but the better opinion seems to be that be appropriated." After a long and careful consideration of the tc have arrived at the same conclusion. Under the Muhammade perpetuity is a necessary condition of a valid waqf : in other wor things as perish in the using (to use Mr. Justice Wilson's ex cannot be appropriated. Some of the Muhammadan authoriti opinion that a condition of perpetuity could not attach to that consequently money could not form the subject waqf. Others again, such as Zafar, held that no could be offered to a waqf of money. We quote the fol from Fatwa Qazi Khan, which is pronounced by a work of equal authority with the Hidaya :- from Zafar that if a man should make a w would be lawful. On being questioned how [194] replied that the *dirhams* could be given in in which one partner supplies capital, and the usufruct thereof be devoted to the purposes of Khan, Volume IV, p. 309). The same appea of Zuhri, as will appear from the following ul-Kari, a commentary on Sahib-ul-Bukh p. 516 :—" Zuhri was asked whether thousand *dinars* in the way of God, tradesman, for investment in some thereof a *sadaka* (charity) to the po eat anything out of the usufruct o usufruct had not been given in could not eat anything out of also of the same opinion, as t also valid the waqf (appropri 'in which it is customary' also *dirhams* and *dinars*. issued to the Qazis (Ju *dirhams* and *dinars*, as

Different views a some he held that t ment was customary out any restriction. of the Hidaya, was

The decision of the question is not by any means free from difficulty; but we are of opinion that the preponderance of authority is in favour of the view that such an endowment is good, and this view is reconcilable with the principle that perpetuity is a necessary condition of a valid waqf. This is the only question which we have to consider in this appeal

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For the reasons set forth we allow the appeal, and varying the decree of the Court below, we dismiss the suit with costs here and in the Court below

Appeal decreed

24 A 195 (=A. W. N. 1902, 10)

[195] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

LALI (*Defendant*) v. MURLIDHAR (*Plaintiff*).* [21st December, 1901]

Limitation—Act No XV of 1877 (*Indian Limitation Act*), *sch. ii, art* 119—*Adoption—Suit for possession of immoveable property, plaintiff claiming as adopted son, his title as such having been denied by defendant more than six years before suit—Construction of document—Document of a testamentary nature—Declaration made in wajib ul arz by the sole proprietor of a village as to his wishes respecting the devolution of the property after his death*

Held, that art. 119 of the second schedule to the Indian Limitation Act, 1877, did not apply to a suit for possession of immoveable property in which the plaintiff claimed as the adopted son of the last male owner of the property, and in which the plaintiff's adoption was denied by the defendant, and the plaintiff himself alleged that his right as adopted son had been interfered with more than six years before the institution of his suit

[illegible] *Sharap Singh* [illegible] *Parbhu Lal* v [illegible] *av* v *Ram-* [illegible] *ranlal* v *Bai* [illegible] *Saminatha* [illegible] *Jagadamba* [illegible] *in Munshi* v [illegible] *Kanhaya Lal* *Mowar* (15) distinguished

The sole proprietor of a certain village caused the following entry to be recorded in the village wajib ul arz.—

"I am the only zamindar in this village I am a Marwari Brahmin Seven years ago I adopted my sister's son, Murli He is my heir and successor (*Malik*) If, after this agreement, a son is born to me, half the property would be received by him and half by the adopted son If more than one son be born to me, the property would be equally divided among them, including the adopted son, as brothers I have two wives now. They will receive their maintenance from him (Murli)"

A son was born to the person making this declaration, but he died before the plaintiff's suit was instituted

As to the adoption of Murli, it was found that, although Murli had been brought up by his alleged adoptive father, and more or less treated by him as

* First Appeal No 160 of 1897 from a decree of Maulvi Syed Muhammad Siraj-ud din Ahmad, Subordinate Judge of Agra, dated the 18th June 1897

(1) (1886) I. L R 8 All 614.
(2) (1886) I L. R 9 All. 253
(3) (1888) I L R 10 All 485
(4) (1895) I L R 17 All. 167
(5) (1887) I L R 14 Cal 401
(6) (1897) I L. R 25 Cal 354
(7) (1888) I L. R 13 Bom 160.
(8) (1895) I L R 21 Bom. 159
(9) (1895) I L R 21 Bom 376
(10) Weekly Notes, 1890, p 241
(11) (1896) I L R 20 Mad 40
(12) (1899) I L R 24 Bom 260
(13) (1886) I L R 13 Cal 308.
(14) (1892) I L R 20 Cal 487
(15) (1894) I L. R 22 Cal 609

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that case was Act No. IX of 1871, the language of article 129, schedule ii of which differs materially from that of articles 118 and 119 of [199] schedule ii of Act No. IV of 1877. In that case no doubt their Lordships of the Privy Council held that article 129 applied indiscriminately to suits for possession of land, and to suits of a declaratory nature; but they remarked that in the Limitation Act of 1877, which superseeded the Act then under discussion, the language is changed, and they go on to observe:—"Whether the alteration of language denotes a change of policy or how much change of law it affects are questions not now before their Lordships." It is thus clear that in that case their Lordships expressly retrained from pronouncing an opinion as to the effect of the alteration in the law made by the Act we have to construe. The next case decided by the Privy Council is *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (1), which was a case in which it was held that the law of limitation applicable was the Act of 1871. It is true that Lord Shand, in delivering the judgment of the Judicial Committee, observes with reference to the alteration of language in the Act of 1877:—"It seems to be more than doubtful whether, if those were the words of the statute applicable to the case, the plaintiff would thereby take any advantage." That no doubt, as an expression of opinion by the highest tribunal, is entitled to great respect, but it seems to us to stop short of deciding the question now raised and not to afford a sufficient justification for departing from the course of rulings which exist in this Court on the point, more specially as the effect of that observation was considered in *Nathu Shingh* v. *Golab Singh* (2). The third case decided by their Lordships of the Privy Council is *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* (3). In that case the Counsel for the appellant argued that the plaintiff's suit was time-barred under article 118 of schedule ii of Act No. XV of 1877. In disposing of that contention Lord Shand observes:—"The appellant's counsel, founding on section 118 of the schedule to the Limitation Act, argued that the limitation of six years from the date of the alleged adoption of the appellant barred the suit. It was maintained that the suit was one in effect to obtain a declaration that the adoption of the appellant was invalid or had never in fact been made, and that six [200] years had elapsed after the alleged adoption had become known to the respondent before the suit was instituted. If the adoption was really made by Bhuina Chaudhrain of a son to herself, and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation could have no application in this suit which relates entirely to the husband's estate. But, in the opinion of their Lordships, there is another ground, in respect of which also this defence clearly fails, *viz.*, that it has not been proved that the alleged adoption did become known to the respondent till the death of Bhuina Chaudhrain, which occurred within two years of the institution of the suit." The Bombay High Court considered that this was a conclusive decision by their Lordships in favour of the view that article 118 applies to a suit for possession. With all deference to the learned Judges of that Court, we are unable to hold that this judgment of the Privy Council conclusively decides the question. As we understand the judgment of the Privy Council, the argument of the

(1) (1892) I. L. R. 20 Cal. 487.
(2) (1895) I. L. R. 17 All. 167.
(3) (1894) I. L. R. 22 Cal. 609.

decided by that Court, but which has since been overruled by the Privy Council, it was necessary to refer an issue to that Court in the question of the custom referred to above Evidence upon that issue has now been adduced by the parties at great length, and the finding of the Court below is before us We shall refer to this finding and the evidence in a subsequent part of this judgment

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The first question which we have to determine in this appeal is whether article 119 of schedule ii of the Indian Limitation Act is applicable to the case There can be no doubt that if that article applies the claim is beyond time, the plaintiff's right as adopted son having, according to his own allegation, been interfered with in 1887, that is, two years after the death of Dhanraj, and the present suit having been brought on the 26th of September, 1896

The question as to whether article 119 is applicable to a suit of this nature is by no means free from difficulty, and the rulings of the different High Courts as to the applicability of that article and the cognate article 118 are conflicting We have in support of the appellant's contention the ruling of this Court in *Inda* v *Jehangira* (1), the decision of the Madras High Court in *Parvathi Ammal* v *Saminatha Gurukal* (2), and the recent Full Bench decision of the Bombay High Court in *Shrinivas* [198] v *Hanmant* (3) On the other hand, as opposed to the view adopted in those cases we have the rulings of this Court in *Basdeo* v *Gopal* (4), *Ganga Sahai* v *Lekhraj Singh* (5), *Ghandharap Singh* v *Lachman Singh* (6), *Nathu Singh* v *Gulab Singh* (7), the decisions of the Calcutta High Court in *Lala Parbhu Lal* v *Mylne* (8) and *Jagannath Prasad Gupta* v *Runjit Singh* (9), and the earlier decisions of the Bombay High Court in *Padajirav* v *Ramrav* (10), *Fannyamma* v *Manjaya Hebbar* (11), and *Harilal Pranlal* v *Bai Rewa* (12) In all the cases last mentioned it was held that articles 118 and 119 can only apply to suits the sole object of which is to declare the validity or invalidity of an adoption, and that a suit for possession of property will be governed by the rule of limitation prescribed for such a suit, even though the question of the validity of an adoption may arise in it and have to be decided The Courts that have taken an opposite view have considered themselves bound by certain decisions of the Privy Council If there were any clear ruling of the Privy Council on the matter, we should, of course, be bound to follow it But we are unable to find in any of the decisions referred to any clear pronouncement of opinion which places the matter beyond doubt, and which would justify us in departing from the view of law taken by this Court in all the cases in which the question has been considered, with the exception of one It is noticeable that one of the Judges who decided the case of *Inda* v *Jehangira* (1), was a party to the earlier cases of *Basdeo* v *Gopal* (4), in which an opposite view was tak[illegible] ...cil, wh[illegible] of th[illegible] he Bc[illegible] v *Dc*[illegible] to

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son was born, or in what year he was married. His evidence is, to our minds, as unsatisfactory as that of Pokhar Das.

[202] The third witness, Mohan Lal, is a resident of the Muttra district, but of a different pargana from that in which Kosi is situated. He is the first cousin of Baldeo, the plaintiff's natural father. He may therefore be supposed to be interested in supporting the plaintiff's case. He has made many confused and conflicting statements, and we do not regard him as a person on whose testimony we can place any reliance.

The next witness, Hargobind, is a resident of the Aligarh district, about thirty-five miles from Kosi. He gives the date of the adoption, and explains as the reason why he remembers the date—that he had noted the date of his invitation upon a paper. But no such paper was produced. It appears that the family property of this witness was sold in execution of a decree and purchased by Dhanraj, and it is probable as suggested that owing to this he would bear no friendly feeling towards Dhanraj's family, and has therefore come forward to give evidence for the plaintiff in this case.

The only other witness to the adoption is one Nathu Ram. He was in the service of Dhanraj for fifteen years. This witness was employed to cook his food and to write up his account-books. He left the service of the family after Dhanraj's death, because, according to his account, he was not on friendly terms with the karinda. These are the five witnesses called to prove the adoption. It is noticeable that, although one or two hundred guests are said to have been present at the time of the adoption, including residents of Kosi, not a single witness from Kosi has been called, although it is proved that some at least of those witnesses are alive and might have been called. We may mention that a number of witnesses who are residents of Kosi, some of whom are relatives of the family of Dhanraj, and of a higher social position than any witness for the plaintiff, have sworn that no such adoption took place, that they heard of no such ceremony being performed, and that had any such ceremony been performed, they would certainly have been invited and have known of it. What tells more than anything against the plaintiff's case, is the conduct of the plaintiff himself and of his natural father Baldeo. It has been stated at the outset that Dhanraj's younger wife Lali gave birth to a son Nand Lal about [203] two years before Dhanraj's death. If an adoption had taken place, the adopted son would have been entitled to a share in Dhanraj's property on his death. But we find that the name of Nand Lal alone, under the guardianship of the two widows of Dhanraj, was entered in the revenue papers as succeeding to the valuable estate of Dhanraj. Again, when Nand Lal died two years afterwards, the name of Lali alone—the other widow having died—was entered as in possession of the estate. On neither of these occasions was any claim put forward on behalf of the plaintiff to this valuable estate. At the time of the first mutation of names Baldeo, the natural father of the plaintiff, was alive, and had he, as a matter of fact, given one of his sons in adoption to Dhanraj, his brother-in-law, he surely would have taken some steps to protect his son's interests. At the time of the second mutation of names Baldeo was dead, but the plaintiff had then attained majority, and he had elder brothers. None of them asserted any claim in opposition to Musummat Lali. There was another occasion in 1887 on which the

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counsel was met by setting forth two reasons, either of which, assuming article 118 to be applicable, would dispose of the plea We cannot infer from the mere absence of a distinct statement that article 118 was in applicable, that the question of its applicability was authoritatively decided It must be remembered that the period of limitation for a suit relating to adoption was twelve years under article 129, schedule ii of Act No IX of 1871 Had the Legislature intended to cut down the ordinary period of twelve years limitation fixed for suits for possession of immoveable property to a term of six years in suits for possession in which the question of the validity of an adoption arises we should have expected it to give effect to its intention in unmistakable language Following therefore the decisions of our own Court and of the Calcutta High Court, particularly the case of *Jagannath Prasad Gupta* v *Runjit Singh* (1), in which the question of the applicability of article 119 to a suit like the present was considered, we hold that the respondent's suit is not barred by limitation.

We have now to consider the next plea urged on behalf of the appellant, namely, that the respondent Murlidhar was never, in fact, adopted by Dhanraj The lower Court has found upon the [201] evidence that the adoption is proved As regards the oral evidence in support of the adoption, it is, in our opinion, meagre and unsatisfactory, and standing by itself, quite insufficient to satisfy us that any ceremony of adoption was ever performed The adoption is said to have taken place on Basant Panchmi, Sambat 1927, corresponding to 25th of January, 1871 The first witness called to prove the adoption was one Pokhar Das Bohra, a resident of the Muzaffarnagar district Dhanraj, we may mention, was a resident of the town of Kosi in the district of Muttra The witness, when giving his evidence on the 3rd of March, 1897, stated his age to be forty two years, so that at the time of the alleged adoption he must have been between fifteen and sixteen years of age He himself stated in cross examination that he could not say whether, at the time of the alleged adoption, he was ten or twelve years' old, or more or less than that His story is that he was then going on a pilgrimage to Kosi, that he stopped at Dhanraj s house in the evening and that the adoption took place the following day If his story is to be believed the necessary ceremony of adoption was performed It appears that he received no invitation to be present at the adoption, but that he casually arrived at Dhanraj's house at the time when the ceremony was to be performed He never vistited Dhanraj's house after that occasion He had at the time no elder relative with him, but only a servant It appears to us highly improbable that a lad of his age should go forth on a pilgrimage by himself Although he gives a circumstantial and detailed account of the adoption, exhibiting a marvellous memory as to events said to have taken place twenty six years before the time he was giving evidence, his testimony is

The next witness is o istrict This witness was no relati . to be present at the adoption, but says he went there with his master Radha Kishen This witness, too, gives a circumstantial account of what took place He gives the very date on which the adoption ceremony is said to have been performed, but he was unable to say in what year his eldest

(1) (1897) I L R 25 Cal 354

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[205] rate before a son was born to him. It is quite possible, therefore, that when Dhanraj speaks of having adopted his sister's son, he may be referring to his having taken him into his house and treated him as his son. This would explain the absence of stronger evidence to prove the performance of the ceremony of adoption, and would account for the conduct of the plaintiff and his relations after Dhanraj's death, to which we have alluded above.

The other documents relied upon by the plaintiff are three mortgage deeds, two of which were executed by one Asa Ram in 1873, and the third by Baldeo and Musammat Sahib Kunwar in 1880. These documents were executed in favour of Dhanraj and Murlidhar. In two of the documents Murlidhar is described as the adopted son of Dhanraj. Our observations with regard to the wajib-ul-arz apply with equal force to these documents. Much was made by the respondent of the fact that the executant of two of the documents was one Asa Ram, who was a near relation of Dhanraj, and might have had some chance of succeeding to his property. Asa Ram was examined as a witness, and he stated that he did not know that the name of Murli had been mentioned in the deeds as the son of Dhanraj. It is somewhat difficult to believe this; but if Dhanraj wished the name of Murli to appear in the document as his son or adopted son, it is not likely that the person borrowing money from him would object. On a review of the whole evidence, we can come to no other conclusion than that the plaintiff has failed to prove by credible evidence that the ceremonies necessary to a valid adoption were performed, and on this issue we cannot agree with the lower Court. This finding relieves us of the necessity of determining whether a custom exists among Brahmans of the class to which the parties to this suit belong by which the adoption of a sister's son is regarded as valid. If it were necessary to express an opinion on the point, we should have no hesitation in agreeing with the conclusion at which the learned Subordinate Judge has arrived after an exhaustive and careful consideration of the mass of evidence adduced by both parties. We agree with him that the evidence adduced by the plaintiff falls far short of establishing a custom which would override the ordinary rule of Hindu law, according to which such an adoption as that set up by the plaintiff is invalid.

[206] The only question that remains to be considered is the effect of the statement made by Dhanraj in the wajib-ul-arz of the village of Daidna, which we have set forth above. It is contended on behalf of the plaintiff that this document is of a testamentary nature. Although in his plaint the plaintiff claimed to be entitled to the whole of the property under the terms of this document, his counsel admitted here, and indeed he could not do otherwise, that in the event of his failure to establish the adoption he could not under that document claim more than half of the property. For the appellant it was contended that this was not a testamentary document, and even if it were held to be of the nature of a will, there was no bequest to the plaintiff, apart from, or independent of, the adoption; in other words, that the bequest to the plaintiff was conditional on the adoption standing good. We are of opinion that the document is of a testamentary nature. It provides for what is to happen in the event of a son being born to the testator, and makes a bequest to the plaintiff of a larger share of the property than he would be entitled to under the Hindu law. Assuming that there had been a valid adoption, the plaintiff would under that law have been entitled, upon the birth of

plaintiff's rights as an adopted son, if he had any, might have been, but were not, asserted, that is, when the mutation of names took place in regard to a property which had been usufructuarily mortgaged to Dhanraj Not only was no claim put forward on any of these occasions by, or on behalf of, the plaintiff as the adopted son of Dhanraj, but we find that when the plaintiff s natural father Baldeo died, the plaintiff s name was entered as succeeding to Baldeo's property in the same way as the names of his three brothers (*vide* p 21 of the appellant s first book) Had the plaintiff been validly adopted by Dhanraj, he would have ceased to have any claim to his natural father s property This conduct of the plaintiff and of his relations, for which no explanation has been offered, seems to us to indicate strongly that they were conscious of the infirmity of his title, and confirms us in the distrust we cannot help entertaining as to the truth of the statements of the five witnesses to whom we have referred above

Had it not been for certain documents to which we will now allude, we would not have had the slightest hesitation in holding that the plaintiff had failed to prove that any formal adoption had taken place The most important of those documents is an [204] extract from the village administration paper (printed at page 34 of the respondent's book) of mauza Daidna, a village owned by Dhanraj This administration paper, which was prepared at the time of settlement in 1877 78, contains the following statement purporting to have been made and signed by Dhanraj :—" I am the only zamindar in this village I am a Marwari Brahman Seven years ago I adopted my sister s son, Murli He is my heir and successor (*Malik*) If, after this agreement, a son is born to me, half the property would be received by him and half by the adopted son If more than one son be born to me, the property would be equally divided among them, including the adopted son, as brothers I have two wives now They will receive their maintenance from him (Murli) ; As regards this document, the case of the defendant was, that it was not the deed of Dhanraj, and that the statement was not actually made by Dhanraj himself, but by the plaintiff s natural father Baldeo, who, it is said, acted for some time as Dhanraj s agent We entirely agree with the Subordinate Judge that the defendant has failed to substantiate this allegation We see no reason whatever to doubt that it is a genuine statement made by Dhanraj himself before the settlement officer As to the importance of the document, there can be no question Dhanraj asserts categorically that seven years previously he had adopted the plaintiff Murli Had the evidence for the plaintiff in support of the adoption been of a more satisfactory character, this statement of Dhanraj himself would have afforded the strongest corroboration that an adoption had taken place But looking to the unsatisfactory nature of the oral evidence, and the unexplained equivocal conduct of the plaintiff and his relations to which we have referred, we cannot look upon this wajib-ul arz as conclusive We say this, having regard to our common knowledge of the vague notions entertained as to what is necessary for a valid adoption It is sometimes considered that the execution of a deed is enough, sometimes it is thought that it is sufficient if the child is brought up and treated as a son. We see no reason to doubt that the plaintiff was brought up by Dhanraj in his house, investiture with the sacred thread and marriage ceremonies were there performed, and that in all respects he was treated by Dhanraj as his son, at any

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[208] MISCELLANEOUS CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

NORTH-WESTERN COMMERCIAL BANKING CORPORATION, THROUGH BABU RAGHUBIR SARAN, OFFICIAL LIQUIDATOR (*Appellant*), *v.* MUHAMMAD ISMAIL KHAN (*Opposite Party*).*
[12th December, 1901.]

Act No. IX of 1887 (*Provincial Small Cause Courts Act*) *schedule ii, clause* (18)—*Small Cause Court suit—Jurisidction—Suit relating to a trust—Suit to recover money paid to legal practitioner to institute suits, but not so expended.*

Held, that a suit in which the plaintiff claimed from the defendant the refund of certain moneys alleged by the plaintiff to have been paid to the defendant, a legal practitioner, for the purpose of instituting certain suits, but not to have been so expended, was a suit which was within the cognizance of a Court of Small Causes, and was not a suit relating to a trust within the meaning of clause (18) of the second schedule to Act No. IX of 1887.

THIS was a reference under section 646B of the Code of Civil Procedure, made by the District Judge of Meerut, upon an application to revise an order of the Judge of the Cantonment Court of Small Causes, returning a plaint for presentation to the proper Court.

The plaintiff alleged that three separate sums, amounting in all to Rs. 382-11, had been paid to the defendant, who was a barrister at that time practising in Meerut, for the purpose of filing certain suits, but that the defendant had never filed the suits for which the money was paid, and the money still remained in deposit with him. The plaintiff had on two occasions demanded the return of the said money, but the defendant had not paid it. The plaintiff therefore claimed payment of the sum named with interest, allowing a set off of Rs. 37-10, which had been deposited by the defendant with the bank of which the plaintiff was the Official Liquidator.

The defendant pleaded *inter alia* that "the suit as laid in the plaint relates to a trust and does not lie in the Small Cause Court."

The Judge of the Court of Small Causes returned the plaint for presentation to the proper Court, being of opinion that the suit was not cognizable by a Court of Small Causes with reference to clause (18) of the second schedule to Act No. IX of 1887.

[209] Against this order the plaintiff applied in revision to the District Judge, who, being of opinion that the view taken by the Judge of the Court of Small Causes was incorrect, referred the question to the High Court.

The following opinion was pronounced :—

KNOX and BLAIR, JJ.—Unfortunately we have not had the benefit of any argument addressed to us, nor of any authorities cited before us. The only paper we had before us is the reference made by the learned District Judge. We hold that the suit as instituted was not a suit which fell within the purview of clause (18) of the second schedule to the Provincial Small Cause Courts Act, and it was a suit, so far as this matter is concerned, not excepted from the cognizance of the Court of Small Causes.

This is our answer to the reference.

* Miscellaneous No. 145 of 1901.

a son to Dhanraj, to one fourth of his property, and not to the half share to which Dhanraj declares he will succeed We have now to consider whether this bequest by Dhanraj was contingent upon the adoption of Murli being valid In other words, to use the language of their Lordships of the Privy Council in the case *Fanindra Deb Raikat v Rajeswar Dass* (1), the question is whether the mention of the plaintiff as an adopted son is merely descriptive of the person who took under the gift or whether the assumed fact of his adoption is not the reason and motive of the gift, and indeed a condition of it In such a case the intention of the testator is what has to be looked to The present case is somewhat similar to the case of *Nidhoomoni Debya v Saroda Pershad Mookerjee* (2) The effect of the will in that case according to their Lordships view, was as follows —"I declare that I give my property to Kaibullo whom I have adopted It was held that it was a gift by the testator to a designated person, [207] and that it was immaterial whether the adoption was a valid one or not We may also refer to the following passage at page 89 of the judgment in the case reported in L R 12 I A p 72 —" The distinction between what is descriptive only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances If a man makes a bequest to his lawful wife 'A B,' believing the person to be his lawful wife, and he has not been imposed upon by her, and falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift Whether the marriage was lawful or not may be considered to make no difference in the intention of the testator The principle of this ruling applies to the present case Here we have a designated person, namely, Murlidhar To this person Dhanraj bequeathed half of his property It is true he describes him as his adopted son, and it may be that he was under the impression that he was a validly adopted son But, as stated above, he gives him more than a validly adopted son would get This is an indication that the adoption was not the reason or motive of the bequest There is no evidence to show that any deception was practised upon Dhanraj It is unnecessary to refer to all the cases that were cited in argument by counsel on both sides Every case must be decided with due regard to the language of the document in question and the surrounding circumstances In the present case we arrive at the conclusion that it was Dhanraj s intention to make a bequest in favour of the plaintiff of a half share and that this bequest was not contingent upon the adoption being in all respects a valid adoption

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The result is that we allow the appeal in part, and, varying the decree of the Court below, we decree in plaintiff s favour for half of the property claimed The parties will pay and receive costs in both Courts in proportion to their failure and success

Decree modified

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(1) (1885) L R 12 I A 72 at p 89. (2) (1876) L R 3 I A 253

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24 A. 209= A. W. N. 1902, 18.

has held that the suit is barred by the provisions of section 244 of the Code of Civil Procedure, and we are of opinion that his view on this point is correct. The question which has arisen between the parties is clearly one relating to the execution, discharge or satisfaction of a decree, and being such, it is not open to the plaintiff to take proceedings by an independent suit. This was laid down in the case of *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*, (1) by their Lordships of the Privy Council; and, as their Lordships say, [211] "is a view to be commended, inasmuch as it is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible." For these reasons we are of opinion that the suit cannot be maintained, and that the decree of the Subordinate Judge dismissing the suit must be upheld. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

24 A. 211 (=A. W. N. 1902, 24)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

KANHAIA LAL AND ANOTHER (*Defendants*) v. RAJ BAHADUR (*Plaintiff*).*
[15th January, 1898.]

Hindu law—Mitakshara—Joint Hindu family—Mortgage by father—Suit for sale on mortgage, son not being made a party—Subsequent suit by son for declaration that his share is not liable under the mortgage decree against father—Further plea that mortgage-debt was contracted for immoral purpose—Act No. IV of 1882 (*Transfer of Property Act*) *section* 85.

The mortgagees to a mortgage of joint family property made by the father in a joint Hindu family, consisting of father and son, brought a suit for sale against the father without making the son a party, and obtained a decree for sale of the entire property mortgaged. The son sued the mortgagees for a declaration that his share was not bound by the decree, firstly, because he was not made a party to the mortgagee's suit for sale, and secondly, because the mortgage-debt was contracted by his father for immoral or impious purposes. It was found in that suit that the mortgagees had at least constructive notice of the son's existence, and ought to have made him a party to their suit for sale. But it was also found in the son's suit that the original mortgage debt of the father was not contracted for immoral or impious purposes.

Held that although the son might have been entitled to the decree sought by him, had he contented himself with raising the first plea only; yet, inasmuch as he himself had raised the issue of the immorality of the debt, which had been found against him, and as that was the only issue which could in any subsequent suit be raised as between himself and the mortgagees, he was not in this suit entitled to any decree save a decree for redemption if he should desire to redeem. *Lala Suraj Prosad* v. *Golab Chand* (2), followed.

Held also, that the mere fact that the son had asserted his right to a moiety of the mortgaged property, and had brought the suit above referred to, did not work a partition of the property or create any separate title in the son. *Padarath Singh* v. *Raja Ram* (3) referred to.

[212] THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* (for whom Babu *Durga Charan Banerji*), for the appellants.

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* First Appeal No. 262 of 1898, from a decree of Babu Bipin Behari Mukerji, Additional Subordinate Judge of Cawnpore, dated the 21st September, 1898.

(1) (1892) L. R. 19 I. A. 166.
(2) (1901) I. L. R. 28 Cal. 517, at p. 531.
(3) (1882) I. L. R. 4 All. 235.

24 A 209 (=A. W N 1902, 18)

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24 A 209=
A. W N
1902, 18.

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt

ADHAR SINGH (*Plaintiff*) v SHEO PRASAD AND OTHERS (*Defendants*)* [8th January, 1898]

Civil Procedure Code, section 244—Sale in execution of decree—Compromise—Suit to set aside compromise and sale

In execution of a money decree the decree holders attached and brought to ... nd themselves ...

... inst the decree holders, ... and the confirmation of ... id, and ineffectual as ...

Held, that such a suit was barred by the operation of section 244 of the Code of Civil Procedure *Prosunno Coomar Sanyal* v *Kasi Das Sanyal* (1) referred to

[Ref 50 I C 65=17 A. L J 677=41 All 443 D 10 O C 199]

[210] THE facts of this case sufficiently appear from the judgment of the Court

Babu *Jogindra Nath Chaudhuri*, for the appellant

Pandit *Sundar Lal*, (for whom Babu *Durga Charan Banerji*), for the respondents

STANLEY, C J, and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Cawnpore dismissing the plaintiff's suit, which was brought to have it declared that certain proceedings, relating to a compromise and the confirmation of the sale of property known as mauza Bahripur, were collusive and invalid, and were taken without any authority on the part of the plaintiff, and that the sale should be set aside The defendants in the suit are decree holders, who obtained a simple money decree against the plaintiff, and in execution attached and purchased at an auction the plaintiff's interest in the lands in question An objection to the sale was raised by the judgment debtor on the grounds of irregularity in the conduct and publication of the sale Whilst these proceedings were pending, the judgment debtor's son, Bijai Singh, is alleged to have entered into a compromise with the decree holders whereby it was arranged that the decree holder should take the village in question in full satisfaction of their debts instead of at the sale price, and that the sale should be confirmed on these terms The amount of the decree was Rs 12,755, and the sale price was Rs 9,500 By the compromise the present plaintiff obtained a considerable advantage He, notwithstanding this, alleges that his son had no authority to enter into the compromise, and seeks, in consequence, to have the sale set aside The learned Subordinate Judge

* First Appeal No 290 of 1898 from a decree of Babu Bipin Behari Mukherji, Additional Subordinate Judge of Cawnpore, dated the 18th October 1898

(1) (1892) L R 19 I A 166.

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decree, unless at least he was prepared to act equitably and pay off the mortgage-debts and redeem the property. Raj Bahadur having died childless pending this appeal, his interest in the property has passed to his father, Kashi Prasad, the mortgagor, subject, it may be, to his widow's right of maintenance out of it.

It has been argued on behalf of the respondent that the effect of the suit brought by Raj Bahadur was to create a partition of the property, so that on his death his share passed [217] not to his father as survivor, but to his widow, the respondent. We cannot accede to this argument. Raj Bahadur and his father remained joint until the death of the former; there was no partition or division of shares between them, nor was even a partition claimed by Raj Bahadur in the present suit. The mere fact that he asserted his right to a moiety of the property and brought the present suit did not create any separate title in him—see *Padarath Singh* v. *Raja Ram* (1). It is clear that the mortgagor, Kashi Prasad, cannot resist the sale of any part of the mortgaged property. The appellants, while not admitting any right in the substituted respondent (widow of Raj Bahadur) to redeem the mortgages, have expressed their willingness to give her an opportunity of redeeming them if she be so advised. We shall provide for this in our decree. We accordingly allow this appeal and set aside with costs the decree of the lower Court, in so far as it declares that the property in dispute in this appeal is not liable to be sold under the appellant's decree. *Provided that* if the substituted plaintiff-respondent shall, within a period of three months from this date, that is, on or before the 15th of April next, pay to the appellants or into Court the amount which shall be found due for principal, interest, and costs under the decree of the 8th of July 1893 (including also the costs of this appeal), then, and in that case, we direct that the appellants shall deliver to the substituted plaintiff-respondent all documents in their possession or power relating to the mortgaged property, and for that purpose we direct that execution of this decree shall be suspended for the period of three months from this date. But if the substituted plaintiff-respondent shall fail to make such payment within the period mentioned above, then, after the expiration of that period, the appellants will be entitled to bring to sale the property, the subject of this appeal, in execution of the decree of the 8th July 1893.

Appeal decreed.

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[218] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DURGA SINGH (*Plaintiff*) *v.* BISHESHAR DAYAL AND OTHERS (*Defendants*).* [15th January, 1898.]

Pre-emption—Wajib-ul-arz—Sale of zamindari share and appurtenances—Indigo factory not appurtenant—Court-fee—Act No. VII of 1870 *(Court-Fees Act), section* 7, *sub-section V (b)—Land—Valuation of suit—Limitation—Civil Procedure Code, section* 54.

When a Court fixes a time under clause (*a*) or (*b*) of section 54 of the Code of Civil Procedure, it must be a time within limitation, and section 54 does

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* First Appeal No. 301 of 1898, from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Meerut, dated the 14th September 1898.

(1) (1882) I. L. R. 4 All. 235.

Babu *Jiwan Chandra Mukerji* (for whom Babu *Devendra Nath Ohdedar*), for the respondent

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APPELLATE CIVIL

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STANLEY, C J, and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Cawnpore declaring that the plaintiff Raj Bahadur was the owner of a moiety of a zamindari share of 8 annas in village Daheli Sujanpur, and that his share of 4 annas was not liable to sale under a decree in suit No 98 of 1896, dated the 8th of July 1893 After the filing of the appeal, Raj Bahadur died, and his widow, Musammat Rup Rani, has been brought upon the record as respondent in his place The facts are shortly as follows —The defendant Kashi Prasad, father of the plaintiff, acquired the share of the property in dispute as ancestral property He, on the 3rd of January, 1887, mortgaged the property in favour of one Tapeshri Prasad, to secure a sum of Rs 1,400, and subsequently on the 9th of February, 1892, he mortgaged it in favour of Jagdish Prasad and Baij Nath to secure a sum of Rs 845 The defendants Kanhaia Lal and Bishambhar Nath, are the heirs of Jagdish Prasad and Baij Nath, both of whom are dead On the 24th of January, 1893, Tapeshri Prasad, the first mortgagee, brought a suit upon his mortgage without impleading the plaintiff, who upon his birth had become entitled to a moiety of the mortgaged property, and he obtained a decree on the 30th of March, 1893 Jagdish Prasad and Baij Nath instituted a suit on the basis of their mortgage of the 9th of February, 1892, against Kashi Prasad, and also against the first mortgagee, Tapeshri Prasad, and likewise did not implead the plaintiff They obtained a decree on the 8th of July, 1893, and paid off the debt of the first mortgagee, Tapeshri Prasad Jagdish Prasad and Baij Nath having died, their heirs, Kanhaia Lal and Bishambhar Nath, the appellants, took out execution of the decree of the 8th of July, 1893 and caused the entire 8 annas share in the village to be advertised for sale on the 20th of May, 1898 The plaintiff thereupon brought the present suit, alleging that Jagdish Prasad and Baij Nath had knowledge of his interest [213] in the property, and yet did not make him a party to the suit which they had instituted, contrary to the provisions of section 85 of the Transfer of Property Act and claiming a declaration that his share in the property was not liable to be sold in execution of the decree of the 8th of July, 1893 He also alleged that the amount of the decree was spent on immoral purposes, an allegation which was interpreted by the parties and treated by them and the Court as raising the issue, whether or not, the mortgages of the 3rd of January, 1887, and the 9th of February 1892, were tainted with immorality, and therefore were not binding on the plaintiff This issue was determined in favour of the defendants, the plaintiff having failed to give any proof in support of his allegation The Court below, however, held that there was gross negligence on the part of the mortgagees in not making proper inquiry as to whether or not the mortgagor, Kashi Prasad, had a son, and therefore must be held to have had notice of the plaintiff's interest in the property within the meaning of section 85 of the Transfer of Property Act We think that the evidence fully justified the finding by the learned Subordinate Judge that the mortgagees had or must be deemed to have had, notice of the plaintiff s interest at the time they brought their suit, and we do not propose to interfere with this finding

This being so, if the plaintiff had confined himself to this issue, the decree in his favour would have been unassailable, inasmuch as he was

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value of the suit stated by him was wrong; also she alleged that the plaintiff had not in any event any right of pre-emption in regard to the indigo factories, the houses, the grove and the shops, etc., also that the value of the indigo factories and the houses, etc., as stated by the plaintiff was wrong and excessive, and that the sale was made at the price of Rs. 55,500, and that too after the plaintiff was requested to purchase the property and had refused to do so, and that so he had lost his right of pre-emption. The defendants vendees in their written statement say that the real price of the property was Rs. 55,500.

The following issues were settled at the trial:—

(1) Has sufficient stamp duty been paid?

(2) Is the claim barred by time?

[220] (3) Was the sale in favour of the vendee concluded after the plaintiff's refusal to purchase?

(4) What was the sale consideration actually paid?

The Court, after recording the evidence of the plaintiff's witnesses, found that the sum paid for Court fees was insufficient, and by order of the 20th of June, 1886, directed that the deficiency should be made good by the following day. This order was complied with by the plaintiff and the deficiency paid. It was the value which the Court placed upon one of the indigo factories which we shall term the new indigo factory which necessitated the payment of an additional Court fee. The suit was instituted on the 23rd of September, 1897, within the period of limitation, but the payment of the deficiency in stamp duty was made beyond the period of limitation, so that if the latter date is to be taken as the date of the institution of the suit, the claim would be statute-barred according to a ruling of a Full Bench of this Court. When a Court fixes a time under clause (*a*) or clause (*b*) of section 54 of the Code of Civil Procedure, it has been held that it must be a time within limitation, and section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits; *Jainti Prasad* v. *Bachu Singh* (1). This decision has not been followed in the Calcutta High Court in the case of *Moti Sahu* v. *Chhatri Das* (2). In that case it was held by Prinsep and Banerji, JJ., that the date of the institution of a suit should be reckoned from the date of the presentation of the plaint, and not from the date on which the requisite Court fees are subsequently paid so as to make it admissible as a plaint. Whatever our individual views may be upon this subject we are bound to follow the decision of a Full Bench of this Court. The learned Subordinate Judge in this case, in his judgment after a review of the evidence, found that the plaint was insufficiently stamped at the date on which it was presented, and that the additional stamp duty ordered to be paid, and paid by the appellant was not paid within the period of limitation, and so that the plaint was originally invalid, and only became valid after the suit had become barred by limitation. Upon this finding he dismissed the plaintiff's claim. The only ground of appeal which [221] has been supported before us by the learned advocate for the appellant is that the plaint was all along sufficiently stamped, and that the Court below erred in regard to the basis upon which the valuation for the purposes of the Court Fees Act ought to be made. His contention is that the entire subject-matter of the suit was *land paying annual revenue to Government* within the meaning of section 7, paragraph 5 (*b*) of the Court Fees Act, and that under this section the amount at which

(1) (1892) I. L. R 15 All. 65. (2) (1892) I. L. R. 19 Cal. 780.

not give a Court any power to extend the ordinarily prescribed period of limitation for suits *Jainti Prasad* v *Bachu Singh* (1) followed *Moti Sahu* v *Chhatri Das* (2) referred to

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On the sale of a share in zamindari property, buildings such as indigo

referred to

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The term "land' as used in the Court Fees Act, 1870, does not include buildings A claim, therefore, for pre-emption of an indigo factory, although the site of the factory may be land paying revenue to Government, must be valued, and Court fees paid thereon, according to the value of the buildings constituting the factory, and not according to the value of the site Such buildings as constitute an indigo factory would fall within the meaning of the term "houses ' as used in the Court Fees Act

[Ref 27 All 197=24 A W N 224=1 A L J 641 61 P L R 1908=34 P W R 1908=146 P R 1908 Not fol 27 Bom 330=5 Bom L R 198 82 P W P 1907=123 P R 1907=3 M L T 63 6 M L T 129 (F B)=32 Mad 305 =1 I O 507, 4 I O 503=19 M L J 340 Ref 74 P R 1903=173 P L R 1903]

THE facts of this case are fully stated in the judgment of the Court

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant

Mr *A E Ryves*, Babu *Jogindro Nath Chaudhri*, and Maulvi *Ghulam Mujtaba*, for the respondents

STANLEY, C J, and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Aligarh dismissing the plaintiff's claim

The claim was made by the plaintiff as a co sharer for pre emption of 15 biswas zamindari property of mauza Godha, consisting of the thoks of Gokul Singh and Hira Singh, each comprising 7½ biswas, an indigo factory, and the wells, buildings [219] and apparatus appertaining to it in thok Gokul Singh, the share in another indigo factory occupying one pakka bigha and one biswa of land, a grove measuring 6 pakka bighas and 15 biswas, houses and shops, etc, and all rights in respect of the property upon payment of Rs 45,500, or such other sum as the Court might adjudge to be the amount of the consideration which was paid by the defendant vendee The claim is based upon a custom of pre emption which is thus described in the wajib-ul arz —" Every proprietor has power to transfer his share, but he shall first offer it to a near sharer, and on his refusal,to another pattidar If no one in the village be willing to take it, he shall transfer it to any person he may like, but should any person allege a fictitious price to deprive a pre emptor of his right, the matter shall be decided by a reference to arbitration or by order of the Court In the plaint the suit is valued for the purposes of jurisdiction at Rs 45,500, and for the purposes of the Court fee the value of the property is stated as follows, namely, Rs 7,521 0 8, five times of Rs 1,504 3 4, the annual amount mentioned in the record of rights (by which is clearly meant the annual revenue Rs 147 0 8), the arrears of rent due by tenants, Rs 6,389 0 4, the estimated value of both the indigo factories and the garhi, and Rs 1,200, the estimated value of the grove, total Rs 15,258 9

In her written statement Bibi Hamid un nissa, the vendee, alleged that the Court fee paid by the plaintiff was incorrect, and that the

(1) (1892) I L R 15 All 65
(2) (1892) I L R 19 Cal 780
(3) (1882) I L R 4 All 381
(4) Weekly Notes 1900 p 31—22 All 168
(5) (1874) 7 N W P H C Rep 38

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indigo factory situate on a specified piece of land, that is the new indigo factory, and a share in another indigo factory, also described as to its situation, also a garhi or fortress, grove, etc., and all the interest and adventitious rights appertaining to or existing in the said share, etc., including the arrears of rent due by the tenants. The factories, fort and grove were conveyed apparently as being appurtenant to the 15 biswas zamindari share purchased by this defendant.

[223] It is said, however, on the part of the respondents that a factory, fort and grove cannot be regarded as part and parcel of, or as appurtenant to a zamindari, and would not pass as such, so that the right of pre-emption did not attach to them, but that inasmuch as the plaintiff in his plaint claimed the right to pre-empt them, he was bound to pay Court fees in respect of them, to be computed according to their market value under sub-section (*e*), para. 5 of section 7. The case of *Abu Hasan* v. *Ramzan Ali* (1) was relied on on behalf of the appellant. In this case it was held that a killa (fort) passed to a purchaser of the rights and interests in a village of one Kadir Ali Khan, a zamindar. Kadir Ali Khan had purchased a village, and with it the killa, some 30 years before the suit was instituted. The killa had always been occupied by him and his family as a residence, and, it was held, would seem to have belonged to him *quâ* zamindar, and that as the zamindari rights and interests were brought to sale in 1873, and purchased by the plaintiff, the presumption was that the killa was included, unless there was anything to show that it was excluded expressly or by implication, as to which there was no evidence. This decision does not far advance the plaintiff's case, inasmuch as it was based on the fact that the killa was occupied by the former owner *quâ* zamindar as a dwelling-house. In the present case there is no evidence to show and it is most unlikely, that the indigo factories were held by the owner *quâ* zamindar. The case of *Banke Lal* v. *Jagat Narain* (2) was also relied on by the plaintiff's advocate. In this case the late Sir Arthur Strachey, Chief Justice, held that certain kothis or houses and out-houses, which were included in the area of zamindari property, passed upon an execution sale to a purchaser of the rights and interests of the zamindar in a village. The kothis had been specifically mentioned in the application for execution and in the warrant of attachment, and were found by the Court to have been actually attached. The learned Chief Justice held that, in the absence of evidence to the contrary, a kothi or other building situate within a zamindari area is included in, and passes with, the zamindari; that no doubt the contrary may be shown by evidence, that is to say, evidence of the [224] circumstances connected with the acquisition, construction or user of the building, from which it may properly be inferred that they are not appurtenances of the zamindari, but have been so severed or held so separately from it as to form a separate and distinct property of the zamindar. In that case there was no evidence to show for what purpose or in what manner either of the kothis was used at any time up to the sale. In the case before us such cannot be said, so far at least as regards the new indigo factory, for it admittedly was, and is, used as a factory, and was conveyed in its entirety as such to the respondent Bibi Hamid-un-nissa. It was apparently treated as being separate and distinct from the zamindari property, in which the vendor had only a share. On behalf

(1) (1882) I. L. R. 4 All. 381. (2) Weekly Notes, 1900, p. 31.

the plaintiff was bound to value the relief sought by him was five times the revenue payable to Government, and no more It is admitted that the revenue is not permanently settled, so that if the property, the subject matter of the suit, only comprised land within the meaning of the section of the Court Fees Act above mentioned, the suit was apparently sufficiently valued by the plaintiff The plaintiff, it is to be observed, claimed a right to pre empt the new indigo factory and the buildings, etc, appertaining to it and also a share in another indigo factory, a *garhi* (fort) and a grove, and the contention of the respondents is that these properties are separate and distinct from, and would not pass as appurtenant to, the zamindari property, and also that the factories are not land, as this expression is used in the Court Fees Act, but houses, and should have been valued as houses for the purposes of the Act, that, as a matter of fact, the new factory was claimed by the plaintiff independently of, and as distinct from the zamindari property, and that consequently the plaintiff was bound to value these properties, as he in fact purported to do, at their market value, and that as he undervalued them his plaint was in the first instance invalid, and only became valid when the deficiency in the Court fees was made good, at which time the suit was statute barred It appears from the plaint that the plaintiff himself valued the factories, the fort, and the grove separately from the revenue paying property, and paid Court fees in respect of these properties He valued, as we have mentioned, the indigo factories at Rs 6,389 0 4 and the grove at Rs 1,200, but the Subordinate Judge found that the old indigo factory was worth Rs 400, that the grove was worth Rs 2,000, and that the new indigo factory was worth Rs 10,000 On the part of the plaintiff it is admitted [222] that he claimed a right to pre empt the entire new indigo factory and not merely a share in it The case made by his learned advocate is that the plaintiff's claim was for pre emption of a share of the zamindari property consisting of the two thoks of Gokul Singh and Hira Singh, and whatever appertained to this share, and nothing else, and that the indigo factories, fort and grove formed part of the zamindari property and passed as appurtenant to it, and that the sites of the factories were, under *the subsisting land settlement, actually charged with and paying annual* revenue to Government, and so the subject matter of the suit was entirely *land* within the meaning of section 7, para 5 (*b*), and not houses The word "land" as used in the Court Fees Act, it is contended on behalf of the plaintiff, includes everything upon the land, such as groves, houses, factories, etc If this contention be well founded, then, instead of having paid insufficient Court fee on the presentation of his plaint, the plaintiff paid an excessive amount The fact that in his plaint the plaintiff himself set a separate value and paid Court fees upon the factories, fort and grove is not consistent with the suggestion that his claim was only in respect of the zamindari property But let us for the moment pass over this inconsistency, and consider, in the first place, whether or not, as a matter of fact, the factories, etc, would pass as being appurtenant to the zamindari From the language of the deed of sale of the 12th of October 1896, made in favour of the defendant, Bibi Hamid un nissa, and also the land settlement record which we have inspected, it is clear that the factories, fort and grove in question were within the area of the two thoks, and were conveyed to her along with the 15 biswas zamindari share The deed purports to convey the 15 biswas zamindari share constituting the two thoks, together with an

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coming within the meaning of the term houses as used in the Court Fees Act. It was not suggested on the part of the appellant that the word "house" as used in that Act was not sufficiently comprehensive so as to include an indigo factory, and we do not think that such a contention, if it had been raised, would have been tenable. Substantial and permanent buildings, such as constitute a factory clearly, [226] we think, come within the meaning of the expression "houses." In the present case the new indigo factory was built subsequently to the date of the last settlement of the lands in dispute, and the site of it is assessed with Government revenue, but this coincidence cannot, we think, be regarded in determining the true meaning of the section of the Court Fees Act to which we have referred. The substantial subject-matter of the suit, so far as regards the new indigo factory, was not the site of the factory, but the factory itself. If the subject-matter of the suit had been the new indigo factory alone, it seems to us that it could not reasonably have been argued that the Court fee was to be computed according to the amount of revenue payable to Government in respect of the site, and not according to the market value of the buildings, etc.

We are of opinion for these reasons that the plaintiff, when he claimed in his plaint a right to pre-empt the new indigo factory, was bound to value it according to its market value for the purposes of the Court fee, as in fact he did purport to do. Unfortunately he undervalued it and must take the consequence. The case is no doubt a hard one upon him, for he paid the additional Court fee which was required of him only to find that his suit was statute-barred. We must, for these reasons, dismiss the appeal with costs.

Appeal dismissed.

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24 A. 226 (=A. W. N. 1902, 31.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BIRI SINGH AND ANOTHER (*Plaintiffs*) v. NAWAL SINGH AND OTHERS (*Defendants*)*. [16th January, 1898.]

Parties to suit—Practice—Suit by some only of several persons entitled to sue, the others being joined as co-defendants.

Where out of several persons who apparently had a right to bring a suit as co-plaintiffs, some only appeared as plaintiffs and joined the others as co-defendants. *Held* that the suit ought not to have been dismissed merely because the plaintiffs failed to show that the persons whom they joined as co-defendants refused to appear with them as plaintiffs. *Pyari Mohun Bose* v. *Kedar Nath Roy* (1) followed. *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (2) referred to.

[**Fol.** 26 Mad. 461 ; 29. Mad. 302 ; 12 I. C. 851 ; **Ref.** 26 Mad. 649 (F.B.) : 34 Mad 406 ; 1916 (1) M. W. N. 181=30 M. L. J. 619=33 I. C. 52 ; **D.** 189 P. L R. 1908.]

[227] THE plaintiffs brought the suit out of which this appeal arose to recover the amount alleged to be due to them upon a mortgage, dated the 25th of September, 1875, and offering to redeem, if necessary, prior mortgages. The original mortgagees were Lachman Singh and Zalim

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* First Appeal No. 305 of 1898, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Mainpuri, dated the 29th September 1898.

(1) (1899) I. L. R. 26 Cal. 409. (2) (1889) I. L. R. 17 Cal. 160.

of the respondents the case of *Salig Ram* v *Debi Parshad* (1) was strongly relied on as showing that a right of pre emption does not ex to a factory, bungalow or garden situate on the land comprised in a th In that case the claim was based on a clause in the wajib ul arz wh was as follows :—" Every share holder is at liberty to transfer by sale mortgage his own share or the land appertaining thereto' A Divisio Bench, consisting of Turner and Brodhurst, JJ, held that the right o pre emption was only intended to extend to the ordinary rights of a zamindar in the village, and to such buildings in the village *as are held ordinarily with such zamindari rights, and that it does not extend to such properties, as for instance a family residence or an indigo factory* A bungalow and garden were accordingly excluded from the claim for pre emption Upon the facts disclosed in the present case we are unable to discover any grounds for holding that the new indigo factory, which was purchased by Bibi Hamid un nissa, formed any part of the zamindari property, or that it passed to her as such, or as appurtenant thereto Upon this question we cannot accede to the argument which has been advanced on behalf of the appellant

We now come to the remaining portion of the argument of the learned advocate His contention is, that the sites of the factories being assessed and chargeable with Government revenue, as appears to be the case, the land upon which the factories stand with the factories upon it are, for the purposes of the Court Fees [225] Act, to be treated as "land" merely, and valued as such under sub-section (b), para 5 of section 7, and not also under sub section (e) of the same section It becomes necessary for the determination of this question to consider the meaning and significance of the word "land," and the word "houses" as used in the Court Fees Act The word "land" in its wider signification would no doubt include not only the surface of the ground, but also everything on or under it, for *cujus est solum, ejus est usque ad cœlum* We are not aware that there is any definition of the word "land" as used in the statutes in this country such as is found in the English statute 13 and 14 Vic, Cap XXI, section 4 In the Court Fees Act the word would seem to be used in a restricted sense, for the Act provides a distinct mode of ascertaining the amount at which relief should be valued according as the subject-matter of the suit is land, or houses or gardens If the subject matter of the suit is land, there are two modes of computing the Court fee according as the land is revenue paying or not, and if it be a house or garden another and distinct mode of computation is provided The word "land" appears to be used in the section in contradistinction to houses or gardens In suits, such as the present suit, to enforce a right of pre emption, the computation is directed to be made in accordance with the value of the land, houses or gardens, in respect of which the right is claimed, such value to be computed in the modes subsequently prescribed Now in this case the plaintiff admittedly claims the right of pre emption of the whole of one indigo factory as also a share in another We may exclude from our consideration the old factory, which is in ruins and f little or no value It was the amount, namely, Rs 10,000 at hich the new factory was valued, which necessitated the payment the additional Court fee This factory, it is contended, and we nk rightly, should have been valued according to its market value as

(1) (1874) 7 N W P H C Rep 38.

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Chief Justice and four judges, in the case of *Pyari Mohun Bose* v. *Kedar Nath Roy* (1), in which it was decided, with the concurrence of both of the Judges who decided the earlier case of *Dwarka Nath Mitter* v. *Tara Prosunna Roy*, (2) that where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff. This case disposes of the authority upon which the learned Subordinate Judge relied. We may observe, however, that it was quite apparent from the written statement which was filed by three of the defendants in question that they disclaimed all interest in the subject-matter of the suit, and [229] would not willingly have been made plaintiffs to it. We therefore must allow the appeal, set aside the decree, and, as the case has been decided on a preliminary point, we remand it under section 562 of the Code of Civil Procedure to the lower Court, to be replaced on the file of pending cases under its original number in the register, for the determination of the issues which have been left undecided. The costs of this appeal must abide the event.

Appeal decreed and cause remanded.

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24 A. 229 (=A. W. N. 1902, 19.)

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

PITAM MAL (*Defendant*) *v.* SADIQ ALI (*Plaintiff*) AND SUGHRA FATIMA AND OTHERS (*Defendants*).* [20th January, 1898.]

Award—Appeal from decree based on an award—Civil Procedure Code, section 506—"*All the parties to the suit.*"

Held that the words "all the parties to a suit" in section 506 of the Code of Civil Procedure refer to the succeeding words of the same section "any matter in difference between them in the suit," and would not necessarily include parties who never put in any appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit. *Deo Nandan* v. *Bhirgu Rai* (3).

[Ref. 17 M. L. J. 394 ; 1 S. L. R. 209 ; 8 A. L. J. 645 ; Dist. 29 All. 423=4. A. L. J. 347=A. W. N. 1907, 147 ; Appl. 32 All. 657.]

THIS was a suit for sale upon a mortgage. During the pendency of the suit the plaintiff and the answering defendants agreed to refer the matters in dispute between them to arbitration. An award was pronounced. Subsequently one of the defendants raised objections to the award, but those objections were disallowed, the Court of first instance holding that it was sufficient that the plaintiff and the answering defendants who had entered an appearance were parties to the submission, and that it was not necessary to join those of the defendants who had never appeared in Court at all. The award was made a rule of Court, and a decree passed thereon. Against this

*Second Appeal No. 870 of 1898, from a decree of L. M. Thornton, Esq., District Judge of Farrukhabad, dated the 6th September 1898, confirming a decree of Rai Anant Ram, Subordinate Judge of Fatehgarh, dated the 23rd December 1897.

(1) (1899) I. L. R. 26 Cal. 409.
(2) (1889) I. L. R. 17 Cal. 160.
(3) Weekly Notes, 1887, p. 215.

Singh Of the two plaintiffs one, Biri Singh, was the son of Lachman Singh, whilst the other, Nita Ram, was the transferee of the interest of Zalim Singh in the mortgage sued upon In paragraph 3 of their plaint the plaintiffs stated that the mortgage money had been borrowed by the defendants or their ancestors from "Lachman Singh, the father and leading member of the joint family of the plaintiff Biri Singh and of the plaintiff Nita Ram," and, apparently on the basis of the family being joint, they made defendants to their suit certain members of the family, namely Bhup Singh, Bijai Singh, Bajan Singh and Kanchan Singh When the suit, however, came to a hearing, the plaintiffs, on an issue as to whether Lachman Singh ought to have been made a party to the suit, pleaded that the family was separate As regards Lachman, it was found that he had died, so that that issue became immaterial The Court of first instance (Subordinate Judge of Mainpuri), however, found that the family was joint, and that the four persons above mentioned ought to have been made plaintiffs in the cause, and because it did not appear that the plaintiffs had given them the option of joining in the suit and that they had refused, he dismissed the suit In taking this view of the law the Subordinate Judge relied on the case of *Dwarka Nath Mitter* v *Tara Prosunna Roy* (1) Against the dismissal of their suit the plaintiffs appealed to the High Court

1898 JAN 16. — APPELLATE CIVIL — 24 A 226= A W N. 1902, 31

Pandit *Sundar Lal* (for whom *Durga Charan Banerji*), for the appellant

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), and Babu *Jivan Chandra Mukerji*, for the respondents

STANLEY, C J, and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Mainpuri dismissing the plaintiff s suit, which was brought to recover the amount due to them upon a mortgage, dated the 25th of September, 1875, and [228] to redeem, if necessary, any prior mortgages The mortgagees in the mortgage deed are Lachman Singh and Zalim Singh The plaintiff Biri Singh is the son of Lachman Singh, and Nita Ram is admittedly entitled to the interest of Zalim Singh in the mortgage The plaintiffs made parties as defendants to the suit, four persons, who are members of their family, namely, Bhup Singh, Bijai Singh, Baduri Singh and Kanchan Singh One of the issues which was framed was an issue as to whether or not the suit could be proceeded with against these defendants, or was it necessary to make Lachman Singh a party to it, the parties at the time the issue was framed being under the impression that Lachman Singh was then alive As a matter of fact Lachman Singh was then dead, so there was an end to this issue The learned Subordinate Judge, however, thought fit to consider whether or not, under the circumstances of this case, the plaintiffs could succeed in establishing their claim without having arrayed the four persons above mentioned as plaintiffs instead of as defendants He found that they and the plaintiffs were members of a joint Hindu family, and relying on the decision in the case of *Dwarka Nath Mitter* v *Tara Prosunna Roy* (1) determined that the members of the family, who were arrayed as defendants, ought to have been joined as plaintiffs, and, accordingly, that the suit could not proceed The decision upon which the learned Subordinate Judge relied has been overruled by a Full Bench of the Calcutta High Court consisting of the

(1) (1889) I L R 17 Cal 160

1898 JAN. 16. — APPELLATE CIVIL. — 24 A. 226= A. W. N. 1902, 31.

Chief Justice and four judges, in the case of *Pyari Mohun Bose* v. *Kedar Nath Roy* (1), in which it was decided, with the concurrence of both of the Judges who decided the earlier case of *Dwarka Nath Mitter* v. *Tara Prosunna Roy*, (2) that where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff. This case disposes of the authority upon which the learned Subordinate Judge relied. We may observe, however, that it was quite apparent from the written statement which was filed by three of the defendants in question that they disclaimed all interest in the subject-matter of the suit, and [229] would not willingly have been made plaintiffs to it. We therefore must allow the appeal, set aside the decree, and, as the case has been decided on a preliminary point, we remand it under section 562 of the Code of Civil Procedure to the lower Court, to be replaced on the file of pending cases under its original number in the register, for the determination of the issues which have been left undecided. The costs of this appeal must abide the event.

Appeal decreed and cause remanded.

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24 A. 229 (=A. W. N. 1902, 19.)

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

PITAM MAL (*Defendant*) *v.* SADIQ ALI (*Plaintiff*) AND SUGHRA FATIMA AND OTHERS (*Defendants*).* [20th January, 1898.]

Award—Appeal from decree based on an award—Civil Procedure Code, section 506—"All the parties to the suit."

Held that the words "all the parties to a suit" in section 506 of the Code of Civil Procedure refer to the succeeding words of the same section "any matter in difference between them in the suit," and would not necessarily include parties who never put in any appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit. *Deo Nandan* v. *Bhirgu Rai* (3).

[Ref. 17 M. L. J. 394 ; 1 S. L. R. 209 ; 8 A. L. J. 645 ; Dist. 29 All. 423=4. A. L. J. 347=A. W. N. 1907, 147 ; Appl. 32 All. 657.]

THIS was a suit for sale upon a mortgage. During the pendency of the suit the plaintiff and the answering defendants agreed to refer the matters in dispute between them to arbitration. An award was pronounced. Subsequently one of the defendants raised objections to the award, but those objections were disallowed, the Court of first instance holding that it was sufficient that the plaintiff and the answering defendants who had entered an appearance were parties to the submission, and that it was not necessary to join those of the defendants who had never appeared in Court at all. The award was made a rule of Court, and a decree passed thereon. Against this

*Second Appeal No. 870 of 1898, from a decree of L. M. Thornton, Esq., District Judge of Farrukhabad, dated the 6th September 1898, confirming a decree of Rai Anant Ram, Subordinate Judge of Fatehgarh, dated the 23rd December 1897.

(1) (1899) I. L. R. 26 Cal. 409.
(2) (1889) I. L. R. 17 Cal. 160.
(3) Weekly Notes, 1887, p. 215.

decree the objecting defendant appealed to the District Judge His appeal was dismissed, and he again appealed to the High Court, raising his former objection that the arbitration was invalid, and the consequent award illegal because all the parties to the suit did not consent to [230] refer the matter in difference to arbitration, and a further ground that the Court of first instance had acted illegally in refusing the appellant's application to summon two of the arbitrators

1898 JAN 20.

APPELLATE CIVIL

24 A 229= A W N 1902, 19

Maulvi *Ghulam Mujtaba* (for whom Maulvi *Muhammad Ishaq*), for the appellant

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the respondents

KNOX and BLAIR, JJ —A preliminary objection has been raised to the hearing of this appeal, namely, that inasmuch as the decree is in accordance with the award, no appeal lies In answer to this, two points have been taken The first is, that inasmuch as all the parties to the suit did not join in the submission, there was no award which could be made the award of the Court, and the second, that the Court before which the award came in the first instance, refused to summon two of the arbitrators in accordance with a request made by Seth Pitam Mal, and so there was no judicial determination, and therefore an appeal lies In support of the first our attention was called to the case of *Deo Nandan* v *Bhirgu Rai* (1) The case therein set out does not appear to have been reported in the Indian Law Reports At first sight this case does seem to be in support of the contention raised, but we prefer to hold that the words "all the parties to the suit" mentioned in section 506, Civil Procedure Code, must refer to the succeeding words, "any matter in difference between them in the suit" In this case the persons who were not parties to the award never put in any appearance in the Court, and so far as we can discover, there was not any matter in difference between them and any other of the persons who submitted the matter in difference between them to arbitration There is a distinction between "all parties to a suit" and "all the parties to a suit," and the words used in section 506 of the Code of Civil Procedure are "all the parties to a suit" It has been held by the Calcutta High Court that this section refers to all the parties to a suit who are interested This appears to us to be the proper interpretation As regards the second point, we are not prepared to hold that simply because two persons were not summoned, there was no judicial determination by the Court There is the judgment by the Court [231] which is a judicial determination There may have been some irregularities preceding it, but what we have really to remember is that, if the decree is in accordance with the award, no appeal lies except in so far as the decree is in excess of, or not in accordance with, the award There was an award, and no plea has been argued before us that the decree was in excess of, or was not in accordance with, the award The preliminary objection taken prevails, and this appeal is dismissed with costs

Appeal dismissed

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(1) Weekly Notes, 1887, p 215

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CIVIL.

24 A. 231=
A. W. N.
1902, 32.

24 A. 231 (=A. W. N. 1902, 32.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

SYEDA BIBI AND ANOTHER (*Plaintiffs*) *v.* MUGHAL JAN AND OTHERS (*Defendants*).* [24th January, 1902.]

Muhammadan law—Shias—Waqf—Invalid waqf—Condition suspending operation of waqf-namah—Condition that waqf-namah should not take effect until registration.

According to the Shia law it is one of the essential condition precedent to the validity of a waqf that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even when it is certain to occur, such as the beginning of the next month, or the occurrence of the death of the waqif.

Hence where a Muhammadan of the Shia sect executed a waqf-namah in which it was provided that "this deed of waqf shall come into force from the date of its registration, no one shall be at liberty to take any objection, etc.," it was *held* that this condition was repugnant to the doctrine of the Shia law and the waqf was invalid. *Agha Ali Khan* v. *Altaf Husain Khan* (1) referred to.

[Ref. 24 All. 257.]

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *Abdul Raoof* and *Karamat Husain*, for the appellents.

Mr. *W. M. Colvin*, the Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Jaunpur in a suit brought by the plaintiff for the recovery of the property of the late Syed Hasan Ali by right of inheritance, and for a declaration that a [232] waqf-namah of the 27th of August, 1886, was invalid and ineffectual according to Shia law.

Syed Hasan Ali, who belonged to the Shia sect of Muhammadans, on the 27th of August, 1886, executed the deed which has given rise to this litigation. In it, after a recital of the uncertainty of life, the executant, "with a view to earn merit in the next world and to benefit the persons mentioned in this document," made a perpetual waqf "for charitable purposes, and to benefit the persons mentioned" in the document according to the Muhammadan law of the Imamia sect of the whole of his moveable and immoveable property, with the exception of some small portions of property, which he specified, subject to the conditions and details which follow.

The deed then provides in paragraph 1 that from the date of its execution his wife, the defendant Mughal Jan, shall be mutawalli, and that after her death certain members of the family expressly mentioned, and after them the eldest member of the family from generation to generation should be mutawallis. In paragraph 2 there is a declaration that Mughal Jan shall receive during her life the profits of the properties, after deducting the expenses mentioned in paragraphs 3, 4, 5, 6, 7 and 8, and other expenses connected with the management, &c., of the waqf properties, and (3) that after her Syed Aulad Husain, Syed Sarfaraz Husain and Syed Asghar Husain, his nephews, shall receive the profits

* First appeal No. 300 of 1898, from a decree of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Jaunpur, dated the 8th September, 1898.

(1) (1892) I. L. R. 14 All. 429.

decree the objecting defendant appealed to the District Judge His appeal was dismissed, and he again appealed to the High Court, raising his former objection that the arbitration was invalid, and the consequent award illegal because all the parties to the suit did not consent to [230] refer the matter in difference to arbitration, and a further ground that the Court of first instance had acted illegally in refusing the appellant's application to summon two of the arbitrators

1898 JAN 20. — APPELLATE CIVIL — 24 A 229= A W N 1902, 19

Maulvi *Ghulam Mujtaba* (for whom Maulvi *Muhammad Ishaq*), for the appellant

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the respondents

KNOX and BLAIR, JJ —A preliminary objection has been raised to the hearing of this appeal, namely, that inasmuch as the decree is in accordance with the award, no appeal lies In answer to this, two points have been taken The first is, that inasmuch as all the parties to the suit did not join in the submission, there was no award which could be made the award of the Court, and the second, that the Court before which the award came in the first instance, refused to summon two of the arbitrators in accordance with a request made by Seth Pitam Mal, and so there was no judicial determination, and therefore an appeal lies In support of the first our attention was called to the case of *Deo Nandan* v *Bhirgu Rai* (1) The case therein set out does not appear to have been reported in the Indian Law Reports At first sight this case does seem to be in support of the contention raised, but we prefer to hold that the words "all the parties to the suit" mentioned in section 506, Civil Procedure Code, must refer to the succeeding words, "any matter in difference between them in the suit" In this case the persons who were not parties to the award never put in any appearance in the Court, and so far as we can discover, there was not any matter in difference between them and any other of the persons who submitted the matter in difference between them to arbitration There is a distinction between "all parties to a suit" and "all the parties to a suit," and the words used in section 506 of the Code of Civil Procedure are "all the parties to a suit" It has been held by the Calcutta High Court that this section refers to all the parties to a suit who are interested This appears to us to be the proper interpretation As regards the second point, we are not prepared to hold that simply because two persons were not summoned, there was no judicial determination by the Court There is the judgment by the Court [231] which is a judicial determination There may have been some irregularities preceding it, but what we have really to remember is that, if the decree is in accordance with the award, no appeal lies except in so far as the decree is in excess of, or not in accordance with, the award There was an award, and no plea has been argued before us that the decree was in excess of, or was not in accordance with, the award The preliminary objection taken prevails, and this appeal is dismissed with costs

Appeal dismissed

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(1) Weekly Notes, 1897, p. 215.

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Khan (1), and, amongst other quotations, gives at p. 466 an extract from the Sharah Lamah Damishkia, which is as follows:—"Besides above mentioned matters *tanjiz* is one of its (waqf's) conditions. Therefore if he (the waqif) has suspended it upon any contingency or quality it is void, except in cases when the contingency already exists, and the waqif (appropriator) is aware of its existence, such as his saying 'I have made this waqf if to-day is Friday,' such as is the rule in regard to other contracts." The learned Judge then observes that "it is clear from these texts that the doctrine of *tanjiz*, which is unanimously approved by the highest authorities of the Shia law, requires as one of the essential conditions precedent to the validity of a waqf that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even when it is certain to occur, such as the beginning of the next month or the occurrence of the death of the waqif, *i.e.*, the appropriator."

In the present case the appropriator made the waqf depend upon the happening of a future event, that is, upon the registration of the waqf-namah. One of the conditions of the instrument was that it should only come into force on the date of its registration, that is, that it should have no force or validity unless and until the document was registered. As a matter of fact, the registration was not effected until a week after the execution of the deed had elapsed, so that for one week the operation of the waqf was suspended. There was no obligation on the part of the executant to have the deed registered at all; if he had chosen not to register it during his lifetime, the dedication would have remained incomplete, and the waqf-namah been suspended or left in abeyance. It has been argued by Mr. *Conlan* on behalf of the respondents that there was no suspension of the waqf created by the deed, that the direction that the deed should come into force from the date of its registration was only declaratory [235] of the law, inasmuch as the deed could not take effect before registration by reason of the provision of the Registration Act that no document shall affect any immoveable property unless it has been registered (section 49, Indian Registration Act). There are two answers to this argument. In the first place, this statement is not strictly accurate, inasmuch as the waqf-namah purports to deal with moveable as well as immoveable property, and as regards moveable property it would operate as from its date without registration. In the second place, as regards immoveable property the deed, when registered, would operate from the time from which it would have commenced to operate if no registration had been required, and not from the time of registration (section 47, Registration Act). So that, but for the condition that the deed should only come into force on the date of registration, it would on registration operate as from the day of its execution.

There being this precise direction by the waqif that the endowment is to become effectual only on the happening of an uncertain event, there is nothing in the Registration Act which would make it operate from the date of execution. If there had been no such direction by the waqif, then according to the Registration Act the deed on registration would have effect from the date of its execution; but such is not the case when, as here, an executant fixes a time from which the deed is to come into force.

(1) (1892) I. L. R. 14 All. 429.

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24 A 231= A W N 1902, 32

after deduction of expenses, and that when any of these persons or their male descendants, how low so ever, are no longer in existence, the entire profits from the endowed property shall be spent in good deeds and proper charities Then in paragraphs 3, 4, 5 and 8, provision is made for defraying out of the income of the property the following expenses, viz —

(1) The expenses of majlis as the appropriator used to do

(2) The expenses of a mosque situate near his house

(3) The expense of constructing a well

(4) The feeding of travellers

(5) The expenses upon his death of holding majlis, recitation of Quran and feeding poor persons

In paragraph 11 is the following important direction, namely — "This deed of waqf shall come into force from the date of [233] its registration, no one shall be at liberty to take any objection, &c' Part of the property of Syed Hasan Ali consisted of mortgage securities, which are not the proper subject matter of a waqf The Subordinate Judge held that, save and except in respect of the mortgage securities, the property was validly dedicated and created a waqf, and he dismissed the claim of the plaintiffs save in regard to the mortgaged property Hence this appeal Three grounds of objection to the deed have been pressed in argument before us on behalf of the appellants First, it is said that the waqf is illusory, that the object of it was merely to benefit the widow and the nephews of the waqif, and the male descendants of the nephews for all time, and that it was only after the extinction of male descendants of the nephews that any substantial portion of the property was made available for good deeds and charities, secondly, it was contended that according to Shia law, acceptance of the waqf by the beneficiary must be proved by substantive evidence, that acceptance cannot be a matter of inference merely, and that substantive evidence of the fact was not adduced, and thirdly, it is said that the direction in the deed that the waqf shall only come into force from the date of registration of the deed is fatal to the validity of it, inasmuch as under the Shia law, the operation of a waqf cannot be suspended or made to depend upon some future event From the view which we hold as regards this last question it is unnecessary for us to determine the earlier questions which have been discussed

Amongst the conditions which relate to a valid waqf is the condition "that it must be entirely taken out of the waqf or appropriator himself, so that if the appropriation is restricted to a particular time or made dependent on some quality of future occurrence, it is void' (Baillie's Imamia Law, page 218) Quoting from Mafateh, Mr Shama Churun Sircar in the annotations to his Tagore Lectures of 1874, writes at page 471 as follows —"Without difference of opinion waqf should be made at once, it cannot be made to depend on the occurrence of an event (in future) unless the same be quite certain and positive" And again at page 472 of the same Lectures, he gives the following illustration of the rule —" If one should say 'I have appropriated when the beginning of the month should come, or if Zayid will [234] arrive, the appropriation would not be valid'' In this he refers to Sharaya ul Islam, pp 236 and 237.

Mr Justice Mahmood elaborately reviewed the various texts on this subject in his judgment in the case of *Agha Ali Khan* v *Altaf Hasan*

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APPELLATE CIVIL.

24 A. 236= A. W. N. 1902, 46.

by the present applicants for the recovery of the village of Kot Kamarhya as next reversioners to the estate of [237] one Paltan Singh, who had died in 1822. The defendants to the suit were the successors in title of a transferee from Harnam Kunwari, one of the widows of Paltan Singh. The applicants plaintiffs had succeeded in their suit in the Court of first instance, but on appeal their suit had been dismissed by the High Court, hence the present application. With respect to the requirements of section 596 of the Code of Civil Procedure, it was admitted that the value of the subject-matter of the suit was below Rs. 10,000, and that the value of the matter directly in dispute before His Majesty in Council was also below that sum. But it was contended that the appeal involved indirectly questions respecting property of greater value, inasmuch as the title of other persons having an interest in the village of Kot Kamarhya would be governed by the decision in the proposed appeal, as well as the title of other transferees of other villages belonging to the same estate who traced their title through Harnam Kunwari. With the application was filed an affidavit, showing that the aggregate value of the properties which, it was alleged, would be thus affected indirectly by the result of the appeal was about one lakh and half of rupees. The further facts in connection with this application will be found stated in the judgment in *Bhagwati Prasad* v. *Hanuman Prasad* (1).

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dave*) for the applicants.

Pandit *Madan Mohan Malaviya* (for whom Babu *Satya Chandra Mukerji*), for the opposite parties.

KNOX and BLAIR, JJ.—This is an application for leave to appeal to His Imperial Majesty in Council. The subject-matter of the suit in the Court of first instance was under ten thousand rupees in value, but in an affidavit, which is attached to the application, it is stated that the title to an eight-anna share in mauza Kot Kamarhya of Pandit Hira Nand Chaub and of Pandit Chattardhari Chaube depends on the decision of the same question, and that the title of other purchasers to the rest of the villages mentioned in the schedule annexed to the petition depends on the same question. In this way it is sought to make out that, though the value of the matter directly in dispute is below ten [238] thousand rupees, yet the decree of this Court involves indirectly questions to or respecting the entire property mentioned in the schedule, which is valued at about 1,50,000 rupees. None of the properties which are said to be affected by the decree of this Court, and which are not in dispute before us, are or have been made the matter of any suit yet instituted. They may or may not hereafter be subject-matters of suits. Our decree may or may not involve, directly or indirectly, a claim or question to, or respecting them. At present all this is a matter of pure conjecture. The application is therefore opposed on the ground that as the value of the subject-matter is not ten thousand rupees this application should be rejected. The question of law, too, which is involved, is not a question of great public or private importance, and it is urged that for these reasons it cannot be held to come within the term "a substantial question of law." In support of this contention reference is made to the case of *Radha Krishn Das* v. *Rai Krishn Chand* (2), and to the case of *Banarsi Prasad* v. *Kashi Krishna Narain* (3). We have

(1) I. L. R. 23 All. 67; S. C., Weekly Notes, 1900, p. 197.

(2) (1901) I. L. R. 23 All. 415.

(3) (1901) I. L. R. 23 All. 227, p. 231.

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But it is further argued that the condition contained in paragraph 11 is repugnant to the direction contained in paragraph 1, namely, the direction that from the date of the execution of the deed Mughal Jan shall be mutawalli of the endowed property, and that there being a repugnancy in the two paragraphs the first in the case of a deed must prevail We do not think that there is any such repugnancy as renders it necessary for us to apply the rule of construction which is relied on The executant by the deed no doubt declares that Mughal Jan shall be the mutawalli from the date of execution that is her appointment as such dates from execution , but by the subsequent provision in paragraph 11, her powers and duties are suspended so as to spring into existence only upon registration Her appointment nominally made on the day of execution, is in effect post dated by the subsequent direction in the deed

[236] Reading the deed then in its entirety, it appears to us to be manifest that the executants intended that the deed should take effect and operate only in case and when it was registered

For these reasons we think that the alleged waqf is invalid, and not binding on the plaintiffs We therefore allow the appeal, set aside the decree of the lower Court, so far as the claim of the plaintiffs was partly dismissed, and we declare that the deed of the 27th of August, 1886, in the pleadings mentioned, was ineffectual to create a valid waqf of the property of the late Syed Hasan Ali, and in modification of the decree of the lower Court we give a decree as claimed with future mesne profits and also costs in both Courts

Appeal decreed

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24 A. 236 (=A W N 1902, 46)

APPELLATE CIVIL

Before Mr Justice Knox and Mr Justice Blair

... BHAGWATI PRASAD

upwards

... laid down that ... decree to be ... question to, ...

THIS was an application presented by the respondents in First Appeal No 48 of 1898, asking for leave to appeal to His Majesty in Council The suit out of which the appeal in question arose was brought

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* Privy Council Appeal No 1 of 1901

(1) (1901) I L R 23 All 415
(2) (1901) I L. R. 23 All 227
(3) (1837) 1 Moo I A 363
(4) (1860) 7 Moo I A 548

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of the 20th of February, 1899, might be set aside as having been obtained by fraud, and that they might be restored to possession of the property. The defendants objected that the suit did not lie, the remedy of the plaintiffs, if any, being by means of an application under section 244 of the Code of Civil Procedure. The Court of first instance (Officiating Subordinate Judge of Gorakhpur) entertained this [240] objection and dismissed the suit, refusing to accede to the plaintiff's suggestion that the plaint should be treated as an application under section 244. On appeal the lower appellate Court (District Judge of Gorakhpur) overruled the Subordinate Judge on both points, and remanded the case under section 562 of the Code. From this order of remand the defendant, Mathura Das, appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. *S. S. Singh*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from an order of the District Judge of Gorakhpur, remanding a case under section 562 of the Code of Civil Procedure to the Officiating Subordinate Judge of Gorakphur for determination upon the merits. The suit was brought for cancellation of a sale deed executed in favour of the appellant Mathura Das, upon a sale had in execution of a decree obtained by two persons Baij Nath and Dilsukh, against the present appellant. The allegation of the plaintiffs in the suit is, that the sale was fraudulent, the same having been brought about collusively between the parties after the decree had been satisfied. The learned Officiating Subordinate Judge, in a carefully considered judgment, held that the suit was not maintainable, having regard to the provisions of Section 244 of the Code of Civil Procedure, and he accordingly dismissed the suit. He also on an application made to him to treat the suit as equivalent to an application under section 244, refused to do so upon the grounds stated at length in his judgment. There was an appeal from this decree to the District Judge of Gorakhpur, when the learned Judge, after reviewing the authorities, was pleased to overrule the decision of the Officiating Subordinate Judge, and to remand the case under the section to which we have referred. The District Judge appears to have overlooked the later decisions both of the Allahabad High Court, and also of the Calcutta High Court following upon the judgment of their Lordships of the Privy Council in the case of *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (1). In this case their Lordships clearly stated the grounds upon which the Court should act in carrying out the [241] provisions of section 244, and expressed disapproval of some of the earlier decisions. The recent cases in this High Court are the case of *Dhani Ram* v. *Chaturbhuj* (2) and the case of *Daulat Singh* v. *Jugal Kishore* (3), and there are the more recent cases in the Calcutta High Court of *Bhubon Mohan Pal* v. *Nunda Lal Dey* (4) and *Moti Lal Chakerbutty* v. *Russik Chandra Bairagi* (5). In these cases effect is given to the principle laid down by their Lordships of the Privy Council, and in the two last mentioned cases it was held that the fact that the purchaser who was no party to the suit was interested in the result of the application, was no bar to the application of section 244, and that an application to set aside a sale on the ground of fraud would come under section 244 of the Code of Civil Procedure, notwithstanding that the

(1) (1892) L. R. 19 I. A. 166.
(2) (1899) I. L. R. 22 All. 86.
(3) (1899) I. L. R. 22 All. 108.
(4) (1899) I. L. R. 26 Cal. 324.
(5) (1899) I. L. R. 26 Cal. 326.

examined the question which is said to be involved, and we determine that it is not a substantial question of law within the meaning of the terms of section 596 of the Code of Civil Procedure We are also of opinion that when it is laid down that the decree must involve, directly and indirectly, some claim or question to or respecting property of ten thousand rupees in value or upwards, the reference is to suits in existence and not to suits, if we may so term it, *in gremio futuri* In this view we are supported by what is stated as the unanimous opinion of their Lordships of the Privy Council in the case of *Moofti Mohummud Ubdoollah* v *Baboo Mootechund* (1) We may also refer to the observations made in the case of *Baboo Gopal Lall Thakoor* v *Teluk Chunder Rai* (2) We therefore direct that this application stand dismissed with costs

Application dismissed

24 A 239 (=A W. N 1902, 49)

[239] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

MATHURA DAS (*Defendant*) v LACHMAN RAM AND ANOTHER (*Plaintiffs*) * [2nd February, 1902]

Civil Procedure Code, section 244—Execution of decree—Suit for cancellation on the ground of fraud of a sale held in execution of a decree—Proper remedy by application

Certain judgment-debtors brought a suit against the decree-holders and the auction purchaser for cancellation of a sale held in execution of a decree, upon the allegation that the sale in question had been brought about by fraud, the decree having in fact been previously satisfied *Held* that such a [illegible]
t [illegible]
S [illegible]
E [illegible]
Chandra Bairagi (7) referred to

[Fol A W N 1907, 65=4 A L J 142, Ref 59 P R 1903=129 P L R 1903 26 All 101 26 All 447=A W N 1904, 61 D 7 O C 199]

IN the suit out of which this appeal arose the plaintiffs came into Court under the following circumstances According to their allegations one Baijnath Prasad, in execution of a decree obtained against them by his father, Dilsukh Rai, had caused certain property of theirs to be advertised for sale Upon this they sold the property to Sadho Ram and others, and with the proceeds thereof paid off the decree The decree holder, on the 28th of February, 1898, acknowledged this payment, and applied to the Court executing the decree that the execution case might be struck off, which was accordingly done Subsequently the decree holder again took out execution of the same decree, and caused the said property of the judgment debtor to be put up for sale on the 20th of February, 1899, and it was sold and purchased by one Mathura Das The plaintiffs thereupon filed the present suit against the decree-holder and the auction purchaser, in which they asked that the sale

* First Appeal from Order No 14 of 1901 from an order of F W Fox, Esq, District Judge of Gorakhpur, dated the 5th December 1900

(1) (1837) 1 Moo I A 363
(2) (1860) 7 Moo I A 548
(3) (1892) L R 19 I A 166
(4) (1899) I L R 22 All 86
(5) (1899) I L R 22 All 108
(6) (1899) I L R 26 Cal 821
(7) (1899) I L R 26 Cal 326

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24 A. 242= A. W. N. 1902, 38.

suit brought for recovery of certain zamindari property, and also of a sum of money. The facts briefly stated are as follows:—The property in dispute belonged to one Ishk Lal, the father of the plaintiff Musammat Dhapo. Ishk Lal died in the year 1884, leaving a widow, Musammat Shama, surviving him and also two daughters—one a married daughter Jei Dei, and the other the plaintiff, who was unmarried. Musammat Shama died on the 13th of March, 1886, and after her death [243] the defendant Ramji Lal, who was a brother of Ishk Lal, and Daulat Ram, who was a first cousin of Ramji Lal and father of the defendants Bansi Lal, Shitab Rai, Mul Chand, Tota Ram and Pirbhu Lal, took possession of the property in dispute. Shortly afterwards, in the year 1889, Jai Dei instituted a suit on behalf of herself and the plaintiff against Ramji Lal and Daulat Ram for recovery of the property. Jai Dei, who acted in the suit as next friend of the plaintiff, Musammat Dhapo, was herself a minor of the age of 15 years, and the plaintiff was younger than she. The subject matter of the suit was referred to arbitration on the 12th of August, 1889, and on the 20th of June, 1890, an award was made which was confirmed by a decree of the 5th of July 1890. By the award the property of Ishk Lal, which was of the value of about Rs. 50,000, was divided between the litigant parties, two sums of Rs. 2,000 each being awarded to the plaintiff, a sum of Rs. 7,500 to Jai Dei, and the balance to Ramji Lal and Daulat Ram. Subsequently Daulat Ram died, and his sons, defendants in this suit, instituted a suit, No. 265 of 1894, against Ramji Lal for partition of the property of Ishk Lal which had been awarded to Daulat Ram by the arbitrators. The plaintiff, Musammat Dhapo, intervened in this under section 32 of the Code of Civil Procedure, and contended that neither the plaintiffs nor anybody else had any title to any portion of the estate of Ishk Lal; that she, having been the only unmarried daughter of Ishk Lal at the time of his death, was entitled to the whole of the estate; that the proceedings taken by Jai Dei in the former suit were taken in collusion wfth Daulat Ram and Ramji Lal and were fraudulent. Whether or not the plaintiff was entitled to intervene in that suit under section 32 of the Code of Civil Procedure is a question which it is unnecessary for us now to determine. The Subordinate Judge entertained her objection and dismissed the suit on the 18th of November, 1895. On appeal the High Court set aside the decree on the ground that the decree of the 5th of July, 1890, could not be treated as a nullity, as it was treated by the Subordinate Judge, unless it was first set aside by a Court of competent jurisdiction. During the pendency of that appeal to the High Court namely, on the 29th of May, 1896, Musammat Dhapo instituted the present suit against Musammat [244] Jai Dei, Ramji Lal and the sons of Daulat Ram who was then dead, for possession of the property of Ishk Lal which had been acquired by them under the award, alleging that the arbitration proceedings and the decree passed thereon were illegal and void as against her. On the 5th of May, 1898, she applied for liberty to amend her plaint by adding a prayer to have the award and the decree thereon set aside, and leave to do so was granted on the 20th of May, 1898, and the plaint was amended. The defence of the defendants is, first, that the claim is barred by the statute of limitation; secondly, a traverse of the alleged *fraud*; and, thirdly, that amongst Saraogis, the sect to which the parties belonged, daughters are excluded from inheriting their father's property.

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purchase was made by a person who was a third party These authorities abundantly show that the Officiating Subordinate Judge was entirely correct in the view which he took, and that the learned District Judge was in error in reversing his decree We might also observe that in dealing with the authorities of this Court which were cited before him, the District Judge has entirely misconceived and misinterpreted them

Upon the other question as to whether the suit might have been regarded as an application under section 244, this was entirely a matter in the discretion of the Officiating Subordinate Judge, who gave it his consideration, and came to the conclusion, in the exercise of his discretion, that the suit ought not to be treated as such an application We see no reason for interfering with the determination at which he arrived Accordingly we allow this appeal, set aside the decree of the District Judge, and dismiss the appeal by the plaintiff to him and we restore the decree of the Officiating Subordinate Judge directing that the suit do stand dismissed with costs

Appeal decreed

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24 A. 242 (=A W. N 1902, 38)

[242] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

BANSI LAL AND OTHERS (*Defendants*) v DHAPO (*Plaintiff*) *
[5th February, 1902]

Act No 1 of 1872 (Indian Evidence Act), section 44—Res Judicata—Evidence—Competence of party against whom a former judgment is set up as constituting res judicata to show that such judgment was obtained by fraud or collusion—Custom—Saraogis—Alleged custom of exclusion of daughters from inheritance to their fathers set up, but not proved

When a subsisting judgment, order or decree, which is relevant under sections 40, 41 or 42 of the Indian Evidence Act, 1872, is set up by one party to a suit as a bar to the claim of the other party, it is not necessary for the party against whom such judgment, order or decree is set up to bring a separate suit to have the same set aside, but it is open to such party, in the same suit in which such judgment, order or decree is sought to be used against him to show if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion *Nistarini Dassi* v *Nundo Lall Bose* (1), *Rajib Panda* v *Lakhan Sendh Mahapatra* (2) and *Bansi Lal* v *Ramji Lal* (3) referred to

Semble that no custom exists in the North Western Provinces of India amongst the members of the Saraogi community by reason of which females are excluded from inheriting the property of their fathers

[Ref 3 O L J 501, 27 I C 587]

THE facts of this case are fully stated in the judgment of the Court

Pandit *Moti Lal Nehru* (for whom Babu *Durga Charan Banerji*) and Pandit *Baldeo Ram Dave*, for the appellants

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the respondent

STANLEY, C J and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Meerut, passed in favour of the plaintiff in a

* First Appeal No 303 of 1898 from a decree of Maulvi Muhammad Ismail, Subordinate Judge of Meerut, dated the 11th October 1898

(1) (1899) I L. R. 26 Cal 891
(2) (1900) I L. R. 27 Cal 11
(3) (1898) I. L. R 20 All 370

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before she could have avoided the operation of it—*Bansi Lal* v. *Ramji Lal* (1). In that case the provisions of section 44 of the Indian Evidence Act were not brought to the notice of the learned Judges who decided it, as we have learnt on inquiry from one of them. We do not find in the report of it any reference to this section. Section 44 [246] runs as follows :—"Any party to a suit or other proceeding may show that any judgment, or order, or decree which is relevant under sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. In the present case we find the decree of the 5th of July, 1890, which was relevant under section 40, set up and proved by the defendants, the parties adverse to the plaintiff as an answer to the plaintiff's claim, and according to the clear and explicit language of section 44, the plaintiff is entitled to show that the decree so relied upon *was obtained by fraud or collusion. We are bound to consider the section* according to the plain meaning of the language used, unless we can find in it or in any other part of the Act, anything that will either modify or qualify the language. This we have not been able to find, nor has our attention been called to any words in the section or in any other part of the Act, which modify or qualify the plain meaning of the language used. The authorities upon the question as to the powers of a Court to treat decrees which had been obtained by fraud as nullities are reviewed at some length in the judgment of a member of this Bench, which was delivered by him while sitting as Judge on the original side of the High Court at Calcutta in the case of *Nistarini Dassi* v. *Nundo Lal Bose* (2), In the latter case of *Rajib Panda* v. *Lakhan Sendh Mahapatra* (3) the true meaning and effect of section 44 of the Evidence Act were also considered. In that case the plaintiff, in a suit to recover possession of a tank as well as damages, adduced in evidence a petition of compromise and a decree obtained upon it in a previous suit between the same parties relating to the same tank, and the defendant stated that the decree was obtained by fraud, and therefore was not binding upon him. The Court of first instance held that the plea of fraud was not proved, but on appeal by the defendant to the District Judge the decree of the Court of first instance was set aside without coming to any definite finding on the question of fraud. Against this decision the plaintiff appealed to the High Court, when Stevens, J., reversed the decree of the District Judge, and restored that of the Munsif, on the ground that the [247] case was concluded by the decree in the previous suit, and so long as that decree was not set aside, either by proceedings duly taken in that suit, or by separate suit brought for the purpose, it was not open to the defendant to challenge it in any subsequent suit in which it was used as evidence against him. Against this decision the defendant preferred an appeal under Clause XV of the Letters Patent, and it was held by Maclean, C.J. and Banerji, J., that under section 44 of the Indian Evidence Act, the defendant was entitled to show that the decree was obtained by fraud, and the case was accordingly remanded. The section of the Indian Evidence Act relied upon, in our opinion, amply justify this decision, and we see no reason to dissent from it. Irrespective, therefore, of the amendments in the plaint by which the plaintiff sought in express terms that the award and decree might be set aside, we are

(1) (1898) I. L. R. 20 All. 370.
(2) (1899) I. L. R. 26 Cal. 891.
(3) (1900) I. L. R. 27 Cal. 11.

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24 A. 242 = A. W. N. 1902, 23

The plaintiff only attained majority on the 8th of December, 1893, and it is admitted that the suit was in time at the date of presentation of the plaint. But the defendants' case is that, so far as the plaintiff sought in her plaint to have the award and decree set aside, her claim is statute barred, inasmuch as it was not raised until the 20th of May 1898. The Subordinate Judge decided the several issues in favour of the plaintiff, and hence the present appeal.

In the first place, it is contended on behalf of the defendants that the amendment of the plaint changed the character of the suit and ought not to have been allowed. Let us see if this is so. In her plaint as it originally stood the plaintiff alleged in the 5th paragraph that Jai Dei, Daulat Ram, and Ramji Lal filed a collusive arbitration agreement on the 12th of August 1889, and that Jai Dei agreed to the arbitration on her behalf. In the 11th paragraph she avers that the arbitration proceedings, the award and the decree thereon are all illegal, ineffectual and null and void against the plaintiff, as was held by the Subordinate Judge in the suit to which we have referred, but that in spite of this the defendants, continue in possession of the property in suit without any rights, and in the 12th paragraph she alleges that the possession of the property in dispute by the defendants was the result of joint collusive proceedings taken by them during the minority of the plaintiffs in order to deprive her of her right. Then in the prayer she asked, amongst other things, for possession of the property, and also for any other relief to which she [245] may be justly entitled in the opinion of the Court. From this it appears that in the plaint as it originally stood, allegation of fraud and collusion on the part of the defendants were made in the most clear and distinct terms. Subsequently, however, as we have said, to the institution of this suit the decree of the High Court was passed in suit No. 265 of 1894, in which the learned Judges held that the decree of the 5th of July, 1890, could not be treated as a nullity, and accordingly the plaintiff, it may be, *ex abundanti cautela* applied for and obtained liberty to amend the plaint, and inserted an express prayer that the arbitration award, dated the 20th of June, 1890, and the decree, dated the 5th of July, 1890, passed thereon, might be set aside, and also in the body of the plaint in the 4th and 5th paragraphs statements to the effect that the suit instituted by Jai Dei on her own behalf and on behalf of the plaintiff was a fraudulent proceeding and that the award and decree were fraudulent and should be set aside. It appears to us that the amendments made in the plaint in no way altered the character of the suit. The substantial relief sought by the plaintiff was the recovery of the property of her father Ishk Lal, and the facts set out in the plaint, if proved, coupled with the prayer for general relief, were quite sufficient to justify the Court in treating the award and decree as nullities, and giving the plaintiff the relief which she sought, notwithstanding that this relief was not asked for in express terms. The relief sought in respect of the award and decree was subservient or ancillary to the substantial relief prayed for; and it could not be said that a new case was sprung upon the defendants or that they were taken by surprise. It was as we have said, held by a Bench of this Court in the suit in which the plaintiff intervened under section 32 of the Code of Civil Procedure that as the decree of the 5th of July, 1890, had not been set aside and was still a subsisting decree, she must have it set aside

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daughter to take and hold this property. The weight of evidence is entirely on the side of the respondent. We agree, therefore, with the learned Subordinate Judge that the defendants have wholly failed to establish the alleged custom.

[249] We now come to the last and most important issue raised in the case, namely, whether or not the arbitration proceedings and the award and decree thereon were tainted with fraud. It is clear that Musammat Jai Dei was not a fit and proper person to act as next friend of her sister in the suit which she instituted. In the first place, her interest and that of the plaintiff were seriously conflicting, inasmuch as in no event had Jai Dei, who was a married daughter, any interest in her father's property, and yet in the suit she claimed to have a right to a share. This fact was evidently not brought to the notice of the Court when permission was given to her to act as a next friend of the plaintiff. In the next place, Jai Dei was at the date of the institution of the suit herself a minor, she being only 15 years of age, and therefore incapable of protecting the plaintiff's interests. This fact was also suppressed from the Court. Again, no relative of the plaintiff was appointed an arbitrator to look after her interest. All the arbitrators appear to have been relatives of, or connected with, the other parties to the proceedings. Then there is the further fact that out of the estate of her father, which was of the value of at least Rs. 50,000, the trifling sum of Rs. 1,000 only was awarded by the arbitrators to the plaintiff, while Jai Dei, who was not entitled to any share in it, got Rs. 7,500, and the balance was given to Daulat Ram and Ramji Lal. These matters alone would be sufficient, in our opinion, to establish the plaintiff's allegations of fraud and collusion. It is clear from them that the plaintiff's interests were sacrificed by the parties who promoted and carried out the arbitration proceedings, and obtained a decree upon the award. *Res ipsa loquitur.* That this was so, is placed beyond all doubt by the evidence of some of the witnesses who were examined. Kishen Sahai, a witness for the defendants, who is the elder brother of the husband of Jai Dei and acted as attorney for Musammat Jai Dei in the arbitration proceedings, in the course of his evidence stated that he had spent about two and a half or three thousand rupees in proceedings taken on behalf of Jai Dei. He admitted that he believed that daughters inherited their fathers' estate, but that the defendants, Daulat Ram and Ramji Lal, told him that he "should refer the case to arbitration in respect of the questions between [250] the parties, otherwise he would have to fight the case up to the High Court and would be ruined." It is apparent from this that Kishen Sahai had a personal interest in the success of Jai Dei's claim. Another witness, Din Dayal, who is a son of the defendant Ramji Lal, deposed that the last witness, Kishen Sahai, told him that the matter should be referred to arbitration; that if the defendants, *i.e.*, Ramji Lal and Daulat Ram, would not refer the matter to arbitration, they as well as his principal, that is, Jai Dei, would be deprived of the property, inasmuch as the entire property would go to the plaintiff, Musammat Dhapo; that afterwards they consulted pleaders on the subject, and learnt from them that these parties would get no share, and that Musammat Dhapo's right would be maintained. He further said that the arbitrators did not decide the question as to whether or not the plaintiff was entitled to the property, inasmuch as they had asked them to award something to such persons. This evidence, if true, and we see no reason for disbelieving it,

of opinion that on her suit as originally framed she was entitled to ask the Court to treat the award and decree as nullities, in the event of her establishing by evidence that they were procured by fraud or collusion. On this ground, therefore, the appeal fails

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It has been further contended on the part of the appellants that the claim to have the award and decree set aside is barred by limitation, inasmuch as the amendments were made after the claim to set aside the deed was time barred As we hold that the plaintiff was entitled to obtain from the Court the relief which she sought upon her claim as it originally stood, it becomes unnecessary to determine this point But we may say that, unless the amendments were improperly allowed or ought not to have been allowed by reasons of their converting the original suit into a suit of another and inconsistent character, there is no substance in the argument For these reasons we hold that the statute of limitation furnishes no answer to the plaintiff's suit.

The appellants next contended that the plaintiff has no title to the property in suit, inasmuch as according to the custom established amongst Saraogis females are excluded from inheriting The evidence given upon this subject is conflicting A number of witnesses were examined in support of the custom, but their evidence is very vague and unsatisfactory In several cases given as illustrations of the existence of the custom uncles succeeded to [248] the exclusion of daughters, but whether or not this was due to the existence of the alleged custom depended on the fact whether or not the property was the exclusive property of the daughters' fathers, and not the joint property of their fathers and uncles The witnesses no doubt in each case depose in a cut and dry statement that the fathers were separate from their brothers, but what their means of knowledge of this fact was is not shown They are mere bald statements In several instances it is clear that the daughters did not acquiesce in the existence of the alleged custom for the question was referred to and decided by panchayats No wajib ul arz was adduced in evidence, in which any such custom was recorded The evidence of one of the witnesses for the appellants, Kishen Sahai, goes to show that there was no uniform or established or recognised custom He says that he believed that daughters inherit their fathers' estate, and that he enquired from members of the brotherhood whether this was so or not, and that some of them said that the daughters did inherit and some that they did not In the absence of evidence to rebut the evidence of the defendants' witnesses, it would be difficult, upon the evidence which was adduced by the defendants, to hold that the alleged custom was proved, but when we consider the evidence of the witnesses who have been examined on behalf of the plaintiff, it becomes clear beyond any doubt that no such custom existed A number of respectable witnesses were examined on behalf of the respondent, who deposed to a number of instances in which daughters succeeded to their father's property to the exclusion of uncles and cousins One case was particularly noticeable, it was a case of one Bahal Singh, who died worth property of the value of more than one and a half lakhs of rupees consisting of three or four villages, some 50 shops and 25 houses Bahal Singh's own brother was alive at the time of his death, and yet his (Bahal Singh's) daughter inherited the property If there had been any such custom as is alleged by the respondents, it is most unlikely that Bahal Singh's brother would have allowed the

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APPELLATE CIVIL.

24 A. 251= A. W. N. 1902, 43.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* and Maulvi *Ghulam Mujtaba*, for the appellants.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the respondent.

[252] BANERJI and AIKMAN, JJ.—The first question we have to determine in this appeal is, whether the suit of the plaintiff-respondent was barred by limitation. The plaintiff stated that he had money dealings with the defendants who borrowed different sums of money from him from time to time since 1879. To secure these loans they pledged jewellery and other moveable property. This property the plaintiff alleges has been sold by him under the power vested in him by section 176 of the Contract Act, and a balance is due, which he seeks to recover personally from the defendants. As has been stated above, the dealings began in 1879; the last advance actually made was on the 5th of November, 1886. Interest is said to have been paid from time to time, but no interest was paid after 1888. The present suit was brought on the 20th of December, 1897. The plea of limitation was set up by the defendants, but it was overruled by the Court below, which decreed the claim. It is contended on behalf of the appellants that the article of schedule ii of the Limitation Act applicable to the suit is article 57. The Court below has applied article 120, being of opinion that no other specific article of the schedule is applicable. It has computed the period of limitation from the 23rd of February, 1897, when the plaintiff sent a notice to the defendants demanding payment of the balance alleged to be due by them. The learned counsel for the respondent admits that that date cannot be regarded as the date on which the plaintiff's right to sue accrued. But he urges that the right came into existence on the date on which after the sale of the moveable property pledged to him, the plaintiff discovered that there was a balance still due. It has been held by this Court that a suit to recover personally fromthe debtor the amount of a loan for which moveable property is pledged is governed by article 57 of schedule ii of the Limitation Act.—*Madan Mohan Lal* v. *Kanhai Lal* (1). It was also held in that case that the six years' limitation prescribed by article 120 applies to a claim to enforce the pledge. This is admittedly not a suit to enforce a pledge. In our opinion the claim is one to recover the unpaid balance of a loan, that is to say, it is a suit for money payable to the plaintiff, for money lent by him, a suit [253] which is specifically provided for by article 57. The fact that moveable property was pledged as collateral security does not, in our judgment, render the suit a suit of any other description than that to which the article referred to above applies. This view is supported by the ruling of the Bombay High Court in *Ram Chandra* v. *Antaji* (2) cited in Rivaz on the Limitation Act, p. 122. There it was held that a suit by a pawnee to recover the balance due on his debt after accounting for the proceeds of the sale of the articles pledged must be brought within three years from the date of the loan. That case is on all fours with the present, and we agree with the view adopted in it. The learned Subordinate Judge thinks that section 176 of the Contract Act conferred a new right on the plaintiff, and this was the contention of the learned advocate for the respondent. In our opinion this view is erroneous. What the plaintiff seeks to recover is the balance of the loan given by

(1) (1895) I. L. R. 17 All. 284. (2) Bom. P. J. 1886, p. 161=5 Bom. L. R. 735.

24 A 242= A W N 1902, 38

shows beyond any doubt the fraudulent nature of the arbitration proceedings Another witness, Kabul Singh, who appears to have been an acquaintance and friend of Ramji Lal and Daulat Ram, deposed to a conversation which he had with Kishen Sahai in the course of which Kishen Sahai stated that he had brought a suit in respect of Jai Dei's right, but that Ramji Lal and Daulat Ram had set up a defence that the plaintiff was entitled to inherit all the property, and further, that it would be better to refer the matter to arbitration, so that the property might be divided amongst all, but Daulat Ram and Ramji Lal said that they had also consulted their legal adviser, and that he also advised them that it would be better if the matter was referred to arbitration Another witness, Medh Singh, a kinsman of Ramji Lal and Daulat Ram, deposed to the same effect as the last witnesses He stated, in substance, that Kishen Sahai told him that the plaintiff had the right to all the property, and that he told Ramji Lal and Daulat Ram so, and asked them to refer the matter to arbitration, that subsequently, in the presence of Kabul Singh, Nihal, Daulat Ram and Ramji Lal, Kishen Sahai was informed that the pleaders had expressed their opinion "that the plaintiff would get her right, that none of them would get even [251] a share in it, and that therefore there should be appointed arbitrators who would divide the estate amongst all the persons We have no reason to doubt the credibility of this evidence It is consistent with the other facts which have been established by the plaintiff in connection with the arbitration proceedings, and we believe it to be true It places beyond doubt the truth of the plaintiff s allegation that the award and the decree thereon were obtained by fraud and collusion It appears to us that not merely was a gross fraud committed upon the plaintiff, but that a fraud was also practised upon the Court in suppressing the true state of facts when permission was given to Jai Dei, herself then a minor, to act as next friend of the plaintiff We, for these reasons, entirely concur in the view expressed by the learned Subordinate Judge and have no hesitation in dismissing this appeal Accordingly we dismiss the appeal with costs

Appeal dismissed

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24 A 251 (=A. W. N. 1902, 43.)

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

SAIYID ALI KHAN AND OTHERS (*Defendants*) v DEBI PRASAD (*Plaintiff*) * [5th February 1901]

Act No IX of 1872 (Indian Contract Act), section 176—Pawnor and pawnee—Suit to recover balance of debt after sale of articles pawned—Limitation—Act No XV of 1877 (Indian Limitation Act,) schedule II, article 57

Held, that the limitation applicable to a suit brought by a pawnee to recover the balance of his debt after accounting for the proceeds of the sale of the articles pledged is that prescribed by Article 57 of the second schedule of the Indian Limitation Act, 1877, namely, three years, and the *terminus a quo* the date of the loan *Madan Mohan Lal* v *Kanhai Lal* (1) and *Ram Chand* v *Antaji* (3) referred to

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* First Appeal No 90 of 1899 from a decree of Munshi Sheo Sahai, Officiating Subordinate Judge of Cawnpore, dated the 23rd March 1899

(1) (1895) I L R 17 All 284 (3) Bom P J 1890, p 161=5 Bom L R

1902 FEB. 7. — REVISIONAL CRIMINAL. — 24 A. 254= A. W. N. 1902, 44.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

STANLEY, C. J.—There are no grounds for this application. Gulzari Lal was tried and convicted of the embezzlement of sums of money amounting in the aggregate to Rs. 37-3-6, moneys paid to him as patwari of a certain village by the tenants under the [255] Court of Wards, and which he represented that he had authority to collect. In the charge the aggregate amount of the items is stated, and, in addition to that, the particulars giving the dates and the amounts of three payments are also stated. It is to be observed that the alleged criminal breach of trust was committed within the period of one year, and therefore the provisions of sub-section 2 of section 222 of the Code of Criminal Procedure apply. This sub-section is in the following terms:—"When the accused is charged with criminal breach of trust, or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234: provided that the time included between the first and last of such dates shall not exceed one year." It seems to me clear that particulars as required by this section had been given—in fact more particulars than it was necessary to give to the accused were given in the charge. It has been argued by the learned vakil for the applicant that because it was in the power, or may have been in the power, of the prosecution to supply fuller particulars, they ought to have done so, and are not entitled to the benefit of the latter part of the section. I find, however, nothing in the Code of Criminal Procedure to warrant such an argument. This case is not governed by the decision of their Lordships of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor* (1), inasmuch as in that case the offences with which the accused was charged extended over a period longer than a year. For these reasons the application is refused. The applicant must surrender himself and undergo the rest of his sentence.

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24 A. 256 (=A. W. N. 1902, 45.)

[256] REVISIONAL CRIMINAL.

Before Sir John Stanley, Knight, Chief Justice.

EMPEROR *v.* KALI CHARAN AND OTHERS.* [10th February, 1902.]

Criminal Procedure Code, section 188—*Offence committed outside British India by a Native Indian subject of His Majesty—Certificate of Political Agent not obtained before making inquiry.*

Where an inquiry into an offence to which section 188 of the Code of Criminal Procedure was applicable was commenced without the certificate provided for by that section having been obtained, it was *held* that the proceedings were void, and that the subsequent commitment to the Court of Session must be quashed, notwithstanding that the necessary certificate was in fact granted some days before the commitment was made, though at the time of the commitment being made it had not come into the hands of the Committing Magistrate.

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* Criminal Reference No. 43 of 1902.

(1) (1901) I. L. R. 25 Mad. 61; S. C. 5 C. W. N. 866.

him to the defendants That loan was secured by the pledge of moveable property Section 176 of the Contract Act gives the pawnee the right to bring a suit on the debt, retaining the article pledged as collateral security It also empowers him to sell the thing pledged after giving reasonable notice, and to recover the balance of the debt, if any, remaining after such sale The original contract of loan is not put an end to or superseded, and no right which did not exist before has accrued by the sale In the present case, as the last item of loan was, as already stated, given in 1886, and as the suit was brought long after the expiry of three years from that date, or from the latest payment of interest, it is clearly beyond time This is sufficient for the disposal of the appeal We set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts

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Appeal decreed.

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24 A 254 (=A W N 1902, 44)

[254] REVISIONAL CRIMINAL

Before Sir John Stanley, Knight, Chief Justice

EMPEROR v GULZARI LAL *

[7th February, 1902]

Act No XLV of 1860 (Indian Penal Code), section 406—Criminal breach of trust—Charge—Criminal Procedure Code, sections 222, 234

[illegible] 'ed or com [illegible] money, the [illegible] the accused [illegible] ems compos [illegible] an three in [illegible] implied by [illegible] yar v King Emperor (1) distinguished

[Fol 27 All 69=A W N 1904, 165 33 All 36=7 A L J 186=11 Cr L J 442=7 I C 186 31 Cal 928=8 C W N 897, Ref 29 Mad 558=5 Cr L J 133 32 Cal 1085=10 C W N 51 6 Cr L J 137=16 P W R 1907 Cr]

THE applicant in this case was charged with having committed the offence of criminal misappropriation or cheating in respect of an aggregate sum of Rs 37 3 6 representing various amounts collected by him under false pretexts from certain tenants, and was sentenced therefor to two years' rigorous imprisonment He appealed from this conviction and sentence to the Sessions Judge, who maintained the conviction, whilst reducing the sentence to one of eighteen months Against this order an application for revision was presented to the High Court, and there it was argued, as it had been argued before the Sessions Judge, that the charge was illegal, having regard to the ruling of the Privy Council in the case of *Subrahmania Ayyar* v *King Emperor* (1) The charge in the present case was a charge of misappropriating the sum-total of different items, all alleged to have been collected by the applicant within a period of less than one year, but it further specified the various items collected, which were more than three in number

Babu *Satya Chandra Mukerji*, for the appellants

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*Criminal Revision No 899 of 1901

(1) (1901) I L R 25 Mad 61 S C 5 C W N 866

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24 A. 257= A. W N. 1902, 51.

24 A. 257 (=A. W. N. 1902, 51).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

HAMID ALI AND ANOTHER (*Plaintiffs*) *v.* MUJAWAR HUSSAIN KHAN AND ANOTHER (*Defendants*).* [11th February, 1902.]

Muhammadan Law—Shias—Waqf—Essentials of a valid waqf according to the Shia law—Illusory dedication.

One Muhammad Faiyaz Ali Khan, a Muhammadan of the Shia sect, on the 7th of May, 1878, caused to be drawn up an instrument, by which he purported to make a waqf of the whole of his property. The instrument [258] beyond the bare statement that the property was constituted waqf, contained no specification of the purposes to which it was to be devoted. The settlor, however, after naming himself as the mutawalli of the waqf property during his life, went on to declare that the precise purposes of the dedication, and the mode in which the waqf property was to be managed, would be set forth in a will which the settlor was about to execute. But he added that the future will should always be acted on after his death, and, so far as he himself was concerned, laid down no rules for the management of the waqf property. On the 11th of May, 1878, the instrument above referred to and the will were executed by Faiyaz Ali Khan, and they were both registered on the 13th of the same month. The will provided for the succession to the office of mutawalli after the death of the testator and laid down certain "rules of practice" to be observed with reference to the management of the endowed property. These rules of practice for the most part merely enjoined upon the mutawalli the keeping up of the religious observances which had been usually performed by the testator in his lifetime, and which were no more than such ceremonies as would ordinarily be performed by a pious and well-to-do Muhammadan of the sect to which the testator belonged. The tenth paragraph of the rules of practice did, however, provide that should the settlor have left any debts "the succeeding mutawalli should pay them *first of all* by curtailing all the expenses". The former of these two documents, while reciting that the waqf was created "in order to obtain benefit in the next world," also provided that the property dealt with thereby should "under no circumstances be made the subject of inheritance," and otherwise clearly indicated that the object of the waqf was very largely the preservation of the property in the hands of the settlor's descendants. After the execution of these documents the settlor never had himself recorded in the Revenue records as mutawalli instead of proprietor, and his son, the succeeding mutawalli, was recorded as proprietor and not as mutawalli.

Held, by Stanley, C. J., that the so-called waqf-namah was invalid, for the reason, chiefly, that there was therein no specific dedication to religious or charitable uses, such as was necessary to constitute valid waqf. The subsequent will could not be prayed in aid to complete the transaction, inasmuch as under the Muhammadan law applicable to the Shia sect a waqf could not be created by will. It appeared moreover that the settlor's intention was to suspend the operation of the waqf-namah until after his death which also was not permissible according to the Shia law. If the two documents could be read together, even then the waqf would be invalid, as it appeared that the dedication was not so much intended to satisfy pious or charitable objects as to secure the preservation of the donor's property for his family. *Agha Ali Khan* v. *Altaf Hasan Khan* (1), *Abdul Ganne Kasam* v. *Husson Miya Rahimtulla* (2) *Mahomed Hamidulla Khan* v. *Lotful Huq* (3) ; *Pathukutti* v. *Avathalakutti* ; (4) and *Sheda Bibi* v. *Mughal Jan* (5) referred to.

Per BURKITT, J,—The waqf namah and the will could be read together as constituting but one transaction which was not therefore open to the [259] objection of being a testamentary waqf inasmuch as the dedication was made

* First appeal No. 2 of 1899 from a decree of J. Denman, Esq., District Judge of Allahabad, dated the 19th September, 1898.

(1) (1892) I. L. R. 14 All. 429.
(2) (1873) 10 Bom. H. C. Rep. 7.
(3) (1881) I. L. R. 6 Cal. 744.
(4) (1888) I. L. R. 13 Mad. 66.
(5) *Supra*, p. 231 ; S. C. Weekly Notes, 1902, p. 32.

[Ref 14 Cr L J 298=19 I C 954=6 S L R 260 38 Mad 779 Dist 15 Cr L J 207=22 I C 991=26 M L J 235]

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IN this case certain persons, Native Indian subjects of His Majesty, and residents of a village in the Basti district, were charged before a first class Magistrate of that district with the offence of dacoity, alleged to have been committed by them in Nepal At the time when the inquiry before the Magistrate commenced no certificate, such as is required by section 188 of the Code of Criminal Procedure, had been obtained The Magistrate committed the accused to the Court of Session on the 21st of November, 1901, the necessary certificate up to that time apparently not having reached him At that time, however, the certificate of the Political Agent in Nepal was in existence, having been signed by the Political Agent on the 19th of November On the commitment coming before the Sessions Judge, he referred the case to the High Court with a view to the commitment being quashed as illegal *owing to the absence of the requisite certificate*

The Assistant Government Advocate (Mr *W K Porter*) in support of the order of the Magistrate

STANLEY, C J —This is a reference by the learned Sessions Judge of Gorakhpur, submitting the record to the High Court with a recommendation that the commitment of the accused Kali Charan Arakh, Behari Arakh, and Girdhari Arakh, who are British subjects, be quashed under section 215 of Act No V of 1898, on the ground that the same was illegal The offence with which the accused are charged is alleged to have been committed in Nepal The Magistrate inquired into the charge without [257] having the certificate of the Political Agent of Nepal as required by section 188 of the Code of Criminal Procedure This section provides that no charge as to among others, an offence committed beyond the limits of British India, or by a British subject in the territories of any Native Prince or Chief in India, shall be enquired into in British India unless the Political Agent, if there be one, for the territory in which the offence is said to have been committed, certifies that in his opinion, the charge ought to be enquired into in British India It is admitted that the certificate of the Political Agent in Nepal was not obtained before the commencement of the inquiry by the committing Magistrate, although it was subsequently obtained It appears to me that under the language of this section the obtaining of such certificate is a preliminary requisite to the holding of an inquiry into such a charge The alleged offence having been committed without the limits of British India, the section forbids any inquiry until the certificate has been obtained I think, therefore, that the commitment was illegal, and I declare it to be so and quash the commitment It will be open, however, to the Magistrate to instititute criminal proceedings *de novo* against the accused in accordance with law

[See in this connection the cases of *Queen Empress* v *Ram Sundar* (1) and *Queen Empress* v *Kathaperumal* (2), in which however there was no certificate at all in existence at the time of the commitment being made —ED]

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(1) (1896) I L R 19 All 109 (2) (1889) I L R 13 Mad 423

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fact they constitute but one instrument and though the first part may perhaps have been written out on May 7th, both parts were executed and attested by the same witnesses on one and the same day, namely May 11th, and were both presented for registration on May 13th by the executant Muhammad Faiyaz Ali Khan.

It was contended that under the rule laid down in the case cited above the appropriation of the property in the present case was bad as being a testamentary waqf, in which possession had not been given by the waqif to the mutawalli. Such is not the case in my opinion. The first part of the waqf-namah is that which contains the dedicatory words. It is in this part that the executant purports to appropriate certain property to the Hazrat Imam Husain, and purports to retain possession of it thenceforth as mutawalli, and not as beneficial owner. The second part, which is styled a will, does not purport to make any testamentary disposition of any property in favour of the succeeding mutawalli. It merely recites the appropriation made in the earlier part, dated May 7th, and then goes on to make certain rules respecting the management of the property. The appropriation, if valid, is complete under the terms of the first part of the [261] waqf-namah, and it is under that part, and not under the will, that the settlor's son, the first defendant, would have taken as mutawalli. Therefore, in my opinion, the appropriation is not nugatory as being a testamentary waqf.

Turning now to the waqf-namah, the first and most important matter to be ascertained is the object for which the waqf was constituted.

As to that question the settlor leaves no room for doubt. The waqf-namah begins with an assertion that "it is incumbent on every individual to protect his life and property, and life is transient," especially in his case, as he had been "unwell for a long time," and that, *therefore*, he had dedicated the property now in dispute to the Hazrat Imam Husain "*in order to obtain benefit in the next world,*" and has retained the ownership in his own hands as mutawalli and manager for his life without any power to transfer. That property, he adds, "*shall never, and under no circumstances, be made the subject of inheritance.*" In the second part of the waqf-namah he sets forth more fully his reasons for, and the object of, the dedication. After again alluding to his illness and that "transient life is uncertain," the settlor proceeds as follows:—"As I myself have seen the condition of my own four brothers and the ruin and miserable state of their property and families and children after their death, it is necessary and incumbent on me to make *some arrangement of my property.* I have, *therefore,* dedicated the whole of my property detailed below to God, the Apostle, and the holy Imams (on whom be peace), to obtain an everlasting benefit in the next world, and have appropriated the same by executing the waqf-namah, dated 7th May." There is a declaration that the endowed property shall never be open to inheritance. The meaning of the above clearly is, that the settlor having seen the miserable condition to which his four brothers and their families and children and property had been reduced (presumably because the properties of his four brothers, being subject to the law of inheritance, had been wasted, and their families reduced to indigence) felt it incumbent on himself to make "*some arrangement*" *of his own property* to avoid those evils. With *this* object the plan he adopts is to make a dedication of it to the Hazrat Imam Husain

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whether, under the circumstances of the case, the settlor had ever taken such possession as *mutawalli* of the waqf property as is requisite under the Shia law

[Ref 11 O C 48]

THE facts of this case are fully stated in the judgments, the material portions of the documents in question being set forth at length in the judgment of Stanley, C, J

Maulvi *Muhammad Ishaq Khan* and Munshi *Gulzari Lal*, for the appellants

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondents

BURKITT, J —This is an appeal against a decree of the District Judge of Allahabad, dated September 19th, 1908, by which he dismissed the plaintiffs' suit

The relief asked for by the plaintiffs in the prayer to their plaint were—(1) for the removal of the first named defendant, Mujawar Ali, from the office of mutawalli of certain property detailed in the plaint, which the plaintiffs alleged to be waqf or endowed property, (2) for a declaration that that property was not saleable in execution of a decree obtained by the second defendant, Musammat Dhan Devi, that the sale of that property and its purchase at the execution sale by Musammat Dhan Devi was null and that her possession was unlawful

The first defendant did not appear to defend the suit The second defendant denied that the property in suit was waqf, and also pleaded that on the death of Faiyaz Husain Khan, father of the first defendant, the alleged waqif, the property was recorded by the Revenue authorities in the name of his son, the first defendant, as full owner, who, as such, mortgaged the properties in suit to her deceased husband, Mul Narain, took the mortgage in good faith, and without any knowledge of the alleged waqf

[260] The learned District Judge found that the waqf was valid, but also found that it had never been acted on He, therefore, dismissed the suit The plaintiffs appeal They by their memorandum of appeal contended that there are no grounds for the finding that effect was not given to the waqf, and that it is a valid and subsisting endowment

The waqif, Muhammad Faiyaz Ali Khan, was a Muhammadan of the Shia sect In considering this appeal we have, therefore, to apply to it the rules of the Shia law regarding waqf Those rules will be found at great length in the elaborate judgment of Mr Justice Mahmood, when delivering the judgment of the full Bench of this Court in the case of *Agha Ali Khan* v *Altaf Hasan Khan* (1)

The waqf namah under consideration in this appeal is made up of two parts, one purporting to bear date of May 7th, 1878, and the other (which is called a will) being dated May 11th, 1878 But as a matter of

(1) (1892) I L R 14 All 429

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provision is subsequently made. This condition alone is sufficient to vitiate the waqf, even if otherwise unobjectionable. That such is the law applicable to Shias is most unmistakably laid down in Shama Churun Sircar's Tagore Law Lectures of 1874, p. 473, and in Syed Ameer Ali's Muhammadan Law, Vol. 1, p. 411. This matter alone is, in my opinion, quite sufficient to justify us in dismissing this appeal.

I think it right nevertheless to discuss the remaining paragraphs of these "rules of practice" (dastur-ul-amal). The eleventh paragraph provides that certain trees are to be left standing, and offerings of flowers made at certain places, and a chapter of the Quran to be recited, the benefit of which is to be transferred to the benefit of the souls of deceased Musalmans. The concluding portion of this paragraph seems to imply that it is the duty of the mutawalli to provide for all the male descendants of the settlor who become "paiks." The twelfth paragraph directs the mutawalli to provide the petty sum of Rs. 30—one rupee a [264] day—during the fasting month (Ramzan) to be spent daily in the ceremonial breaking of the fast (after sunset) during the month, and in the morning ceremony on the 21st of that month. Then a sum of Rs. 80 is provided for illuminations and assemblies (majlis), with directions as to the special dishes to be served on the 3rd, 7th, and 8th, and a majlis is to be held on every Friday between the 3rd and 40th days. If there be any unexpended balance this paragraph provides that there should be a proper and economical distribution of it, and again "let there be some distribution on some day." A sum of Rs. 100 is to be spent on the procession in honour of the 40th day, but out of this sum Rs. 20 is to be given *as usual* to the females (of the settlor's family) for their expenses on the days preceding the 40th day. Then follows a provision that Rs. 10 are to be spent in fireworks to be let off *as usual*, and that a fund of Rs. 100 annually should accumulate for five years to be spent in addition to the imambara, and in helping some descendants of the settlor to go to Mecca if there be any surplus. The last clause of this paragraph is not of much importance. Now as to all the above matters directed in this will there is a finding by the lower Court which has not been contested in this appeal, that everything therein directed had been usually done in the life-time of the settlor. They all (with the exception perhaps of the accumulation of Rs. 100 for five years) are such acts as any pious Muhammadan gentleman of the Shia sect in good circumstances would do of his own accord.

I am in full accord with the opinion of the lower Court, that no effect ever was given to this waqf-namah. The settlor died in July 1878. What happened after his death we do not know, except that the property which his father had purported to dedicate was at once recorded in the name of the son as full owner in the official records. The son was not of age then. But when he did come of age, he lost no time in raising money on the property, the first loan being in 1893 and the last in 1895. It was not till 1898 that the present plaintiffs (who as near relatives must have known what Mujawar Ali was doing) instituted the present suit after the property had been sold to pay the debts which Mujawar had imposed on it. In less than three years he had borrowed nearly Rs. 4,000, treating the alleged waqf [265] property as his own and borrowing money on its security. It is only at the last moment that the plaintiffs came in, and alleging that Mujawar Ali had no power to alienate the property, they ask the Court to deprive the mortgagee of the fruits

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[262] in order to obtain benefit in the next world That is to say, he attempts to establish a perpetuity in favour of his own descendants as beneficiaries, an estate which shall not be subject to the law of inheritance, which shall not be susceptible of transfer, and which therefore cannot be wasted by his descendants as the properties of his brothers had been wasted And this he purports to do under the guise of a dedication to God, the Apostle, and the holy Imams Beyond this there is no dedication of any sort There is no dedication (such as is usual in waqfs) to any charitable or religious uses, nor any dedication, whether immediate or ultimate, for the benefit of the poor Under the first part of the waqf namah the settlor assumes possession as mutawalli of the endowed property, untrammelled by any dedication to any purpose, or by any direction as to how he is to use the revenues He says, no doubt, that it is his intention to specify in detail in writing the powers he possesses in respect of the waqf property in a separate will, but adds that this "will" should always be acted on *after his death*, but that during his life he will manage the property and look after the affairs of the imambara *as he may think expedient* So there was no obligation on him during the remainder of his life to do any of the acts he in the will directs his successors to perform, but after him "everything shall be always done in accordance with the terms specified in the will" As long as he lived the waqf was practically in abeyance, or rather did not come into existence

Turning now to the terms of the "will,' which sets forth the powers the mutawalli is to possess in respect of the management of the waqf property, the settlor in the first paragraph reiterates his determination that after him the property shall not be subject to the law of inheritance In the second paragraph he recites the appointment made in the first part of his son (the first defendant) to be mutawalli, with his wife, Musammat Fizza Begam, as the son s guardian during his minority, for the performance of the affairs mentioned in the will, she being bound to act "in accordance with what is written hereafter and declared to be *the rule of practice*' In the third [illegible] rected to act under the advice of three [illegible] Ali, Khan Bahadur, whose son is [illegible] in [263] his case, Wahid Husain Khan and Inayat Ali Khan, whose wife (sister of the settlor) is another of the plaintiffs appellants in this case Very large powers are given to these persons and to the majority of them They are even authorized to remove the mutawalli The next three paragraphs have reference to the education and training of the settlor s son and to the succession to the office of mutawalli The latter is always to be one of the settlor's descendants, and in case of a failure of male descendants, then a female or a relative, or an able man of another sect, may be appointed as a *paid* mutawalli, but such paid mutawalli is to be paid as little as possible, and is in no case to get more than Rs 10 per month

The seventh, eighth, and ninth paragraphs are not very important

The tenth paragraph, however, is most important It provides that if the settlor has left any debts the succeeding mutawalli should pay them *first of all* by curtailing all the expenses The meaning of this is, that the first duty incumbent on the mutawalli is to pay any debts his father, the settlor, may have left unpaid, that this is to be done first of all, and that it is to be accomplished by reducing the expenditure, for which

1902 FEB. 11. removed from the office of mutawalli of the property, and to have some other person appointed in his place. The facts are shortly as follows :—

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On the 7th of May, 1878, Faiyaz Ali Khan executed a deed purporting to dedicate to Hazrat Imam Husain the properties belonging to him in order to obtain benefit in the next world. The deed runs as follows :—" I, Muhammad Faiyaz Ali Khan, son of Ashraf Ali Khan, resident of muhalla Dariabad, one of the muhallas of the city of Allahabad, do declare as follows:—It is incumbent on every individual to protect his life and property, and life is transient, as clear from the tenor of the holy verse, *viz.*, "Every soul shall taste of death," and life is altogether uncertain, especially in my case, who have also been unwell for a long time, therefore I, while in a sound state of body and mind, [267] and in possession of all my senses, have dedicated (made a waqf of) of my own free will and accord, the undermentioned property, consisting of the zamindari, houses, and groves owned and possessed by me, to Hazrat Imam Husain (peace be on him), in order to obtain benefit in the next world, and have retained the ownership of the same in my hands as a mutawalli (superintendent) and manager for my life without any power of transfer whatever. I shall reduce into writing in detail and specify the powers which I possess in respect of the management of the waqf property in a separate will, which should always be acted upon after my death. During my life I, the executant, myself will manage the property as a mutawalli (superintendent), and look after the affairs of the imambara and repairs, etc., as will be deemed expedient ; and after me everything shall always be done in accordance with the terms specified in the will, which I will execute hereafter. After my death my own son, Mujawar Husain Khan *alias* Salwat Husain Khan, besides whom I have no other male issue, shall be the mutawalli (superintendent) of the appropriated (waqf) property under the guardianship of my wife, Musammat Fizza Begam, according to the terms of the will to be hereafter executed by me. During the minority of the said son, the said Musammat shall perform all the affairs as guardian of the said mutwalli (superintendent). The undermentioned property, which I have willingly appropriated, shall never, and under no circumstances, be made the subject of inheritance. I have consequently written these presents by way of waqf-namah (deed of appropriation) amounting to a deed of gift in respect of the property specified below that it may serve as evidence." Then follow the details of the properties so dedicated.

This document which I shall describe as the waqf-namah was written on the 7th of May, but was not attested until the 11th, and on the 13th of May, it was registered. On the same day on which the waqf-namah was attested Faiyaz Ali Khan also executed a will, which commences with the following recital :—

"As I have been unwell for a long time and the transient life is uncertain, and as I myself have seen the condition of my four own brothers, and the ruin and miserable state of their property and families and children after their death, it is necessary and [268] incumbent on me to make some arrangement of my property. I have, therefore, dedicated the whole of my property detailed below to God, the Apostle, and the holy Imams (on whom be peace) to obtain an everlasting benefit in the next world, and have appropriated the same by executing the waqf-namah (deed of appropriation), dated the 7th May. I execute this will to the following effect that it may be enforceable for

of her decree against it After a careful consideration of the whole case, I am of opinion that the waqf namah on which the appellants rely is not a valid instrument It contain no dedication of the property to the worship of God It contains no immediate or ultimate dedication of that property to any unfailing religious or charitable object or for the relief of the poor It seems to me to have been nothing more than a mere paper transaction The one object of the settlor appears to me to have been to settle the property on his descendants in perpetuity, so as to remove it from the operation of the law of inheritance, and prevent the recurrence of the evils he had seen in his brothers families *That*, and not the worship of God or the benefit of his fellow Musalmans was his sole object He settles the property first on himself, and then on his son and descendants and instructs the latter to carry on certain ceremonial observances which he had been accustomed to perform This is not a case of a dedication to the worship of God or to religious and charitable uses, with a provision engrafted thereon for the benefit of the settlor s family, but is a case of a perpetual endowment on the family with instructions to do certain ceremonial acts, some of which may be of a religious nature Such a dedication is not, in my opinion, valid It may also be strongly doubted whether there was in this case that strict seisin by the mutawalli which the Shia law requires The settlor did no doubt draw up the paper waqf namah, in which he says that thenceforth he holds the property as mutawalli But he did nothing more except to register the paper He in no way changed the outward appearance of the title by which he remained in possession If he had been sincere in his desire to divest himself of his proprietary title he would have at once applied to the revenue authorities to have his name no longer recorded in the public registers as owner of the dedicated property, and instead to have a new entry made recording him as mutawalli This he did not do, nor after his death did his sons guardian have a correct entry made It is [266] admitted that Mujawar Husain Khan was, after his father s death entered as full owner, and not as mutawalli The respondent's husband, when he consulted the village papers previous to accepting the mortgage, would not have found any indication that Mujawar Husain Khan had not a full and absolute title to the property, nor that fifteen years previously that property had become waqf On the above facts I am unable to say that the settlor, notwithstanding his paper declaration to that effect, did really obtain that seisin as mutawalli which the Shia law requires

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For all the above reasons I have come to the conclusion that the decision of the Court below dismissing the suit is right I would, therefore, dismiss this appeal with costs

STANLEY, C J —The suit out of which this appeal has arisen has been brought by the plaintiffs, who are members of the family of the late Faiyaz Husain Khan, to have it declared that certain properties situate in the district, and also in the city of Allahabad, and in the district of Fatehpur, are waqf [illegible] property which was held o[illegible] he defendant, Musamm[illegible], a mortgagee, in execution of a mortgage decree obtained by Mul Narain, was null and void By the plaint the plaintiffs also seek to have the defendant, Mujawar Husain, who is the son of Faiyaz Husain Khan,

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ever, and that everything be done in accordance with its terms Inheritance shall never open in respect of the undermentioned property which has been appropriated for good (pious) purposes' In clause 1 of this document the testator declares that no one has a right to, or share in, the property, nor shall inheritance open in respect of it after him, and that even the mutawalli shall have no power to transfer or mortgage any part of it In clause 2 he appoints his son, the defendant Mujawar Ali Khan, mutawalli and in the succeeding clauses 3, 5 and 6, provision is made for the management of the property, and also for the removal and appointment of mutawallis In clause 12 a sum of Rs 350 is fixed to defray all the expenses in connection with the ceremony of mourning, the breaking of fast in the month of Ramzan, and the Shab i Barat, etc It is in this last mentioned clause that the objects of the dedication of the property are specified From the view which I have formed of the case and upon which I am prepared to decide it, it is unnecessary for me to refer more particularly to the provisions of the will The net income of the property is stated in the details attached to the will to be Rs 862 3 4 In respect of the application of Rs 350 only of this amount are directions given in the will Faiyaz Husain Khan died on the 5th July, 1878, and upon his death his son, Mujawar Husain entered into possession of the properties He in the years 1892, 1893, 1894 and 1895, borrowed moneys, amounting in the aggregate to Rs 3 900, from Mul Narain, on the security of mortgages of the property which his father purported to dedicate as waqf Mul Narain brought a suit to recover the amount due to him, and obtained a decree on the 21st of April, 1896, and he having died, his widow, the respondent Dhan Devi, took out execution of the decree, and caused part of the property to be sold by auction and herself purchased it on the 20th of December, 1897, and obtained [269] possession It is to have this sale set aside that the present suit was instituted Faiyaz Husain Khan belonged to the Shia community of Muhammadans, and it is by the Shia law, therefore, that any question arising in the case must be determined

The learned District Judge held that the waqf namah and wasiyat namah (will) were really parts of one and the same transaction, and must be read together, and that, so reading them, although the main purport of the waqf was to create a trust and prevent the descendants of the waqf from ruining and alienating the property, still enough of the income of the property had been set apart for religious purposes and that the religious element in the waqf was not nominal and fictitious, but was large enough to make a valid waqf He held, however, that the waqf had not been given effect to, and that the defendant, Mujawar Husain, held possession of the property as owner and not as mutawalli and that the suit was not therefore maintainable, and he accordingly dismissed it For the appellants, it was at first contended by their learned counsel that the waqf namah and the will must be read together, and that their combined effect was to create a valid dedication of the property to religious and pious purposes When, however, he was met by the argument that under the Shia law a waqf can only be created by act *inter vivos* and not by will, he fell back on the contention that the waqf namah of itself independently of the will, was an effectual dedication of the property as waqf Now that the contemporaneous document was intended to operate as a will, and as a will only appears to me to be

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suspended during the life of Faiyaz Ali, and during this period Faiyaz Ali in effect reserved for himself the profits of the property as well as the power of revoking his will and disposing of the property as he might think fit. The waqf-namah was no more than a declaration by Faiyaz Ali that his property was waqf, and that he would by his will specify the object of the dedication. It seems to me that the object of the two documents not improbably was to enable him to retain unfettered control of the property during his lifetime, and at the same time in case he did not revoke or alter his will, to secure the [273] transmission of it to his descendants in perpetuity, trammelled only with some pious and charitable trust. If this was not his object, it is difficult to understand why he did not specify the objects of the dedication in the waqf-namah, instead of in an instrument drawn up and executed simultaneously with the waqf-namah.

For these reasons I am of opinion that the waqf-namah was an imperfect dedication of the property according to the Shia law, and that the will does not cure the defect inherent in it, and so no valid waqf has been created.

It is unnecessary for me to deal with any other aspect of the case; but I may observe that if the waqf-namah and the will can be read together, as my brother Burkitt considers that they can, I should have difficulty in coming to any other conclusion than that at which he has arrived, namely, that the dedication was not so much intended to satisfy pious or charitable objects as to secure the preservation of the donor's property for his family. The appeal will therefore be dismissed with costs.

Appeal dismissed.

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24 A. 273 (=29 I. A. 70=6 C. W. N. 425=4 Bom. L. R. 376=8 Sar. 233).

PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Robertson, and *Lord Lindley.*

CHANDIKA BAKHSH (*Defendant*) *v.* MUNA KUNWAR (REPRESENTATIVE OF RATAN SINGH) AND OTHERS (*Plaintiffs*) AND DRIGBIJAI SINGH (*Defendant*) *v.* MUNA KUNWAR (REPRESENTATIVE OF RATAN SINGH AND OTHERS (*Plaintiffs*).

[14th, 15th November, 1901 and 22nd February, 1902.]

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

Hindu Law—Custom—Mitakshara and Mayukha Schools of Hindu Law—Proof of family custom at variance with Hindu Law—Governing law of migrating families.

A family custom alleged to exist amongst the Ahban Thakurs of Oudh, in derogation of the ordinary Mitakshara law in force there, that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor was held by the Judicial Committee not to be proved by four instances of the custom of comparatively modern date, which their Lordships found to be the only portions of the evidence adduced which supported it.

[Ref. 24 I. C. 519=28 M. L. J. 669; 32 All. 363; 30 P. R. 1903=85 P. L. R. 1903; Rel. 20 I. C. 810=18 C. L. J. 559=18 C. W. N. 55.]

APPEALS from judgments and decrees (9th and 30th August 1898) of the Judicial Commissioners of Oudh reversing two decrees (15th June 1896) of the Subordinate Judge of Sitapur.

page 467, the principle is thus expressed under the heading " Conditions required of the object of waqf, number DCCCXXVII He (in whose favour a waqf is made) must be in existence, capable of owning property and '*distinctly indicated*; he must not be one in whose favour it is unlawful to make waqf." In his treatise on Muhammadan Law (2nd Ed, Vol I, 401) Mr. Justice Ameer Ali gives as one of the four requisites concerning the *maukoof alaih*, or beneficiary, that he must be *muyyin*, or specified Turning now to the waqf namah in the present case, we find that while the motive of the dedication is stated by Faiyaz Ali Khan as being to protect his property, and the dedication is made to Hazrat Imam Husain " in order to obtain benefit in the next world, " no object whatever of the waqf is specified The dedication is not expressed to be made in the way of God or for any pious or charitable purpose It is simply a dedication for such purposes and objects as the waqif should by will specify. It appears to me, therefore, that one of the essential conditions of a valid dedication is wanting, and that the waqf is consequently void, unless it be that the will can be called in to supplement the provisions of the waqf namah and cure the defect which I have pointed out Can this be done ? I think not, and for this reason, that according to Shia law property cannot be made waqf by will The law upon this subject is elaborately discussed by Mahmood, J, in his judgment in the case of *Agha Ali Khan* v *Altaf Hasan Khan* (1), in the course of which the learned Judge treats of the exact nature and constitution of waqf as understood in the Shia law, and points out how the Shia law recognises waqf, not as a unilateral disposition of property, as it is recognised in the Sunni law, but as a [272] contract which, according to the requirements of juristic notions irrespective of either of these two systems, must be a transaction *inter vivos*, and this *ex necessitate rei* According to Mr Justice Ameer Ali, there are four essential requisites on which depends the legality of a waqf—(1) that it must be perpetual, (2) that it must not be contingent, (3) that possession must be given of the thing dedicated, or more properly, the property should cease to be the property of the donor, and (4) that the right of the donor should be entirely divested therefrom [illegible] (1) It (the waqf) [illegible] taken out of the waqif or appropriator himself In the case before us, the second and fourth of these requisites appear to be wanting, for although the donor purported to dedicate the property when he executed the waqf namah, and also purported to assume possession of it as mutawalli, no definite objects existed for which he was to hold possession The waqf namah was designed not to take effect until the death of Faiyaz Ali, although it assumed in some respects the form of a disposition *inter vivos* The operation of the waqf was in fact suspended during the life of the waqif, and this we have held is not permitted by the Shia law in the unreported case of *Syeda Bibi* v *Mughal Jan* (F A No 300 of 1898, decided on the 24th January, 1902) *

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Faiyaz Ali retained control over the property during his life, and could deal with it as he pleased Only upon his death could his will have any operation The operation of the dedication was in fact

(1) (1892) I L R 14 All 429

* Since reported, *Supra* p 231 S C Weekly Notes, 1902, p 32

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24 A. 273=29 I. A. 70=6 C.W.N. 425=4 Bom. L. R. 376=8 Sar. 283.

Ranjit Singh died on 7th December, 1891, and was succeeded by his sons Anant, Ratan and Durga and by his grandson Kirat, whose father Kali had predeceased Ranjit Singh. Mahipat died on 17th January 1893, and was succeeded by his son Chandika Bakhsh. In March, 1893, Ranjit Singh's estate was released from the Court of Wards, and on the 27th April, 1895, the plaintiffs, the sons and grandson of Ranjit, brought the suits out of which the present appeals arose to recover from Chandika Bakhsh and Drigbijai Singh the shares they had taken of Munnu Singh's estate, to which the plaintiffs claimed that Ranjit Singh was under the Mitakshara law alone entitled to succeed on the death of Umrai Kunwar.

The main defence in both suits was that the succession was governed by the special custom already mentioned, and not by the ordinary law of the Mitakshara. Other grounds of defence were raised, but they were all decided against the defendants by both the lower Courts and were not raised in the present appeals.

The Subordinate Judge held that the custom set up by the defendants was proved, but that the succession under it was *per capita* and not *per stirpes*. In the suit against Chandika Bakhsh for an eight-anna share of the property the Subordinate Judge gave the plaintiffs a decree for a two-anna eight pie share, that being the excess held by Chandika over the one-third share to which he was entitled. The suit brought against Drigbijai for a four-anna share of the property was dismissed with costs.

[276] On appeals preferred to the Court of the Judicial Commissioner, that Court held that the custom set up by the defendants had not been proved, and therefore reversed the decrees of the Subordinate Judge and decreed the plaintiffs' claim in each case in full.

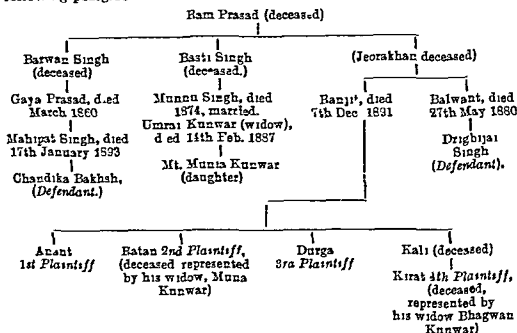
The material portion of the judgment of the Judicial Commissioners in the case against [illegible]andika Bakhsh as to the custom set up was as :—

on to cons[illegible] tion whether the Hindu Law of the *Mitakshara*
inheritance h[illegible] rseded or modified by a custom binding upon
The rule of [illegible] hich is alleged by the defendant to be binding
[illegible] is [illegible] [illegible]eased brot[illegible] [illegible]usin, uncle or nephew of
are entit[illegible] the shoes [illegible] father and inherit along
[illegible]'s brothe[illegible] Subordi[illegible] relied upon the *wajib-*
[illegible]ur, Kun[illegible] Bidhip[illegible] [illegible]n the judgment of the
S[illegible] in *Bhag*[illegible] [illegible]*rigpa*[illegible] *ni*, dated July 22nd,
[illegible] findi[illegible] had [illegible] d. The material
[illegible]-*arz* [illegible] *rne aurat mazkur*,
sh[illegible] [illegible] *bhatijon ke jo waris*
kar[illegible] *ka* [illegible]*rz* of Bidhipur is
[illegible] d is as follows :—
'Afte[illegible] [illegible] nephews of her
[illegible] nearest heir of the
same [illegible] [illegible]d that the word
'and' [illegible] h in the original
there is [illegible]
" [illegible] is that brothers
[illegible] construction.
[illegible] is the language
[illegible] nephews may
[illegible] contention be
[illegible] word '*bhai*'
[illegible] it cannot be
[illegible] provision for
[illegible] therefore, was
[illegible] The *wajib-*
[illegible] record of the

[274] The parties to these appeals were Ahban Thakurs, a tribe which, coming originally from Gujrat, had settled in Oudh many centuries ago The suits out of which the appeals arose were brought by the respondents as next heirs of one Munnu Singh, a divided member of the family, to recover his property on the death of his widow, Umrai Kunwar The property in suit consisted of shares in eleven villages which had been held by Munnu Singh as his separate estate until his death on 21st January 1874, and afterwards by his widow until she died on 14th February 1887

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The relationship of the parties in the litigation is shown by the following pedigree :—



It was undisputed that daughters did not succeed, so that on the death of Umrai Kunwar, the nearest heir under the Mitakshara law prevailing in Oudh was Ranjit Singh, the father of the plaintiffs A custom, however, was set up by the defendants that among the Ahban Thakurs, on the death of one of several brothers without direct heirs, the descendants of the other brothers took equally without reference to their nearness to the common ancestor In accordance with this custom Mahipat Singh and Drigbijai Singh would succeed simultaneously with Ranjit Singh, and the property would be divided *per stirpes*

[275] On the death of Umrai Kunwar it appeared that disputes arose between the claimants to the estate, which resulted in the attachment of the property now in suit under section 146 of the Criminal Procedure Code (Act No X of 1882) Subsequently the tahsildar was directed to effect a compromise, if possible, and eventually an arrangement was come to that Ranjit Singh should take a four anna share, Drigbijai Singh a four anna share, and Mahipat Singh an eight-anna share, in Munnu Singh's property An order to this effect was made by the Deputy Commissioner on 11th November, 1887, and the property released from attachment, the shares of Ranjit and Drigbijai being placed in charge of the Court of Wards under whose management their estates already were

1901 Nov. 14, 15. 1902 Feb. 22. — Privy Council. — 29 I.A. 273=29 I.A. 70=6 C.W.N. 425=4 Bom. L. R. 376=8 Sar. 233.

In the case against Drigbijai Singh the judgment of the Subordinate Judge was reversed on the same grounds.

Chandika Bakhsh and Drigbijai brought separate appeals to His Majesty in Council.

In the first appeal—

Mr. *Leslie DeGruyther*, for the appellant Chandika Bakhsh.

Mr. *J. D. Mayne*, for the respondents.

In the second appeal—

Mr. *G. E. A. Ross*, for the appellant Drigbijai Singh.

Mr. *C. W. Arathoon*, for the respondents.

In the first appeal—

Mr. *DeGruyther*, for the appellant contended that the succession in this case was governed by the special custom set up and not by the ordinary law of the Mitakshara. The parties, Ahban Thakurs from Gujrat, where the Mayukha law is in force, must be presumed to have brought that law with them when they migrated and settled in Oudh. The custom now contended for is founded upon the Mayukha. The rule in the Mayukha is to the effect that " sons of a deceased brother succeed along with the surviving brothers" (see Stoke's Hindu Law, ch. iv., section 8, verse 17). " Brothers " is not confined to brothers proper, but extends to cousins, the rule of the Mayukha having been naturally extended to include more remote relationships than actual brothers (West and Bühler's Hindu Law, 3rd Ed. Book I, p. 108). In this case the appellant contends that cousins and cousins' sons [279] succeed together, and it is submitted that the evidence supports that contention. There are 18 instances in which the custom has been observed. As to proof of a custom *Garuradhwaja Prasad Singh* v. *Superundhwaja Prasad* (1) was referred to. The Subordinate Judge was in error in holding that the rule of succession is *per capita*, and not *per stirpes*; but even if the division were made *per capita*, the respondents are not entitled to so much as has been allotted to them. As to the effect in evidence of the *wajib-ul-arzes*, or administration papers, *Uman Parshad* v. *Gandharp Singh* (2) and *Lekraj Kuar* v. *Mahpal Singh* (3) were referred to.

Mr. *J. D. Mayne* for the respondents contended that the special custom set up had not been established: the evidence in support of it was unsatisfactory and insufficient to prove such a custom, which was one in derogation of the ordinary law. The alleged custom had only been followed in three out of the eighteen instances adduced in support of it, and those are of comparatively modern date and are insufficient to establish it, one of the essential requisites of a custom being that it is ancient. All the remaining instances merely follow the rule of succession laid down in the Mayukha. The extension of that rule contended for by the appellant is not in accordance with the principles of the Hindu law and should not be allowed. The following cases and authorities were cited :— Stoke's Hindu law, ch. IV., section 8, verse 17; Stoke's Hindu Law, pp. 443, 445, verse 8; Mitakshara, ch. II, section 4, verse 1; West and Bühler's Hindu Law, 3rd Ed., Book I., pp. 107, 108; *Jamiyatram* v. *Bai Jamna* (4); *Lakshmi Bai* v. *Ganpat Moroba* (5) *Sant Kumar* v. *Deo Saran* (6).

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(1) (1900) I. L. R. 23 All. 37; L. R. 27 I. A. 238. p. 27 *ante*.
(2) (1887) I. L. R. 15 Cal. 20 (28) L. R. 14 I. A. 127 (131).
(3) (1879) I. L. R. 5 Cal. 744; L. R. 7 I. A. 63.
(4) (1864) 2 Bom. H. C. R. 11.
(5) (1868) 5 Bom, H. C. R. O. C. 128 (139)
(6) (1886) I. L. R. 8 All. 365 (369).

"The judgments in *Bhagwant Singh* and *Drigpal* v *Raj Rani* do not help the defendant's case Mandhata, Mahipat, Suphal and Bhagwant were brothers Drigpal was the son of Mandhata It appears that at the regular settlement Mahipat was found to be in possession of Suphal's *sir* Bhagwant and Drigpal brought a suit against Mahipat, which resulted in an arbitration award and a [277] decree, dated January 1866, by which it was declared that Mahipat and his wife who were childless should retain possession for their lives Many years later Raj Rani after Mahipat's death executed a mortgage of the property, whereupon Bhagwant and Drigpal sued her and ... gage would be ineffectual against the ... and nephew could not join as plaintif ... plea with the remark that Bhagwant and Drigpal were entitled to sue together both under the decree of 1866 and by custom in proof of the custom he referred to the dec ee of the Settlement Court and to the evidence of a solitary witness He added that Bhagwant at all events had a right of suit On appeal the District Judge did not deal with the question of custom at all The judgment of the Subordinate Judge cannot be relied upon as a pronouncement in favour of the existence of such a custom as that pleaded by the defendant The decree of the Settlement Court is not in evidence, and there is nothing to show that the award of the arbitrators was based upon the custom alleged by the present defendant It is remarkable that the *wajib-ul arzes* of the villages in suit do not mention the custom the parties who attested them seem to have induced the Settlement Officer to record what suited their purpose

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"This exhausts the documentary evidence which is supposed to tell in favour of the custom

"... cumstance which is a custom would be ...d in ... ago ... itho- ... with surviving brothers This is supposed to explain the origin of the custom set up in this case Babu Sri Ram pointed out that the Mayukha, was the work of Nilakantha, who lived about 1600 A D *id est* long after the migration of the Ahban Thakurs to Oudh This may not be a sufficient answer, for the law in force in Gujrat at the time of migration may have been the same as that laid down in the Mayukha some centuries later If the custom set up in this case owes its origin to the law in force in Gujrat so many centuries ago and has been observed ever since one would expect to find some mention of it in the *wajib ul arzes*

"... ons of a deceased brother succeed ... enable sons of deceased cousins, ... ving cousins, uncles or nephews I ... in the Mayukha cannot be held to establish an antecedent probability in favour of the much more comprehensive rule pleaded by the defendant

The Court then discussed the oral evidence and went in detail through the 18 instances put forward by the defendant in proof of the custom, and in conclusion said —

[278] "In the result, then, I am of opinion that instances 9, 14, 15 and 17 have not been established, that Nos 6 and 13 may be taken as proved that Nos 3 and 18 may be but are not necessarily, true examples of the custom, and that Nos 1, 2, 4, 5 7, 8, 10, 11, 12 and 16 must, for various reasons be regarded as doubtful It is noticeable that instances 1 to 11 and 14 are said to have occurred in Kunwa Danda Shahpur and Bidhipur, though, as already explained, the *wajib ul arzes* of ... lusions at which ...

I consider that the evidence must on the ... been established by a long series of authori... family custom at variance with the ordinary law of inheritance it is necessary to show that the usage is ancient and has been invariable, and it must be established by clear and unambiguous evidence

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appellant in his reply. He could do no more than add one of the other cases as an instance of the alleged custom, contending on the evidence that it was not simply an example of the Mayukha rule.

The result is that in support of the alleged custom four instances at most can be adduced, and those of a comparatively modern date, and that there is no other evidence.

It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation.

The appeal of Drigbijai Singh fails on precisely the same ground.

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed. In each case the costs will be borne by the appellant.

Appeals dismissed.

Solicitors for the appellant, Chandika Bakhsh—Messrs. *Watkins* and *Lempriere*.

Solicitors for the appellant, Drigbijai Singh—Messrs. *Barrow, Rogers* and *Nevill*.

Solicitors for the respondents in both appeals—Messrs *T. L. Wilson & Co.*

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24 A. 282 (=A. W. N. 1902, 63.)

[282] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

SHEORAJ SINGH (*Judgment-debtor*) *v.* KAMESHAR NATH AND ANOTHER (*Decree-holders*).* [14th February, 1902.]

Execution of decree—Limitation—Res judicata.

Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for execution is made by a competent Court, having jurisdiction to try whether such execution is barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

An application for execution of a decree was struck off on the 15th of January, 1894. The next application for execution was not made until the 29th of May, 1897. Notice of this application was served on the judgment-debtors, and they filed objections, but on the day fixed for hearing failed to support them, and they were dismissed. The application for execution was, however, ultimately struck off by reason of the non-payment of process fees by the decree-holders. *Held* that it was not open to the judgment-debtors on a subsequent application for execution being made to plead limitation in respect to the application of the 29th of May, 1897, as a bar to the execution of the decree. *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1), *Behari Lal* v. *Abdul Majid* (2), *Lakshmanan Chetti* v. *Kuttayan Chetti* (3), *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry* (4) and *Dhonkal Singh* v. *Phakkar Singh* (5) referred to. *Tileshar Rai* v. *Parbati* (6) and *Onkar Singh* v. *Mohan Kuar* (7) distinguished.

[Fol. 31 Cal. 822=8 C. W. N. 672 : A. W. N. 1905, 237: A. W. N. 1906, 70=3 A. L. J. 198 ; Ref. 27 P. L. R. 1905 : 47 P. R. 1906=86 P. L. R. 1907: 12 A. L. J. 206 = 23 I. C. 286 21 I. C. 938=18 C. L. J. 264 : 31 I. C. 293: (1916) 2 M. W. N. 64=33 I. C. 443 =3 L. W. 339 : 63 I. C. 189 : 44 All. 164 : Dist. 10 C. W. N. 209=3 C. L. J. 240 : 14 I. C. 977=14 Bom. L. R. 264: 2 L. W. 1055.]

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* First Appeal No. 166 of 1900 from a decree of Munshi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 14th May, 1900.

(1) (1881) L. R. 8 I. A. 123.
(2) Weekly Notes, 1897, p. 29 also see p. 138 *ante*.
(3) (1901) I. L. R. 24 Mad. 669.
(4) (1900) I. L. R. 28 Cal. 122.
(5) (1893) I. L. R. 15 All. 84.
(6) (1893) I. L. R. 15 All. 198.
(7) Weekly Notes, 1898, p. 96.

Mr *DeGruyther* replied— 1901

1902 22nd February The Judgment of their Lordships was delivered by LORD MACNAGHTEN — Nov 14, 15 1902 FEB 22

The question involved in these appeals may be disposed of in a few words In the first case the Subordinate Judge of Sitapur found in favour of the appellant (the principal defendant [280] in the suit) on the ground of an alleged family custom that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor The Judicial Commissioners reversed this decision and adjudged the estate in dispute to the respondents, who were plaintiffs in the suit, holding that the alleged custom had not been made out

PRIVY COUNCIL

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The parties to this litigation are Ahban Thakurs It seems that the tribe known in Oudh as Ahban Thakurs came originally from Gujrat and settled in Oudh many centuries ago In Gujrat the Mayukha is recognised as authority of paramount importance when it differs from the Mitakshara According to the Mayukha sons of a brother who is dead share along with surviving brothers The rule, however, as found in the Mayukha does not go beyond brothers and brothers' children Although the migration of the Ahban Thakurs took place before the Mayukha was written it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre existing custom

The argument of the learned counsel on behalf of the appellant was to this effect :—It is to be assumed (he said) that the tribe known as the Ahban Thakurs brought with them from Gujrat the law of the Mayukha it is quite true that the Mayukha deals only with the case of a deceased brother, but it is a legitimate, and under the circumstances a natural, extension of the doctrine to apply it to cases of more distant relationship It is a development of the law which might be expected to grow up among a tribe settled in a foreign land and there living apart In support of the appellant's claim there was in evidence a judgment which was not much to the point, some oral testimony which was anything but satisfactory, certain *wajib ub arzes* which on examination are found to prove nothing, and 18 instances of succession which were put forward as demonstrating the existence of the alleged custom The Judge of first instance considered these instances conclusive The Judicial Commissioner who delivered the judgment of the Court examined them in detail He found that four had not been established, that ten must be [281] regarded as doubtful, that two were not necessarily true examples of the alleged custom, and that the remaining two might be taken as proved But his opinion was that if all the 18 instances had been established, the evidence must on the authorities still be held insufficient

Mr Mayne for the respondents contended that the suggested extension of the Mayukha rule would be abhorrent to the fundamental principles of Hindu law. He was willing to concede for the purposes of this case that the Ahban Thakurs settled in Oudh were governed by the Mayukha, but if that position was accepted, it was, he said, destructive of the appellant's case He discussed the 18 instances and showed that all but three were true examples of the Mayukha rule and nothing more This result was not really contested by the learned counsel for the

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been pressed, and they are these:—(1) That the application for execution of the decree made on the 29th of May, 1897, having been made more than three years after the previous application of the 13th of January, 1890, was barred by limitation; (2) that the decree was incapable of execution by reason of the compromise of the 2nd of April, 1892, and (3) that the attachment was made after the death of the judgment-debtor, Raja Shankar Singh, and consequently was *not* binding on the appellant, who took the property by right of survivorship and not by right of inheritance. These same objections were raised by Raja Sheoraj Singh on the occasion of the application for execution which was made on the 29th of May, 1897, and were dismissed; and it is now contended on the 'part of the decree-holders that, inasmuch as these objections have already been disposed of by an order against which there has been no appeal, the matter is *res judicata,* and the objections cannot be reagitated. Reliance is placed upon several authorities to which we shall refer. In the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry,* (1) their Lordships of the Privy Council held that, although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for such execution has been made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. Sir Barnes Peacock in delivering the judgment of their Lordships in the course of his judgment observed:—"The Subordinate Judge had jurisdiction upon the petition of the 8th of October, 1874 (*i.e.,* a petition to attach properties), *to determine* whether the decree was barred on the 8th of October, 1871, and he made an order [285] that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge, in a suit upon a cause of action, is bound to dismiss the suit or to decree for the defendant if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal, and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation." Now in the case before us the Subordinate Judge dismissed the plaintiff's objections on the 20th of December, 1897. Whether rightly or wrongly, he must have considered that the application was not barred by limitation, for he allowed execution to issue, and by a subsequent order of the 17th of March, 1898, directed the pleader for the decree-holders to pay the costs of attachment on or before the 21st of March, 1898. The order of the 20th of December, 1897, was acquiesced in by the appellant and was acted on. It appears to us that the ruling of their Lordships is applicable to and governs this case.

In a case which was decided in this Court a similar question arose, namely, the case of *Behari Lal* v. *Majid Ali* (2). In that case one Gauri Shankar obtained a money decree against Majid Ali. Gauri Shankar having died, one Behari Lal alleging that he was the brother of Gauri Shankar, and one Musammat Sonkali alleging that she was the widow of a deceased brother of Gauri Shankar, applied for execution of the decree by arrest of Majid Ali. Notice was issued to Majid Ali under section

(1) (1881) L. R. 8 I. A. 123.

(2) Weekly Notes, 1897, p. 29. See also p. 138 *ante.*

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THE facts of this case are fully stated in the judgment of the Court

Babu *Durga Charan Banerji*, for the appellant

Pandit *Sundar Lal*, Pandit *Moti Lal Nehru* and Pandit *Tej Bahadur Sapru*, for the respondents

STANLEY, C J and BURKITT, J —This is an appeal from the order of the Subordinate Judge of Aligarh disallowing the objections of Raja Sheoraj Singh to the execution of a decree recovered by the respondent against the late Raja Shankar Singh, the father of Raja Sheoraj Singh A number of proceedings in execution of this decree were taken, which it is unnecessary to state in detail Suffice it to give the following [283] particulars —On the 31st of January, 1890, the first application for execution was made, and two villages were attached in execution Raja Shankar Singh died on the 24th of August, 1891, and the names of his sons, Raja Sheoraj Singh and Raja Maharaj Singh, were substituted as his legal representatives On the 2nd of April, 1892, an arrangement was come to between the decree holders and Raja Sheoraj Singh, whereby it was agreed that the amount of the decree should be paid off by six instalments, and that in default of payment of any instalment the execution proceedings should be revived and carried out It was also agreed that the two villages which had been attached should remain hypothecated (this is the word used) until the instalments had been paid The decree had been sent for execution to the Collector of Etah, and on the 16th of May, 1892, the execution proceedings were sent back to the Civil Court Raja Sheoraj Singh, upon the compromise being effected, paid the sum of Rs 3,231 into Court in satisfaction of interest due on foot of the decree A payment order was passed in favour of the decree-holders on the 18th of June, 1892, and on the 13th of July, 1892, they obtained payment of this amount The sanction of the Court which passed the decree was not obtained to the compromise as required by section 257A of the Code of Civil Procedure, and consequently it was void Two instalments of Rs 5 000 each were paid on foot of the decree, and in accordance with the compromise arrangement on the 24th of March, 1893 and 15th of January, 1894, but no further instalment was paid, and in consequence of this default on the 29th of May, 1897, the decree holders made a further application to the Court for execution of the decree Notice was duly given to the judgment debtors under section 248 of the Code of Civil Procedure, and Raja Sheoraj Singh, as also his brother, filed objections The objectors failed to appear in support of their objections on the day fixed by the Court for the disposal of them, namely, the 29th of December, 1897 Their pleader stated to the Court that he had no instructions, and the objections were dismissed There has been no appeal from this order The process fees, which were directed to be paid for issue of further execution, not having been paid in due course, the execution [284] proceedings were struck off on the 8th of June, 1898 This necessitated a further application for execution, which was made on the 14th of October, 1898, and granted Again the execution proceedings were struck off owing to the neglect of the decree holders to file some khewats, and on the 19th of December, 1898, the application for execution, which is now being resisted by the judgment debtors, was made On the objections which Raja Sheoraj Singh has filed, three only have

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(page 97) of the judgment in *Onkar Singh* v. *Mohan Kuar* (1) to which one of us was a party. That case also might be distinguished [as in the recent case of *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry* (2)] from the present by the fact that on the day fixed for disposing of an objection to execution raised by the judgment-debtor; neither the latter nor the decree-holder appeared, and the objections were struck off without any judicial determination. As the case, however, was shortly afterwards transferred to the Collector under section 320 of the Code of Civil Procedure for execution by sale of the hypothecated property, the Subordinate Judge must be held to have made an order for execution of the decree, an order which, whether right or wrong, was valid, so long as it stood unreversed on appeal. Neither the then recent case of *Behari Lal* v. *Majid Ali* (3) (1897, November 29th) mentioned above nor the judgment of their Lordships of the Privy Council mentioned above was cited in argument, and the Bench lost sight of the rule that once an execution Court has passed an order for execution in favour of the decree-holders the only remedy left to the judgment-debtor is by way of appeal. We are of opinion that the true principle applicable to objections to execution raised by judgment-debtors is that laid down in the case just cited, and that the principle on which the rule as to decree-holders in *Dhonkal Singh* v. *Phakkar Singh* (4), is founded, does not apply to the disposal of such objections. For the foregoing reasons we are of opinion that the appellant was not entitled to raise the objections which he filed to the execution of the decree of the defendants. [288] On this ground his appeal fails. It is unnecessary for us to determine the other questions which have been discussed in the course of the arguments.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

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24 A. 288 (=A. W. N. 1902, 47.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

LALTA PRASAD AND ANOTHER (*Plaintiffs*) *v.* SADIQ HUSEN (*Defendant.*)*
[15th February, 1902.]

Cause of action—Assignment of decree for costs—Costs realized by assignee—Decree reversed in appeal—Suit by successful appellants to recover from the assignee the costs realized by him.

Certain appellants in the High Court obtained from that Court a decree dismissing the respondents-plaintiffs' suit with costs. That decree for costs was assigned by the decree-holders, and the assignee took out of Court in execution thereof the money which had been paid in satisfaction of it by the judgment-debtors. Subsequently that decree was reversed by the Privy Council, and the plaintiffs obtained a decree in their favour with costs in all Courts. After an infructuous attempt to get a portion of those costs from the assignee by way of execution of the order of the Privy Council, the decree-holders filed a separate suit against him for their recovery. *Held*, that the decree-holders had no cause of

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* First Appeal No. 61 of 1899, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 3rd February 1899.

(1) Weekly Notes, 1898, p. 96.
(2) (1900) I. L. R. 28 Cal. 122.
(3) Weekly Notes, 1897, p. 29. See also p. 138 *ante*.
(4) (1893) I. L. R. 15 All. 84.

248 of the Code of Civil Procedure, and was served upon him, but he failed to appear, and an order for arrest was made Majid Ali could not be found, and the warrant was not executed Subsequently, on the 2nd of August, 1893, Behari Lal and Musammat Sonkali presented another application for execution of the decree by the arrest of Majid Ali On this occasion Majid Ali appeared and filed objections to the right of Behari Lal and Musammat Sonkali to have execution of the decree The first Court made an order for execution The second Court allowed the objections of Majid Ali and dismissed the application On the second appeal to the High Court, Edge, C. J and Blair, J, held, upon the principle laid [286] down by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (1), that Majid Ali was not, upon the second application made for execution, entitled to dispute the right and competence of Behari Lal and Musammat Sonkali to have execution of the decree as representatives of Gauri Shankar, that their right to execute the decree was established when an order for execution was passed on the first application, and that the principle of *res judicata* applied So in the case before us, the objector having failed to appear and support his objections on the 29th of December, 1897, and the same having been dismissed, he is estopped from now setting up the same objections In the case of *Lakshmanan Chetti* v *Kuttayan Chetti* (2), this question was considered In that case a decree had been obtained on the 16th of March, 1893, and a petition in execution was presented on the 8th of February, 1894 On the 2nd of July, 1897, that is, more than three years after the presentation of the petition of the 8th of February, 1894, the next petition in execution was presented, when the judgment debtor, though he had notice of the application, did not raise the defence of limitation An order was passed on the petition for the issue of a warrant for the arrest of the defendant, and the warrant was duly issued Within three years of the making of this application a further application in execution was made, when it was objected that as the application in 1897 had been presented more than three years after the previous application in 1894 it was barred, and that in consequence the further application must also be barred It was held by Davies and Moore, JJ, that it was not open to the judgment debtor then to raise the objection that the application of 1897 was barred and that this question was *res judicata* These decisions are based on the ruling of their Lordships of the Privy Council in the case to which we have referred On behalf of the appellant two decisions of this High Court have been relied on The first is the concluding paragraph (at page 204) of the judgment pronounced by one of us in the case of *Tileshar Rai* v *Parbati* (3) That case, however, is distinguishable, as it appears that the date fixed for hearing the objections of the judgment debtors [287] to execution was a Sunday, and that their objections were rejected on the following day in their absence, they having had no notice to appear on that day. That was the reason why the Bench which heard that case held that the objection raised by the judgment debtors had not been judicially disposed of Had the attention of the Bench been called to the rule laid down in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Choudhry* (4) it probably would have come to a different conclusion The second case which is relied on for the appellant is the concluding portion

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(1) (1883) I L R 6 All 269
(2) (1901) I L R 24 Mad 669
(3) (1893) I L R 15 All 198
(4) (1881) L R 8 I A 123

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they sue the plaintiff as a party to the litigation, which ended with Her late Majesty's order in Council, the answer is complete and is twofold, namely, firstly, that in that case their suit is barred by the provisions of section 244 of the Code; and, secondly, that it is barred as *res judicata* by the decree in the reported case mentioned above. If, on the other hand, they sue defendant as a stranger to that litigation, it is difficult to see what cause of action they have against him. The appellants seem to have perceived this difficulty, for all they say is that "they are entitled under the law and equity to recover." We fail to see what are the facts on which the appellants can found their cause of action. What happened is, that the respondent Sadiq Husen purchased for consideration (as found by the learned Subordinate Judge in this case) the right to receive from the Court a sum of money, being the costs due from appellants to Aziz-ud-din and Hafiz-ud-din, and he received those costs in cash from the present appellants through the Court in due process of execution. Now if Aziz-ud din and Hafiz-ud-din instead of assigning to Sadiq Husen before execution, had themselves executed the decree for costs, and on receipt of the money had handed it over to respondent there and then, would the appellants here have had any cause of action against Sadiq Husain when the decree, in execution of which those costs had been paid, was subsequently reversed? We think not, and we cannot see, what difference it makes that Sadiq Husen, acting under the assignment of those costs to him, asked the Court to pay them to him; for we must assume that Sadiq Husen did not thereby become a party to the suit or a representative of a party. As the learned Subordinate Judge finds that consideration passed for the assignment, it may well be that Hafiz-ud-din and Aziz-ud-din were in debt to Sadiq Husen, and discharged the debt by the payment made to Sadiq Husen through the Court, on the authority conveyed by their assignment. But how does that [291] give any cause of action to the appellants against Sadiq Husain? The order of Her late Majesty in Council gave the appellants a decree against Hafiz-ud-din and Aziz-ud-din for the costs incurred by them in all three Courts. We cannot understand why, having that decree in their hands, the appellants prefer to proceed against Sadiq Husen for a considerable portion of those costs instead of against Hafiz-ud-din and Aziz-ud-din. The appellant's decree is against the latter and not against Sadiq Husen, and that decree gives them a right to recover from Hafiz-ud-din and Aziz-ud-din the very sum which they now seek to recover from Sadiq Husen.

In our opinion the appellants have not shown any tangible cause of action against the respondent. We therefore dismiss this appeal with costs.

Appeal dismissed.

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24 A. 291 (=A. W. N. 1902, 67.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

COLLECTOR OF JAUNPUR (*Petitioner*) *v.* BITHAL DAS AND ANOTHER (*Opposite party*).* [17th February, 1902.]

Civil Procedure Code, section 244—Execution of decree—Question relating to the execution, discharge or satisfaction of the decree—Application to recover proceeds of sale from decree-holder after sale has been set aside.

* First Appeal No. 292 of 1900, from a decree of Syed Muhammad Ali, District Judge of Jaunpur, dated the 25th September 1900.

action for a suit to recover from the assignee the costs realized by him in the manner above described

[Dist 38 Mad 36]

THE facts of this case will be found stated in the report of the case of *Sadiq Husain* v *Lalta Prasad* (1), but briefly they were as follows —

On the 21st of July, 1888, Lalta Prasad and Har Prasad obtained a decree for sale on a mortgage from the Court of the Subordinate Judge of Bareilly against Aziz ud din Ahmad and Hafiz ud din Ahmad The defendants appealed, and on the 16th of March, 1891, the High Court set aside that decree, and dismissed the plaintiffs suit with costs

This decree for costs the defendants assigned to one Sadiq Husen, who applied for execution thereof, and realized the amount of costs decreed

The plaintiffs appealed from the decree of the High Court to the Privy Council, and on the 5th of April, 1895, the Privy [289] Council decreed the appeal and restored the decree of the Court of first instance in favour of the plaintiffs

The plaintiffs did not make Sadiq Husen a party to their appeal to Privy Council Having obtained their decree, however, the plaintiffs attempted to execute it as regards the costs realized by virtue of the assignment to him of the decree of the High Court against Sadiq Husen In this attempt they were unsuccessful, and they next filed a separate suit against Sadiq Husen for the recovery of those costs with interest The Court of first instance (Subordinate Judge of Bareilly) dismissed the suit, and the plaintiffs thereupon appealed to the High Court

Mr *D N Banerji*, for the appellants

Mr *A E Ryves* and Maulvi *Ghulam Mujtaba*, for the respondent

STANLEY, C J and BURKITT, J —This is an appeal against the decree of the Subordinate Judge of Bareilly dismissing plaintiffs' suit with costs

It is unnecessary that we should set out the facts of this case at length, they will be found fully detailed in the reported case of *Sadiq Husain* v *Lalta Prasad* (2) of which this case is a sequel

Suffice it to say that in that case the present appellants failed in their attempt to have execution of the decree of Her late Majesty in Council against Sadiq Husen, the respondent here It was in that case held by a Bench of this Court, of which one of us was a member, that as Sadiq Husen was no party to the decree made by Her late Majesty in Council, that decree could not be executed against him Being thus foiled in their attempt to proceed against the respondent by way of execution, the appellants have had recourse to this regular suit, by which they seek to recover from him Rs 4,820 13, the amount of the costs in the Court of the Subordinate Judge in the suit of 1888, which they paid into Court in July, 1891, when the original decree of the first Court was reversed by this Court on March 16th, 1891, and they were ordered to pay that sum as their appellants' costs, and it was paid to the respondent Sadiq Husen pursuant to an assignment to him from the successful defendants appellants [290] Aziz ud din and Hafiz ud din The plaintiffs here further ask for Rs 4,068 11 6 interest by way of damages on the Rs 4,820 13

In our opinion the decree of the lower Court dismissing the suit is right The appellants appear to us to be on the horns of a dilemma If

(1) (1897) I L R 20 All 139 S C, W N, 1897, p 222 (2) (1897) I L R 20 All 139

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died during the pendency of execution proceedings, and his brother, Raja Shankar Dat Dube, whose estate is now represented by the appellant, was brought on the record as his legal representative. On the 4th of April, 1892, he preferred an objection respecting the application for the sale of the attached property, on the ground that the property sought to be sold belonged to him, and did not form a part of the assets left by Raja Hari Har Dat Dube. That objection was disallowed by the Court below on the 6th of September, 1892. On the 20th of March, 1893, the property was sold by auction and the proceeds of the sale were taken out of Court by the respondents on the 28th September, 1893. Meanwhile Shankar Dat appealed to this Court against the order disallowing his objection, and it was during the pendency of this appeal that the property was sold. This Court, on the 5th of February 1895, set aside the order of the Court below, and remanded the case to that Court under section 562 of the Code of Civil Procedure. In the result the Court of first instance, on the 25th of September, 1897, upheld the objection of Shankar Dat, and ordered that the property in question should be released from attachment, declaring that it was incapable of being attached in execution of the decree. The present application was made for the refund of the sale-proceeds, which the respondents withdrew from Court on the 29th of September, 1893.

The Court below has refused the application on the ground that it is not one to which section 244 of the Code of Civil Procedure relates. We are unable to agree with that view. The learned Judge was of opinion that the property having been sold and the decree having been satisfied no question relating to the execution, discharge or satisfaction of the decree could arise, and in support of his view he referred to the ruling of this Court in *Ramchhaibar Misar* v. *Bechu Bhagat* (1). That case, if carefully looked into, does not support the learned Judge's view. What was really decided in that case was, that after a sale any question which arose between the auction-purchaser and [294] judgment-debtor was not a question relating to the execution of the decree. The judgment in that case must be considered with reference to the facts which the Court had to deal with. We have a number of authorities of later date in which it was held that a question of the nature of that which arises in this case is one relating to the execution, discharge or satisfaction of a decree, although it arises after a sale has taken place under the decree; in other words, section 244 applies as well to a dispute arising between the parties after the decree has been executed, as it does to a dispute arising between them previous to execution. We need only refer to *Imdad Ali* v. *Jagan Lal* (2), and *Dhan Kuwar* v. *Mahtab Singh* (3). The principle of the Full Bench ruling in *Partab Singh* v. *Beni Ram* (4), is also applicable. The mere fact that no execution case was pending before the Court below at the time when the appellant filed his application on the 27th of August, 1900, would not render section 244 inapplicable. The result is that we allow this appeal, set aside the order of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure, for disposal on the merits. The appellant will have his costs of this appeal. Other costs will follow the result.

Appeal decreed and cause remanded.

(1) (1885) I. L. R. 7 All. 641.
(2) (1895) I. L. R. 17 All. 478.
(3) (1899) I. L. R. 22 All. 79.
(4) (1878) I. L. R. 2 All. 61.

Held that an application to recover from a decree holder the proceeds of a sale in execution, such a sale having been set aside, is an application which falls within section 244 of the Code of Civil Procedure

Section 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties after the decree has been executed as it does to a dispute arising between them previous to execution

Imdad Ali v *Jagan Lal* (1), *Dhan Kunwar* v *Mahtab Singh* (2) and *Partab Singh* v *Beni Ram* (3) referred to *Ramchhaibar Misur* v *Bechu Bhagat* (4) distinguished

[Ref 49 I C 948, Appl 1 Pat 336]

THE facts out of which this appeal arose were as follows —

On the 21st of July, 1890, Bithal Das and Girdhar Das obtained a decree against Raja Harihar Dat Dube in the Court of the Subordinate Judge of Benares The decree was sent for execution to the Court of the District Judge of Jaunpur and an eight anna [292] share in Mauza Dilshadpur was attached The judgment debtor's brother Raja Shankar Dat Dube filed an objection under section 278 of the Code of Civil Procedure, but before that objection was decided the judgment debtor died and was succeeded by the objector The objector subsequently filed another objection under section 244 of the Code This objection, as well as the objection under section 278, was decided against him on the 6th of September, 1892 Against the order disallowing the objection under section 244 an appeal was preferred, and, on the 5th of February, 1895, the High Court allowed the appeal and remanded the case under section 562 of the Code of Civil Procedure In the result the objection of Raja Shankar Dat Dube prevailed, and by his order of the 25th of September, 1897, the District Judge declared that the property in question was not liable to sale Meanwhile, however, the property had, on the 20th of March 1893, been actually sold and had been purchased by Munni Ram Darogha for Rs 3 389 and the purchase money had been paid to the decree holders Bithal Das and Girdhar Das

In the present case the Collector of Jaunpur as Manager of the estate of Raja Sri Kishan Dat Dube, the successor in title of Raja Shankar Dat Dube, applied under section 244 of the Code of Civil Procedure to obtain a refund of the money paid to Bithal Das and Girdhar Das with interest

The District Judge of Jaunpur dismissed the application, holding, first, that questions arising subsequent to sale could not be dealt with under section 244 of the Code, and secondly, that an application under section 244 could not be entertained unless execution proceedings were pending in the Court to which it was made

From this dismissal the applicant appealed to the High Court

Mr *A E Ryves*, for the appellant

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondents

BANERJI and AIKMAN, JJ —The sole question which arises in this appeal is whether the application of the appellant was one under section 244 of the Code of Civil Procedure, and should have been adjudicated upon by the Court below under that section

[293] The respondents obtained a simple decree for money against one Raja Hari Har Dat Dube, and in execution thereof caused certain property to be attached as the property of the Raja Hari Har Dat Dube

(1) (1895) I L R 17 All 478
(2) (1899) I L R 22 All 79
(3) (1878) I L R 2 All 61
(4) (1885) I L R 7 All 641

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24 A. 294= A. W. N. 1902, 45.

presented was accepted by the Judge who heard the appeal, who accordingly dismissed it.

From this judgment dismissing the appeal the defendants-respondents preferred an appeal under section 10 of the Letters Patent.

Mr. *Amir-ud-din*, for the appellants.

Mr. *C. Dillon*, Babu *Jogindro Nath Chaudhri*, *Pandit Sundar Lal* (for whom Babu *Lalit Mohan Banerji*), Munshi *Gulzari Lal* and Munshi *Gokul Prasad*, for the respondents.

KNOX and BLAIR, JJ.—The quarrel out of which the suit is said to have arisen, which led up to the present appeal, is thus stated in the pleadings. The plaintiffs, who are here respondents, say that the defendants began to pick lac off certain *pipal* trees. Upon the plaintiffs' servants interfering, the defendants, here appellants, maintained that the trees belonged to them, and the plaintiffs had no right, title or claim whatsoever in the wall and the trees. The Subordinate Judge went into the whole matter in a very lengthy judgment. Part of the obscurity of the case is perhaps due to the very length of the judgment. His findings, however (he was the Court of first appeal), were to the effect that the wall belonged to the garden, which was admittedly the plaintiffs' property, that the trees were in the garden wall, and that the defendants had not proved any act of adverse possession of any kind. It was unfortunate that the learned Subordinate Judge had not apparently the courage to take the further step and state boldly that upon his finding the wall belonged to the garden and the trees were in the garden wall. The palintiffs' evidence which had established these facts covered and applied to the whole of the matter now in dispute. He obviously intended this when he went on to consider the question of adverse possession on the part of the defendants.

In second appeal after a remand a finding was undoubtedly put upon the record that the plaintiffs had not proved that they had done any act of specific possession within the twelve years next preceding the suit, and ground was at once opened for the present appeal. The learned counsel who appeared for the appellants [297] had every right to insist that upon this finding the plaintiffs' suit must be held to have failed altogether. With considerable energy he pushed forward this finding, and supported it by reference to the ruling of their Lordships of the Privy Council in *Asghar Reza* v. *Mehdi Hossein* (1) and *Mohima Chunder Mazoomdar* v. *Mohesh Chunder Neoghi* (2). The learned Judge of this Court from whose judgment this appeal has been filed took, however, the broader and what we consider proper view of the whole case. He did not content himself by a bare adherence to this finding ; but looking at the whole case found it to be one in which, while it might be that specific acts of possession on the part of the plaintiffs could not be directly proved upon a particular portion or appendage of property, still the evidence which applied to the property in the whole of which the part in dispute was merely an appendage, must be held to govern the appendage also. He applied to the case the principle laid down by their Lordships of the Privy Council in *Rajkumar Roy* v. *Gobind Chunder Roy* (3). The property in dispute in that case was a portion of the whole and a portion covered with water. Their Lordships held that "as the plaintiffs' evidence is in accordance with, and is aided by, his title and

(1) (1892-93) I. L. R. 20 Cal. 560.
(2) (1888) I. L. R. 16 Cal. 473.
(3) (1891-92) I. L. R. 19 Cal. 660, at p. 677.

24 A 294 (=A W N 1902, 45)

1902 FEB 18

APPELLATE CIVIL

24 A 294= A W N 1902, 45

APPELLATE CIVIL

Before Mr Justice Knox and Mr Justice Blair

IQBAL HUSEN AND OTHERS (*Defendants*) v NAND KISHORE AND OTHERS (*Plaintiffs*) * [18th February, 1902]

Evidence—Possession—Presumption—Evidence of possession of certain specific property treated as evidence of possession as regards an appendage to such property though no definite acts of possession were proved as regards the appendage—Limitation

Where, on the right to the produce of certain trees being called in question it was found that the plaintiffs had not for twelve years previous to the [illegible]

[illegible] Chunder *Mazoomdar* v *Mohesh Chander Neoghi* (3) referred to

THE plaintiffs in this case were the purchasers of a certain garden on the south side of which was a wall upon which some *pipal* trees grew The defendants were purchasers of a market which adjoined the plaintiffs' garden to the south The plaintiffs alleging that the defendants or their servants had interfered with their possession by picking lac off the pipal trees which grew out of the wall sued for a declaration that the defendants had no right to the wall or the trees, and for an injunction to restrain them from interfering therewith

Both the Court of first instance (Munsif of Farrukhabad) and the lower appellate Court (Subordinate Judge of Farrukhabad) found that the wall in question belonged to the plaintiffs garden and not to the defendants' market, and that the defendants had not been in proprietary possession of the wall and the trees for such a period as to confer on them a right to the said wall and trees by prescription Both Courts accordingly decreed the plaintiffs' claim

The defendants appealed to the High Court and contended that the lower appellate Court had failed to find whether the plaintiffs were in possession within twelve years preceding the date of the suit, and that its finding upon the question of the burden of proof was erroneous Upon this an issue was remitted by the High Court as to whether or not the plaintiffs had proved their possession within twelve years anterior to the date of the suit The lower appellate Court found that the plaintiffs had not proved by evidence that they had done any act of possession within twelve years and hence came to the conclusion that the plaintiffs' possession within twelve years had not been proved It was, however, contended on behalf of the plaintiffs respondents that having regard to the nature of the plaintiffs' possession and to the fact that the plaintiffs' title to the property had been found, the mere fact of the absence of proof of any specific act of possession could not in law lead to the conclusion that the plaintiffs were out of possession but that possession being presumed to be with [296] the person having the title, the Court should have held the plaintiffs to be in possession The view thus

* Appeal No 32 of 1901 under section 10 of the Letters Patent

(1) (1891 92) I L R 19 Cal 660
(2) (1892 93) I L R 20 Cal 560
(3) (1888) I L R 16 Cal 473

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REVISIONAL CRIMINAL.

24 A. 298= A. W. N. 1902, 58.

[299] make out at first that there was no quarrel at all about these trees, though he afterwards had to admit that both parties laid claim to them, and his statement that the three men mentioned went together to cut the trees is totally at variance with all that has been said by the parties themselves, and is contradicted by the medical evidence, which shows that Kadhu Singh and Jai Singh had far more wounds than anyone else, and these two men must therefore have been fighting before anyone else came up. As regards Karan Singh, Jhamman Singh, and Dhan Singh, it is impossible to accept their explanation that they had no sticks, and only interfered to stop the quarrel. Supposing that a crowd had gone up to stop the quarrel, is it likely that five of them would have received injüries, and one of them would have had five distinct marks more than are to be found on several of the alleged actual combatants?

"Under sections 147 and 325, Indian Penal Code, I sentence Kadhu Singh as the ringleader to rigorous imprisonment for six months, and Dhan Singh, Sardar Singh, Karan Singh, Heti Singh, and Jhamman Singh to rigorous imprisonment for three months."

From this order an appeal was preferred to the Sessions Judge, who dismissed it and affirmed the convictions and sentences. The appellants thereupon applied in revision to the High Court.

Mr. *C. R. Alston*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—I do not see any reason to interfere. It is one of those cases arising out of one of those wretched little village squabbles, which should be disposed of by the Magistrate, but which both parties prefer to dispose of by *lathis*. These present applicants went prepared for a fight. They knew that there were other persons who claimed right and title in these trees. They thought to steal a march on them. They knew very well that there was a probability that they would be met by force. They cut down one tree in dispute, then they proceeded to cut down another. From the point of view of their opponents they were doing an act either of theft or mischief. In doing so they knew [300] what they had to expect. They went prepared to fight, and they did fight. They have been punished, and rightly punished too. It is not a case where a man has been in actual exclusive possession of the land, in which case the presumptions of law are all in his favour; there is no such possession in this case. The petition is dismissed.

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4 A. 300 (=A. W. N. 1902, 60.)

ELLATE CIVIL.

Banerji and Mr. Justice Aikman.

TU (*Decree-holder*).* [4th March, 1902.]

n Act), sch. ii, arts. 178, 179—*Execution of mption—Time from which limitation begins to*

le to the Indian Limitation Act, 1877, or order which can at its date be executed. n there is no decree capable of execution

1901, from an order of Munshi Mata dated the 25th September, 1901.

previous possession, which is now made clear, and is not countervailed by anything of the slightest weight on the defendants' part ' they were *prepared to hold that the evidence, which clearly applied to the whole of* the property, must be taken to apply to the land in dispute So here title and possession of the garden has been clearly found to be with the plaintiffs It is not countervailed by any act of possession on the defendants' part over the wall and the trees in dispute We hold that the evidence which applies to the garden must be taken to apply to the walls and the trees in dispute, which we consider to be merely appendages to and part of the garden The result is that this appeal is dismissed with costs

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APPELLATE CIVIL

24 A 294= A W N 1902, 45

Appeal dismissed

24 A 298 (=A W. N 1902, 58)

[298] REVISIONAL CRIMINAL

Before Mr Justice Blair

EMPEROR v KADHU SINGH AND OTHERS *
[27th February, 1902]

Act No. XLV of 1860 (*Indian Penal Code*) *section* 147—*Riot*—*Act No XLV of* 1860, *sections* 96 *et seq*—*Right of private defence*

Of two parties, each of which claimed title to certain trees, one party went

claim that they had acted in the exercise of the right of private defence

[Ref 35 Cal 368=7 C L J 359=12 C W N 384=7 Cr L J 256=3 M L T 385, Fol 3 O L J 14]

IN this case six persons were convicted by a Magistrate of the first class of the offences of rioting and causing grievous hurt and were sentenced therefore to various terms of imprisonment The facts on which the convictions were based are thus set forth in the order of the Magistrate —

" This is the case of a fight which occurred at Usita between two parties of Thakurs, who are engaged in a dispute about certain land in their village Kadhu Singh went to cut a tree, and had cut up a considerable amount of a *jamun* tree, and begun to cut down a *babul* tree, when Jai Singh came up and told him to stop Both sides were enraged, and a fight took place in which a large number of injuries were inflicted Both parties accused one another at the thana afterwards, but subsequently did all they could to hush up the case I have convicted the other side of rioting and causing grievous hurt

" The fact that Kadhu Singh, Sardar Singh and Heti Singh went to the place with *lathis*, shows that they were prepared to defend their right to the tree by force, and the whole course of the case shows that both parties knew quite well that the possession of the trees was in dispute It is therefore clear that these three men, at any rate, were guilty of having the common object of enforcing their supposed right by a show of force, and the fact that they were attacked does not make their position any better, since they obviously provoked the attack The patwari's evidence cannot be regarded as important, as he attempted to

* Criminal Revision No 70 of 1902

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REVISIONAL CRIMINAL.
24 A. 298= A. W. N. 1902, 58.

[299] make out at first that there was no quarrel at all about these trees, though he afterwards had to admit that both parties laid claim to them, and his statement that the three men mentioned went together to cut the trees is totally at variance with all that has been said by the parties themselves, and is contradicted by the medical evidence, which shows that Kadhu Singh and Jai Singh had far more wounds than anyone else, and these two men must therefore have been fighting before anyone else came up. As regards Karan Singh, Jhamman Singh, and Dhan Singh, it is impossible to accept their explanation that they had no sticks, and only interfered to stop the quarrel. Supposing that a crowd had gone up to stop the quarrel, is it likely that five of them would have received injuries, and one of them would have had five distinct marks more than are to be found on several of the alleged actual combatants?

"Under sections 147 and 325, Indian Penal Code, I sentence Kadhu Singh as the ringleader to rigorous imprisonment for six months, and Dhan Singh, Sardar Singh, Karan Singh, Heti Singh, and Jhamman Singh to rigorous imprisonment for three months."

From this order an appeal was preferred to the Sessions Judge, who dismissed it and affirmed the convictions and sentences. The appellants thereupon applied in revision to the High Court.

Mr. *C. R. Alston*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—I do not see any reason to interfere. It is one of those cases arising out of one of those wretched little village squabbles, which should be disposed of by the Magistrate, but which both parties prefer to dispose of by *lathis*. These present applicants went prepared for a fight. They knew that there were other persons who claimed right and title in these trees. They thought to steal a march on them. They knew very well that there was a probability that they would be met by force. They cut down one tree in dispute, then they proceeded to cut down another. From the point of view of their opponents they were doing an act either of theft or mischief. In doing so they knew [300] what they had to expect. They went prepared to fight, and they did fight. They have been punished, and rightly punished too. It is not a case where a man has been in actual exclusive possession of the land, in which case the presumptions of law are all in his favour; there is no such possession in this case. The petition is dismissed.

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24 A. 300 (=A. W. N. 1902, 60.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

CHHEDI (*Judgment-debtor*) *v.* LALU (*Decree-holder*).* [4th March, 1902.]

Act No. XV of 1877 (*Indian Limitation Act*), *sch. ii, arts.* 178, 179—*Execution of decree—Limitation—Decree for pre-emption—Time from which limitation begins to run against the decree-holder.*

Article 179 of the second schedule to the Indian Limitation Act, 1877, applies only where there is a decree or order which can at its date be executed. In the case of a decree for pre-emption there is no decree capable of execution

* First Appeal from order No. 104 of 1901, from an order of Munshi Mata Prasad, Officiating District Judge of Ghazipur, dated the 25th September, 1901.

until the decree-holder pays into Court the pre emptive price The first application, therefore, for execution of such a decree will be governed not by article 179, but by article 178 and limitation commences to run against the decree holder from the time when the pre emptive price is paid *Muhammad Suleman Khan* v *Muhammad Yar Khan* (1), referred to

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24 A 300= A W N 1902, 60

[Doubted 28 Mad 211, Ref 26 Mad 780=13 M L J 412 24 All 542 60 I C 23 11 O C 22 Not fol 8 M L T 251]

ONE Lalu obtained a decree for pre emption against Chhedi The decree was passed on the 20th of December, 1887, and was conditioned on the decree holder's paying the pre emptive price on or before the 20th of February, 1898 The decree holder deposited the money on the 17th of February, 1898, but made no application for execution until the 16th of February, 1901 On that date the decree holder applied to the Court which passed the decree alleging that he had in fact got possession of the property to which the decree related, but asking that for the sake of greater security formal possession might also be awarded to him To this application it was objected by the judgment debtor that it was barred by limitation The Court of first instance (Munsif of Ghazipur) held the application to be barred and dismissed it On appeal by the decree holder the lower appellate [301] Court (Officiating District Judge of Ghazipur) overruled the Munsif on the question of limitation and remanded the case under section 562 of the Code of Civil Procedure

From this order of remand the judgment debtor appealed to the High Court

Mr *Abdul Majid*, for the appellant

Maulvi *Muhammad Ishaq*, for the Respondent

BANERJI and AIKMAN, JJ —This appeal arises out of an application for the execution of a decree for pre emption passed on the 20th of December, 1897 The decree provides that the purchase money should be paid within two months from its date, and that on such payment the plaintiff should obtain possession of the property The purchase money was paid on the 17th February, 1898, and the present application for execution was presented on the 16th of February, 1901 It was thus made after the lapse of three years from the date of the decree, but within three years from the date on which the money was paid The Court of first instance on the objection of the judgment debtor held the application to be barred by limitation, applying to it article 179 of schedule ii of the Indian Limitation Act On the decree holder s appeal the lower appellate Court set aside the order of the Court of first instance and remanded the case to that Court under section 562, Code of Civil Procedure From this order of remand the present appeal has been preferred by the judgment debtor, who renews his contention that the application for execution is barred by limitation

It is clear that if the first paragraph of article 179 applies, the application is beyond time But in our opinion, having regard to the nature of the decree which was passed in the case, that article cannot be held to be applicable It was held in *Muhammad Suleman Khan* v *Muhammad Yar Khan* (1) that the first paragraph of the third column of art 179 must necessarily apply only when there is a decree or order which can at its date be executed A decree for pre emption is not capable of execution on the date on which it is passed, unless on that date the plaintiff pre emptor pays the purchase money which

(1) (1894) I L R 17 All 39

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the decree directs to be paid. In this case there was no decree [302] in existence on the 20th of December, 1897, which was capable of execution on that date. It was only when the decree-holder plaintiff paid the purchase money within the time allowed by the decree that he acquired the right to execute the decree by applying to be put in possession of the property in suit. The decree was drawn up in the usual form under section 214 of the Code of Civil Procedure, and one of the provisions of it was that on failure of the plaintiff to pay the purchase money within the time fixed the suit was to stand dismissed with costs, so that the decree was subject to a condition, the performance or non-performance of which made it one which could be enforced at the instance of the plaintiff or the defendant as the case might be. Such being the case, we are of opinion that the article properly applicable to the first application for the execution of such a decree is article 178, and that the three years provided in that article should be calculated from the date on which the right to apply accrued. Subsequent applications for the execution of the decree will of course be governed by article 179. We think the learned Judge was right, and we dismiss the appeal with costs.

Appeal dismissed.

24 All. 302 (=A. W. N. 1902, 68)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt,

SAKINA (*Applicant*) *v.* GAURI SAHAI (*Opposite Party*).*
[11th March 1902.]

Civil Procedure Code, sections 80, 108—*Application to set aside a decree passed* ex parte—*Irregular service of summons.*

Where a serving officer finds a defendant to be away temporarily from home, and knows where he is, it is not a good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service.

[Fol. 30 Bom. 623=8 Bom. L. R. 757: 32 I. C. 826; Ref. 29 Mad. 324; 1 L. W. 51=23 I. C. 219; 2 N. L. R. 63; Not. Fol. 15 M. L. T. 217=26 M. L. J. 368=23 I. C. 14=1919 M. W. N. 253; Dist. 13 I. C. 127=17 C. W. N. 999; 7 A. L. J. 286.]

IN this case Gauri Sahai having obtained a decree *ex parte* against Musammat Sakina, the latter applied, under section 108 of the Code of Civil Procedure, to have the *ex parte* decree set aside and the case re-heard. The principal grounds of the judgment-debtor's application were that she had not been served with notice of the suit, and had in fact only come to know of the existence of the decree about two weeks or more after it was [303] passed, and that although her husband's brother Ashfaq Husain had been a party to the suit and had appeared and defended, Ashfaq Husain was in reality hostile to her and had neither informed her about the suit nor protected her interests therein.

The Court of first instance dismissed the application. The material part of its finding was as follows:—

"The record shows that the 9th April, 1900, was the date fixed for final hearing. There were several defendants, among whom was one Ashfaq Husain who was own brother to Musammat Sakina's husband, and he contested the claim fully. Musammat Sakina's summons was affixed to the door with the allegation that she had gone

* First Appeal from Order No. 94 of 1901, from an order of Maulvi Muhammad Shafi, Officiating Subordinate Judge of Moradabad, dated the 13th May 1901.

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until the decree-holder pays into Court the pre emptive price The first ... decree will be governed not by ... commences to run against the ... ptive price is paid *Muhammad* ... ferred to

[Doubted 28 Mad 211 Ref 26 Mad 780=13 M L J 412 24 All 512 60 I C 23 11 O C 22 Not fol 8 M L T 251]

ONE Lalu obtained a decree for pre emption against Chhedi The decree was passed on the 20th of December, 1887, and was conditioned on the decree holder's paying the pre emptive price on or before the 20th of February, 1898 The decree holder deposited the money on the 17th of February, 1898, but made no application for execution until the 16th of February, 1901 On that date the decree holder applied to the Court which passed the decree alleging that he had in fact got possession of the property to which the decree related, but asking that for the sake of greater security formal possession might also be awarded to him To this application it was objected by the judgment debtor that it was barred by limitation The Court of first instance (Munsif of Ghazipur) held the application to be barred and dismissed it On appeal by the decree holder the lower appellate [301] Court (Officiating District Judge of Ghazipur) overruled the Munsif on the question of limitation and remanded the case under section 562 of the Code of Civil Procedure

From this order of remand the judgment debtor appealed to the High Court

Mr *Abdul Majid*, for the appellant

Maulvi *Muhammad Ishaq*, for the Respondent

BANERJI and AIKMAN, JJ —This appeal arises out of an application for the execution of a decree for pre-emption passed on the 20th of December, 1897 The decree provides that the purchase money should be paid within two months from its date, and that on such payment the plaintiff should obtain possession of the property The purchase money was paid on the 17th February, 1898, and the present application for execution was presented on the 16th of February, 1901 It was thus made after the lapse of three years from the date of the decree, but within three years from the date on which the money was paid The Court of first instance on the objection of the judgment debtor held the application to be barred by limitation, applying to it article 179 of schedule ii of the Indian Limitation Act On the decree-holder s appeal the lower appellate Court set aside the order of the Court of first instance and remanded the case to that Court under section 562, Code of Civil Procedure From this order of remand the present appeal has been preferred by the judgment debtor, who renews his contention that the application for execution is barred by limitation

It is clear that if the first paragraph of article 179 applies, the application is beyond time But in our opinion, having regard to the nature of the decree which was passed in the case, that article cannot be held to be applicable It was held in *Muhammad Suleman Khan* v *Muhammad Yar Khan* (1) that the first paragraph of the third column of art 179 must necessarily apply only when there is a decree or order which can at its date be executed A decree for pre emption is not capable of execution on the date on which it is passed, unless on that date the plaintiff pre emptor pays the purchase money which

(1) (1894) I L R 1? All 3?

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24 A. 304=
A. W. N.
1902, 66.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. K. Sorabji*, for the applicants.

Pandit *Moti Lal Nehru*, for the opposite party.

STANLEY, C. J. and BURKITT, J.—This is an application under section 622 of the Code of Civil Procedure praying that an order of the District Judge of Allahabad transferring a suit from his file to the Court of the Subordinate Judge may be set aside, on the ground that the learned Judge had no power to retransfer the suit from his Court to the Court of the Subordinate Judge.

The suit was brought in the Court of the Subordinate Judge, and upon an application made by both parties to the District Judge, it was transferred by him to his own file. Several applications appear to have been made in the suit, one of which, namely, an [305] application for amendment of the plaint, had been disposed of by the Subordinate Judge. On the 16th of November the District Judge *suo motu* retransferred the case to the files of the Subordinate Judge for trial.

It is now contended on the part of the appellants that this order of retransfer was made *ultra vires*, there being no power under section 25 of the Code of Civil Procedure, once a case has been transferred from a subordinate to a superior Court, to retransfer it back to the same subordinate Court. The language of the section appears to us to be explicit and clear. Under it the High Court or District Court is empowered to withdraw any suit, whether pending in the Court of first instance or in the Court of appeal, subject to the High Court or District Court, as the case may be, and try the case itself or else transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature, and the amount or value of the subject-matter. Now it appears to us that once the District Court withdrew the suit and transferred it to its own file for trial, it had exhausted all its powers under the section, and was not competent under the section to re-transfer it again to the subordinate Court. It was open to the District Court to transfer the case for trial to any other subordinate Court competent to try it at the time of the withdrawal of the suit; but this the District Court did not do in the present case, but placed the case upon its own file for trial. We find that a question very similar to this came up before a Bench of this High Court of which one of us was a member, namely, the case of *Sita Ram* v. *Nanni Dulaiya* (1). In that case the District Judge had under the provisions of section 25 of the Code of Civil Procedure transferred a suit from the Court of the Subordinate Judge to his own Court for trial. The District Judge decided the suit, and from his decree there was an appeal to the High Court. Upon the appeal the High Court remanded the suit under section 562 of the Code to the Court of the District Judge. Thereupon the District Judge transferred the case to the Subordinate Judge for trial. It was held that the District Judge had no power so to transfer the suit, but was bound [306] to try it himself. The facts are not altogether on all fours with the case before us, but the true principle which, in our opinion, governs the case was laid down by the learned Judges in the judgment in that case (at p. 231 of the Report) in the following terms:—"His (*i.e.* the District Judge's) power of transfer under section 25 had been exhausted

(1) (1899) I. L. R. 21 All. 230.

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24 A 302=
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to Seana on the 12th March, 1900, that is about one month before the date fixed for hearing which was the 9th April, 1900 Ashfaq Husain fully contested the claim, and the suit was decided on the 25th August, 1900 On the 19th September, the present application for setting aside the decree was presented on behalf of Musammat Sakina I consider it extremely improbable that during the whole period of more than five months that the suit was litigated she had no notice of it A few of her relations have been called to show that Musammat Sakina had remained in Seana for six or seven months but being her relations they are partial These witnesses … erms with Musammat Sakina … \n I believe that it is really … or at least to cause a delay in execution '

From this order the applicant appealed to the High Court

Maulvi *Ghulam Mujtaba*, for the appellant

Mr *Abdul Majid*, for the respondent

STANLEY, C J and BURKITT, J —This is an appeal from an order of the Subordinate Judge of Moradabad refusing an application made by the defendant, the present appellant, to have an *ex parte* decree obtained against her set aside under the provisions of section 108 of the Code of Civil Procedure, on the ground that she was not duly served with the summons It appears from the evidence of the process server that he attended at the house of the defendant, and learnt on inquiry that she was not present in the house, but had gone to Seana, in the district of Bulandshahr Without further attempt to serve the summons on the defendant personally, he affixed the summons to the outer door of the house in which she had resided This was clearly not proper service within the provisions of the Code of Civil Procedure Where the serving officer finds a defendant to be away temporarily from home and knows where he is, it is not good [304] service if he thereupon does no more than fix the summons to the outer door He must make further efforts to effect personal service The Subordinate Judge ought in our opinion, under the circumstances, to have set aside the *ex parte* decree, and allowed the defendant an opportunity of defending the suit We accordingly must set aside his order, and direct that the decree passed *ex parte* be set aside, so far as the appellant is concerned and the case reheard upon the merits as against her The appellant is entitled to her costs

Appeal decreed

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24 All 304 (=A W N 1902, 66)

REVISIONAL CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Burkitt

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AMIR BEGAM AND OTHERS (*Defendants*) v PRAHLAD DAS (*Plaintiff*) *
[11th March 1902]

Civil Procedure Code, section 25—Transfer—Retransfer by District Judge to his own file of a case once transferred by him to the file of the Subordinate Judge

Where a District Judge has once exercised the powers conferred by section 25 of the Code of Civil Procedure, and transferred a case to his own file from the file of the Subordinate Judge he cannot afterwards re-transfer such case to the Subordinate Judge *Sakharam* v *Gangaram* (1) followed *Sita Ram* v *Nanni Dulaiya* (2) referred to

[Fol 10 C W N 902 Ref 24 All 356 26 Cal 193=5 C L J 611=1 I C 913 12 A L J 1001=25 I C 141 Dist. 25 All 183=A W N 1903 4]

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* Civil Revision No 2 of 1902

(1) (1889) I L R 13 Bom 651. (2) (1889) I L R 21 All 230

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twenty years of age), and that he is apparently of a respectable family and from his appearance he is rather weak. The [illegible] [illegible] he proposes to pass a sentence which would have been a [illegible] for an offence under the section under which the accused was [illegible].

Taking all the learned Magistrate had said into consideration, it appeared to me that this was a case to which the provisions of section 562 of the Code of Criminal Procedure [illegible] to apply. It was necessary, however, to be satisfied that matters, which had not been proved before the Magistrate, could either be proved or admitted in this Court, i.e., that the accused was one against whom no previous conviction could be proved, and that his character and antecedents were of such a nature as to authorize a [illegible] of this section. Time was accordingly given to [illegible]. The learned Government Pleader represented that he was satisfied that the [illegible] forthcoming as to character and antecedents of the [illegible] quite sufficient, and he therefore did not propose to [illegible] this point. He, however, contended that section 562 was a section of which [308] this Court could not avail itself [illegible] appeal; also that the offence was an offence punishable with imprisonment for more than two years. Lastly, he contended that the offence was not a trivial one. [illegible] maintained that the offence of which the appellant was convicted was in reality an offence falling within the provisions of section 160 of the Indian Penal Code. [illegible] [illegible] [illegible] [illegible] I have, however, [illegible] [illegible] [illegible] [illegible] section 423 [illegible] [illegible] [illegible] [illegible].

I take the offence of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [308] [illegible]

[illegible]

when the suit was originally withdrawn from the Court of the Subordinate Judge, so even if section 25 were applicable to a case remanded under section 562 (we think it is not applicable,) that section does not empower the District Judge to retransfer the case to the subordinate Court from which it had been withdrawn This decision by anticipation seems to govern the present case We find, however, that the question has been expressly decided in a case in the Bombay High Court, in which the facts were on all fours with those of the present case, namely in the case of *Sakharam* v *Gangaram* (1), in which case it was held that when a District Judge made an order to retransfer a case to the original subordinate Court, "the order of retransfer was *ultra vires*, and should be discharged We think, therefore, that upon the language of the section of the Act, and upon the authorities cited above, the order of retransfer in this case was clearly wrong We therefore must allow this application, and cancel the order of the District Judge and direct him to retain the case upon his own file for trial Seeing that the order of retransfer was made by the learned Judge of his own motion, we make no order as to costs

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Application allowed

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24 A 306 (=A W N 1902, 69)

APPELLATE CRIMINAL

Before Mr Justice Knox

EMPEROR v BIRCH * [11th March, 1902]

Criminal Procedure Code, section 562—First offender—Powers conferred by section 562 exerciseable by a Court of appeal—Criminal Procedure Code, section 423 (d)

Held that the powers conferred by section 562 of the Code of Criminal Procedure upon a Court by which a first offender is convicted are by virtue of section 423 (d) of the Code exerciseable by the High Court sitting as a Court of appeal

[Appr 29 Mad 567=5 Cr L J 136 Ref 12 Cr L J 213=10 I C 114=16 P R 1911 Cr =155 P L R 1911]

[307] IN this case the appellant was convicted of an offence under section 471 of the Indian Penal Code and sentenced to three months rigorous imprisonment The facts found against him were, that he, having applied for the post of Secretary to the Municipal Board of Jhansi, supported his application by the production of what purported to be a copy of a certificate granted to the appellant by "S W Harding, Commissioner,' the said copy being a forgery Against this conviction and sentence the appellant appealed to the High Court

Mr *R K Sorabji*, for the appellant

The Government Pleader (Maulvi *Ghulam Mujtaba*), for the Crown

KNOX, J —The accused has been convicted of an offence under section 471 of the Indian Penal Code He has been sentenced to three months' rigorous imprisonment Of the serious nature of the offence there can be no doubt

The learned Magistrate who convicted the accused said not one word too strong in his judgment about the nature of the offence He adds, however, that in consideration of the youth of the accused (for he is only

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* Criminal Appeal No 103 of 1902

(1) (1889) I L R 13 Bom 654

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24 A. 309= A. W. N. 1902, 70.

"For the applicant it is contended that he did not omit to comply with any written directions which the Board could lawfully pass, that he ought to have been served with a notice to alter the building under section 87 (5), against which he might have appealed to the Commissioner and got him to stay prosecution with reference to section 152 of the Act, and that the order for a recurring fine was illegal at that stage of the case.

"With regard to these contentions, I think it is correct that the applicant did not omit to comply with any express written condition or direction as to the strip between the wall and the drain. But when a person is given permission to build according to a plan which he has himself put in, it is clear that it must be understood that a condition of the permission is that the building should be according to the plan. It is absurd to suppose that a man may get a building sanctioned according to a plan and then build anything he likes. Section 87 (5) provides that the bond may require the building to be altered or demolished. But this is permissive, not mandatory, and I find nothing in the law which requires that such a notice shall be issued before a person can be prosecuted under section 147. It is possible that a Municipal Board may think it sufficient to get a man punished for his contempt of public authority, and not think it worth while to put him to the trouble and expense of making considerable alterations. To take the present case, it is probably a [311] matter of little consequence to the Board whether the applicant's wall comes up to the drain or not. But, as a matter of principle, and to prevent all sorts of tricks and encroachments, the Board is entitled to expect that people should adhere to their plans. I think, therefore, that the applicant, having been permitted to build according to a plan, has been very properly fined for building in contravention of that condition.

"With regard to the recurring fine, section 147 provides that in the case of a continuing breach a further fine may be imposed for every day, after the date of the first conviction, during which the offender is proved to have persisted in the disobedience or omission. In the similar case of *Ram Krishna Biswas* v. *Mohendra Nath Mozumdar* (1), it has been held that the order for the payment of the daily fine was illegal, inasmuch as it was an adjudication in respect of an offence which had not been committed when the order was passed. From this it would appear that the Municipal Board, if they want to have the applicant subjected to a daily fine for persisting in his omission to comply with the condition of the permission, will have to wait for a reasonable time, and then institute a fresh prosecution with this object.

"I accordingly submit the record to the Hon'ble High Court, with a recommendation that the order for a recurring fine should be set aside."

Upon this reference being laid before the Court, the following order was passed :—

BLAIR, J.—The order for payment of so much fine per day so long as the building continues to stand is illegal. The addition of such an order is premature. There must be proof of a continuing offence before the jurisdiction of a Magistrate to make such an order arises. That portion, therefore, of the order will be set aside. I am supported in this view by the decision of the Calcutta High Court in *Ram Krishna Biswas* v. *Mohendra Nath Mozumdar* (1).

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(1) (1900) I. L. R. 27 Cal. 565.

to the youth, character, and antecedents of the offender, and the section applied on those grounds 1902 MARCH 11

I accordingly, maintaining the conviction, alter the nature of the sentence, and make an order under section 562 of the Code of Criminal Procedure APPELLATE CRIMINAL.

I direct that accused enter into a personal bond of Rs 100 with two sureties of Rs 100 each, and that upon his doing so he be released, and for a period of one year undertake to appear and receive sentence when called for, and in the meantime to keep the peace and be of good behaviour I give him one week within which to carry out this order Upon the order being carried out, the bail under which he at present stands will be discharged 24 A 306= A W N. 1902, 69

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24 A 309 (=A W N 1902, 70)

REVISIONAL CRIMINAL

Before Mr Justice Blair

EMPEROR v WAZIR AHMAD * [17th March, 1902]

Act (Local) No 1 of 1900 (*Municipalities Act*), *section* 147—*Bye laws of Municipality —Continuing breach—Recurring fine—Imposition of fine in advance*

Held that where, as in section 147 of Act No 1 of 1900 (Local), it is direc … t a certain sum … to the Court to … n respect of the … breach having … *Mosumdar* (1) followed

[Ref 7 Cr L J 454=11 O C 122]

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Agra The facts out of which the reference arose are fully stated in the order of the Sessions Judge, which was as follows :—

"The applicant in this case applied to the Municipality for permission to construct a house With his application, dated June 25th, 1901, he put in a plan which showed that he proposed to leave a space of 1½ feet between the wall of his house and the kachcha drain which separated it from the public road Building according to the plan was permitted, except that permission was [310] refused for the construction of two flights of steps at the sides of the house bridging the drain

"As the applicant did not himself propose to bring the wall right up to the edge of the drain, there was, of course, no need for any express written order that he should leave a space, and no such order was consequently passed However, in contravention of his own plan he carried his front wall forward right up to the edge of the drain For this he was prosecuted under section 147 for omitting to comply with the conditions, subject to which permission was given him by the Board under the power conferred on it by chapter 7 of the Municipal Act, and fined Rs 25 with a fine of Rs 2 per day, for every day during which, after 35 days from the date of the conviction, the building remained unaltered, and not in accordance with the plan

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* Criminal Reference No 142 of 1902

(1) (1900) I L R 27 Cal. 565

24 A 312 =(A W N 1902, 72)

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24 A 312=
A W N
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[312] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

JAMNA KUNWAR (*Plaintiff*) v NASIB ALI AND OTHERS (*Defendants*) *
[18th March, 1902]

Civil Procedure Code, sections 510, 514—*Arbitration—Delegation of their duties by the arbitrators—Award not submitted by the arbitrators within the time limited by the Court*

The parties to a suit for winding up a partnership agreed to refer the suit [illegible] ie parties [illegible] one Saif [illegible] rbitrators [illegible] ce there [illegible] efore the time fixed by the Court for the submission of the award but the arbitrators did not submit their award within time *Held* that the agreement of the parties to let the matters in dispute be settled actually by Saif Ali could not possibly have the effect of superseding the appointment of arbitrators by the Court Before the Court could proceed to hear the suit it was necessary that it should itself make, under either section 510 or section 514, an order superseding the reference to arbitration

[Dist 14 M L T 388]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath* (for whom Munshi *Gulzari Lal*), for the appellant

Pandit *Moti Lal Nehru*, for the respondents

STANLEY, C J, and BURKITT, J —The decree of the learned Subordinate Judge in this case cannot be upheld The suit was instituted by the plaintiff for dissolution of partnership and taking of the partnership accounts Thereupon an agreement was entered into between the parties to refer the matters in dispute to arbitration, and an order was made by the Court under the provisions of the Code of Civil Procedure, referring the suit to arbitration on the 27th of June, 1898 The arbitrators appointed were one Debi Prasad and one Maulvi Ahsan ullah, who were respective pleaders for the parties in the suit A number of proceedings were recorded by these arbitrators, and amongst others a proceeding of the 7th of August, 1898, in which it was stated that "the parties would accept and admit the decision of [313] the case as made jointly by Pandit Mangli Prasad, the plaintiff and Shaikh Nasib Ali, the defendant Nothing appears to have been done by these parties so named, but on the 8th of August a further proceeding is recorded by the arbitrators, in which it is stated that "all the parties have agreed to accept what would be decided in this case by Sheikh Saif Ali" Upon this the arbitrators allowed time up to the 18th of August 1898 to Sheikh Saif Ali to deliver his decision in writing to them within the said period Sheikh Saif Ali delivered his decision to the arbitrators on the 20th of August It appears that the arbitrators, Debi Prasad and Ahsan ullah, had applied to the Court on several occasions and got extensions of time for filing their award up to the 20th of August, 1898 The time was extended by three orders, dated the 28th of July, the 19th of August and 26th of August We further find that these

* First Appeal No 65 of 1899, from a decree of Rai Kishan Lal, B A, Subordinate Judge of Cawnpore, dated the 18th January, 1899

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trate *suo motu*, and not upon a complaint of the defendant, or in any application made by him for the issue of process. The words complained of were spoken by the defendant upon a privileged occasion, namely, when he was being examined before a Magistrate in the course of a criminal proceeding. It appears to us, therefore, that the action was wholly misconceived, and that the facts appearing in evidence did not justify its institution. It is unnecessary for us, holding as we do this view, to go into the other matters which have been discussed in the judgment of the Subordinate Judge; but we may say that if there was a prosecution of the plaintiff by the defendant as alleged, the reasons which the Judge has assigned in his judgment for his refusal to admit the plea of the defendant that there was reasonable and probable cause for the prosecution are wholly unintelligible. We allow the appeal, set aside the decree, and direct the plaintiff's suit to stand dismissed with costs.

Appeal decreed.

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24 A. 319 (=A. W. N. 1902, 127.)

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.

DEO NARAIN RAI AND ANOTHER (*Plaintiffs*) *v.* KUKUR BIND AND OTHERS (*Defendants*).* [20th June, 1902.]

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 59 *and* 123—*Mortgage—Signature of mortgagor—Mortgagor's name signed by the scribe of the document at the request and in the presence of an illiterate mortgagor—Signature held to be good—Maxim—*Qui facit per alium facit per se—*Construction of Statutes.*

It is not imperatively required by section 59 of the Transfer of Property Act, 1882, that a mortgage, where the principal money secured is Rs. 100 or upwards, shall be signed by the mortgagor with his own hand, or by an agent specially appointed in that behalf. If the mortgagor is [320] illiterate, it is a good signature if, in the presence and at the request of the mortgagor, some other person signs the mortgagor's name on his behalf as executant of the document.

So held by Stanley, C. J., and Knox, Blair and Banerji, JJ., (Aikman, J. *dissentiente*) overruling the decision in *Moti Begam* v. *Zorawar Singh* (1).

Per AIKMAN, J.—Whether or not the autograph signature of the executant is required to any particular document is usually a question of construction to be decided separately in each case. In the case of a mortgage executed in accordance with the provisions of section 59 of the Transfer of Property Act, 1882, the law requires the personal signature of the mortgagor.

In the course of the judgments the following authorities were referred to—*Hyde* v. *Johnson* (2), *Spencer* v. *Metropolitan Board of Works* (3), *The Queen* v. *The Justices of Kent* (4), *In re Whitley Partners Ld.* (5), *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (6), *Budoobhoosun Bose* v. *Enaet Moonshee* (7), *Ex-parte Wallace* (8), *Commissioners for Special Purposes of the Income-tax* v. *Pemsel* (9) and *Crawford* v. *Spooner* (10).

[Fol. 33 ; Cal. 861 ; Ref : 63 I. C. 507.]

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*Second Appeal No. 401 of 1900 from a decree of Maulvi Syed Zain-ul-abdin, Subordinate Judge of Ghazipur, dated the 10th of February 1900, confirming a decree of Munshi Achal Behari Lal, Munsif of Ghazipur, dated the 12th of December, 1899.

(1) Weekly Notes, 1899, p. 196.
(2) (1836) 2 Bing. N. C. 776.
(3) (1882) L. R. 22 Ch. D. 142.
(4) (1873) L. R. 8 Q. B. 305.
(5) (1886) L. R. 32 Ch. D. 337.
(6) (1873) 20 W. R. C. R. 375.
(7) (1867) 8 W. R. 1.
(8) (1884) 14 Q. B. D. 22.
(9) (1891) L. R. 1891, A. C. 531.
(10) (1846) 6 Moo. P. C. 1.

24 All 315 (=A W N 1902 74)

[315] REVISIONAL CRIMINAL

Before Sir John Stanley, Knight Chief Justice

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REVISIONAL CRIMINAL

24 A 315= A W N 1902, 74

IN THE MATTER OF THE PETITION OF NATHU MAL *

[18th March 1902]

Statute 21 and 25 Vic., cap civ, section 15—Criminal Procedure Code, sections 145 435 439—Order of Magistrate in case of a dispute relating to immoveable property —High Court's powers of revision

Held that the High Court cannot exercise revisional powers in respect of proceedings under Chapter XII of the Code of Criminal Procedure unless in a case where the Magistrate has acted without jurisdiction *Doulat Koer v Rameswari Koeri* (1) followed

[Ref (1916) 2 M W N 159=17 Cr L J 314=35 I C 490 33 Cal 68 6 Cr L J 201=4 L B R 75]

THIS case arose out of a dispute as to the right to collect dues in a certain bazar The facts were briefly as follows On the 3rd of December 1901 one Bodhai Ram and others presented a petition to a Magistrate of the Allahabad District, complaining that one Nathu Mal through his agent and servants had on the 2nd December 1901 taken forcible possession by collecting bazar dues of a certain bazar called bazar Jasra, which, the complainants alleged had up to that date been in their possession This application was referred to the Tahsildar for inquiry and report On the 9th of December Bodhai Ram and others applied to the Magistrate under section 144 of the Code of Criminal Procedure, for an order restoring them to possession, which was granted On the 10th of December an application presented on behalf of Nathu Mal was dismissed Subsequently on the 17th December the Magistrate, in consequence of the report submitted by the Tahsildar, commenced proceedings under section 145 of the Code of Criminal Procedure Both sides filed written statements, and a large number of witnesses were summoned by both sides, one party applying for the summoning of 57 witnesses and the other for the summoning of 50 witnesses These numbers were afterwards reduced to 21 and 12 respectively Before, however, the witnesses named in the amended lists filed by the parties had been summoned, the Magistrate had examined the most important of the witnesses, and having arrived at the conclusion that Nathu Mal had forcibly dispossessed Bodhai Ram and that he was supporting a false claim by means of perjured witnesses and forged [316] documentary evidence, made an order under section 145 (4) of the Code in favour of Bodhai Ram Against this order an application in revision was presented to the High Court, the principal ground of which was that none of the witnesses named in the second list of 21 witnesses put in by Nathu Mal had been examined by the Magistrate This application was made not under the Code of Criminal Procedure, but under section 15 of the Charter Act

Babu *Sital Prasad Ghosh*, for the applicant

The Assistant Government Advocate (Mr *W K Porter*), in support of the order of the Magistrate

STANLEY, C J —A rule in this case was issued, calling upon the Magistrate to show cause why his order of the 21st of January, 1902, passed under section 145 of the Code of Criminal Procedure, should not be set aside, on the ground that the same was passed without hearing the

* Criminal Revision No. 111 of 1902

(1) (1899) I L R 26 Cal. 625.

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24 A. 319= A. W. N. 1902, 127.

[322] the present case. That case was referred to and explained by Bowen, J., in *In re Whitley Partners Ld.* (1). The view I now contend for was taken by a Bench of the Court in S. A. No. 48 of 1895, decided by Knox and Burkitt on 30th April 1897.

Mr. *Abdul Raoof* for the respondents.

I do not deny the truth of the general principle *qui facit per alium facit per se*, but I rely on the clear language of section 59 of the Transfer of Property Act. I would specially point out the difference in the wording of the two sections 59 and 123. Where such a difference of language exists in the same Act, it is to be presumed that the difference is intentional, and the inference is that in the case of a mortgage the Legislature meant to make the personal signature of the mortgagor necessary, or at any rate signature by a specially authorized agent. I would refer to *The King* v. *The Inhabitants of Great Dolton* (2). There are also certain cases decided on former Limitation Acts, which throw some light upon the construction which, I submit, is to be placed on section 59 of the Transfer of Property Act. These are *Budoobhoosun Bose* v. *Enaet Moonshee* (3) and *Luchmee Buksh Roy v. Ranjeet Ram Pandey* (4).

Pandit *Sundar Lal* in reply.

On the 20th of June 1902 the judgment of the Full Bench was delivered.

STANLEY, C.J.—The question raised in this appeal is a narrow one, but it is none the less very important. It is whether or not, having regard to the provisions of section 59 of the Transfer of Property Act, 1882, a mortgage to be effective must bear either the autograph signature of the mortgagor or his mark. The facts of the case are simple and undisputed. On the 25th of August, 1896, one Kukur Bind borrowed a sum of Rs. 381 from the plaintiffs on the security of a mortgage, which provided that the interest on the mortgage-debt should be payable annually, and in default of payment of interest the mortgagee should be entitled to possession of the mortgaged property. Default was made in payment of the second instalment of interest, and in consequence the plaintiffs instituted this suit for possession of [323] the mortgaged property. The mortgagor is illiterate, and the signature to the mortgage was made by the scribe of the deed by the direction and in the presence of the mortgagor. The following are the words which were written by the scribe in signing the deed on behalf of the mortgagor :—" Signed by Kukur Bind *alias* Umar Bind ; the deed of simple mortgage is correct ; by the pen of Shiunandan Lal, patwari." The deed was duly registered on the 28th of August 1896, when Kukur Bind appeared before the Registrar and acknowledged the due execution of the deed. The Court of first instance dismissed the suit on the ground that the mortgage had not been executed in accordance with the provisions of section 59 of the Transfer of Property Act, relying on the decision in the case of *Moti Begam* v. *Zorawar Singh* (5). On appeal the lower appellate Court upheld the decision of the Munsif. Hence the present appeal.

The words of section 59 which bear upon the question run as follows :—" Where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument

(1) (1886) L. R. 32 Ch. D. 337.
(2) (1828) 8 B. and C. 71.
(3) (1867) 8 W. R. I.
(4) (1873) 20 W. R. 375.
(5) Weekly Notes 1899, p. 196.

THIS was a suit for possession under the terms of a mortgage deed executed by one Kukur Bind *alias* Umar Bind Kukur Bind, the mortgagor, being illiterate, his signature was affixed for him to the mortgage deed by the scribe thereof, one Shiunandan Lal, a patwari What was actually written was this —" Signed by Kukur Bind *alias* Umar Bind, by the pen of Shiunandan Lal, Patwari " The deed was duly registered, and Kukur Bind admitted execution of the deed His signature below the registration endorsement appears as —" Signature of Kukur Bind by the pen of Shiunandan Lal' Kukur Bind was identified before the registering officer by the patwari who had signed for him When, however, the present suit was brought, Kukur Bind, among other defences, pleaded that the document sued on was not a valid mortgage deed, because it had not been executed and completed according to section 59 of the Transfer of Property Act (No IV of 1882) This contention was accepted by the Court of first instance (Munsif of Ghazipur), which, following the ruling of the High Court in *Moti Begam* v *Zorawar Singh* (1) dismissed the suit An appeal to the District Judge having been dismissed on the same grounds, the plaintiff appealed to the High Court

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[321] Pandit *Sundar Lal* for the appellants

The only question in this case is whether the mortgage deed has been signed by the mortgagor within the meaning of section 59 of the Transfer of Property Act, 1882 In the General Clauses Act of 1868 no definition is given of "signature In the Indian Registration Act, 1877, "signature includes the affixing of a mark Similarly, neither in the General Clauses Act of 1887 nor in that of 1897 is there any exhaustive definition of "signature" These Acts merely say what "signature ' shall include, but contain no precise definition of the term The practice in India is that where the executant of a document is illiterate he simply touches the pen wherewith some one else signs his name for him (*cf* Gour's Transfer of Property Act, p 266) Stroud's Judicial Dictionary, article "Signature,' page 736, and Darby and Bosanquet, Law of Limitation, page 382, were also referred to

I rely upon the general maxim "*Qui facit per alium facit per se*," and I submit that the case of *Moti Begam* v *Zorawar Singh*, (1) has not been correctly decided Shiunandan Lal, patwari, was the agent of Kukur Bind for the purpose of making his signature Such agency may be created orally, or even by implication and ratification—Bowstead on Agency, pp 38 and 43 There is nothing in the language of section 59 of the Transfer of Property Act to take it out of the operation of the general principle alluded to above At the hearing of *Moti Begam* v. *Zorawar Singh* (1) reliance was placed upon section 123 of the Transfer of Property Act, which relates to gifts and provides that a deed of gift of immoveable property must be signed "by or on behalf of the donor" As to this I say first that gifts and mortgages are not *in pari materia*; and, secondly that the Chapter on mortgage in the Transfer of Property Act must be construed as a part of the Contract Act (*vide* section 4 of Act IV of 1882) I rely upon *The Queen* v *The Justices of Kent* (2) and *In re Whitley Partners, Ld*, (3), especially the latter case *Hyde* v *Johnson* (4), upon which the judgment in Moti Begam s case was largely based, was a case decided upon a special enactment and affords no safe ground for the decision of

(1) Weekly Notes, 1899, p 196
(2) (1873) L R 8 Q B 305
(3) (1886) L R 32 Ch D 337
(4) (1836) 2 Bing N C 776

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[325] "to understand; but the distinction is there and I am reluctantly forced to the conclusion that in the case of a mortgage the law requires the personal signature of the mortgagor. In my opinion," he goes on to say, "the case relied on by the appellant *Hyde* v. *Johnson* (1) is in point. To hold that the Legislature meant the same thing in section 59 as in section 123 would, in my judgment, be opposed to the ordinary canons of construction." Now let me see what is the language of section 123 to which so much weight has been attached by my learned brother. It provides that a transfer of immoveable property must be effected by a registered instrument signed by or on behalf of the donor. Do these words "by or on behalf of the donor" accurately express the meaning of the Legislature, or are they a loose form of expression? What was intended by the Legislature is that the instrument should be signed either by the donor or by an agent authorized by him in that behalf, but the section does not say so. An instrument may be signed on behalf of a party without his authority. It was certainly not the intention of the Legislature that such a signature should be effectual. The language is clearly elliptical. It is not accurate draughtsmanship. We must supply after or in addition to the words "on behalf of" some such words as "by an agent duly authorized in that behalf." The section otherwise does not express the intention of the Legislature. Are we justified then in placing any reliance upon the use of the loose and vague words "on behalf of" contained in section 123—a section dealing with gifts of property—to elucidate the meaning of the plain and intelligible language used in section 59 of the Act—a section which falls within the part of the Act which deals with a different subject-matter, namely, mortgages. I am of opinion, with all deference to the views of my brother Aikman, that we cannot safely adopt such a course, and that it would not be consistent with the canons of construction to do so. Sir George Jessel in *Spencer* v. *Metropolitan Board of Works* (2), observed to the effect that we ought to find out the meaning of a section of an Act, if we can, from the section itself. If we can do that, we need not have recourse to other sections of the Act. If we cannot, then, he says, "I agree [326] with the principle which was laid down by Mr. Justice Chitty that, as a general rule, a word is to be considered as used throughout an Act of Parliament in the same sense, and that therefore we may look through the other sections to see in what sense the word is there used." In the case of *Hyde* v. *Johnson* (1), upon which so much reliance has been placed, the Court was considering one of a series of enactments which made a distinction between the signing of a document by a party personally and the signing by an agent; and it was therefore considered that where signature by an agent was not mentioned the Act intended that the signature should be an autograph signature. The Act which we are considering is not of that nature. The Statute in that case required an acknowledgment to be signed "by the party chargeable thereby." The mischief aimed at by the Statute was to exclude temptation to perjury in the proof of agency, and it was contended in that case if the signature of an agent were admitted, parol evidence also must be admitted to prove the agent's authority, and that then all the inconvenience would be reproduced which the Statute was passed to obviate. Moreover, in that case the 7th section of the Statute, 9 Geo. IV, Chap. XIV, under which the controversy arose, recites the 17th section of the Statute of Frauds,

(1) (1836) 2 Bing. N. C. 776. (2) (1832) L. R. 22 Ch. D. 142.

signed by the mortgagor and attested by at least two witnesses" In the decision to which I have referred it was held by a Bench of this Court that "where a mortgage was signed on behalf of a mortgagor, who was illiterate, by the scribe of the document not being *specially* empowered in this behalf, such a signature was not sufficient within the meaning of the section to validate the mortgage" One of the learned Judges who decided this case, my brother Aikman, held that "in the case of a mortgage the law requires the personal signature of the mortgagor," while my brother Knox held that "none but the mortgagor or some one vested by the mortgagor by deed in writing with full power to act as and for the mortgagor can execute such a document" It is contended on behalf of the appellants that this decision cannot be supported, that in accordance with the maxim *qui per alium facit per se ipsum facere videtur* (which I may translate, "he who does an act through another in the eyes of the law does it himself"), or, as the maxim is more familiarly known *qui per facit per alium facit per se,* signature by the authorized agent of a mortgagor is sufficient This is an old and [324] well recognised maxim, and, as it seems to me, ought to prevail, unless the Legislature makes it reasonably clear that its operation was intended to be excluded in the interpretation of a Statute At common law where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it But there are, no doubt, cases in which a different construction must be put on particular Statutes, as in the case of the Statute of Frauds Such was the case of *Hyde* v *Johnson* (1), upon which reliance was placed by the learned Judges who decided the case of *Moti Begam* v *Zorawar Singh* (2) It seems to me not to be open to argument that if there were nothing to be found in the other provisions of the Transfer of Property Act to exclude the operation of the common law rule, a signature by an agent acting under the authority of the mortgagor would satisfy the requirements of section 59 of the Act A section, however, has been discovered which, it is contended, has this effect, and that is section 123 Section 123 is the second section of Chapter VII of the Act, which deals, not with mortgages at all, but with a different subject matter, namely, gifts of moveable and immoveable property We have not been pointed out, nor am I aware of any words in any of the sections of Chapter IV of the Act, which deals with mortgages of immoveable property and charges, which throw any light upon the provisions of section 59. Section 123 runs as follows:—"For the purpose of making a gift of immoveable property the transfer must be effected by a registered instrument signed *by or on behalf of the donor*, and attested by at least two witnesses" It is contended that, inasmuch as the Legislature used in this section the words "on behalf of" and did not use these words in section 59, the difference of language must be *primâ facie* regarded as indicative of intended difference of meaning In his judgment in the case to which I have referred, my brother Aikman observes —"The difference in the language of these two sections is striking In the case of a gift the instrument must be signed 'by or on behalf of' the donor In the case of a mortgage, like the one in suit, the instrument must be signed 'by the mortgagor' Why the Legislature made this distinction I am unable" he says

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(1) (1836) 2 Bing N.C 776 (2) Weekly Notes, 1899 p. 196.

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others, were so rated. Wells appealed against the rate to the Quarter Sessions. According to the provisions of section 1 of the Statute 12 and 13 Vict., Cap. XLV, under which the appeal was presented, a notice of appeal to a Quarter Sessions "should be in writing signed by the person or persons giving the same, or by his, her or their attorney, on his, her, or their behalf." The notice of appeal in that case was signed in Wells' name by the clerk to his attorney by Wells' authority. It was objected on the part of the Commissioners that the notice of appeal was insufficient, as the signature of the appellant was not in his handwriting. The Quarter Sessions held that the notice of appeal was bad and dismissed the appeal. Upon a rule calling upon the Justices of Kent to show cause why a mandamus should not issue commanding them to cause to be heard and determined the appeal of Wells on the merits, the Court of Queen's Bench, consisting of Blackburn, Quain and Archibald, JJ., held that a notice of appeal signed in the appellants' name by the clerk to his attorney with the appellant's authority was sufficient. Blackburn, J., in his judgment says:—"No doubt at common law where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require a personal signature." He then refers to the case of *Hyde* v. *Johnson* (1) as one coming within the purview of a Statute which requires personal signature and, referring to the case before the Court, observes:—"Here the clerk having full authority from the appellant signed for him, and this is a sufficient signing at common law. I see nothing in this Statute that makes a personal signature necessary, and the rule must therefore be made absolute." Quain, J., says:—"I am of the same opinion. We ought not to restrict the common law rule *qui facit per alium facit per se* unless the statute makes a [329] personal signature indispensable." Archibald, J. says:—"I think this case comes within the common law rule *qui facit per alium facit per se*, and there is nothing in the Statute to qualify the operation of that maxim." In the case of *Ex parte Wallace* (2) a similar question arose on the Bankruptcy Rules of 1883. Rule 125 provides that "a creditor's petition shall be in form No. 10 in the Appendix with such variations as circumstances may require." Form No. 10 provides that "the petition shall be *signed by the petitioner*, and that his signature shall be attested by a witness," and the attestation clause contains the words "signed by the petitioner in my presence." In this case a petition in bankruptcy was presented by one William Richards against one Wallace, who carried on business in the city of London. The petition was signed "William Richards by his attorney Thomas Picton Richards." The signature was attested by a witness, and the attestation clause was as follows:—"Signed by the petitioner by his attorney Thomas Picton Richards in my presence." The objection was taken by the debtor to the petition that it was not duly signed as required by rule 125. The Registrar overruled the objection. Whereupon the debtor appealed. It was held by the Court of appeal, consisting of Baggallay, Bowen and Fry, L. JJ., that the petition was properly signed, that a bankruptcy petition by a creditor might be signed on his behalf by his duly constituted attorney. Baggallay, L. J., in the course of his judgment, remarks:—"The next question is, whether the signature of a bankruptcy

(1) (1836) 2 Bing. N. C. 776. (2) (1884) L. R. 14 Q. B. D. 22.

and the Court held that the Legislature must therefore have had that section in view at the very time of passing the Statute, and therefore must have intended the distinction between writings signed by a party or signed by his agent A similar case is that of *Budoobhoosun Bose* v *Enaet Moonshee* (1) and also that of *Luchmee Buksh Roy* v *Runjeet Ram Panday* (2), in which last mentioned case it was held by their Lordships of the Privy Council that the acknowledgment referred to in the Limitation Act Act No XIV of 1859, section I (clause 15), must bear the signature of the mortgagee himself, and that the signature of an agent would not be sufficient In that case their Lordships refer to the case of *Hyde* v *Johnson* (3) and to the language used by Chief Justice Tindal in his judgment, and then observe —"It has been said that this case ought to be decided upon an equitable construction and not upon the strict words of the Statute, but their Lordships think Statutes [327] of limitation, like all others, ought to receive such a construction as the language in its plain meaning imports Statutes of limitation are in their nature strict and inflexible enactments The object of the Legislature in passing them is to quiet long possession and to extinguish stale demands Such legislation has been advisedly adopted in India as in this country Their Lordships think that in construing these Statutes the ordinary rules of interpretation must prevail I may observe that if such legislation was advisedly adopted in India, it was not followed in the amending Act The Legislature altered the law in the subsequent Act, Act No IX of 1871, and also in the Limitation Act, Act No XV of 1877, whereby it is provided that the expression "signed by the party" in section 19 means "signed either personally or by an agent duly authorized in this behalf" But let me assume that we are entitled to call section 123 in aid of the interpretation of section 59 What light does it throw? As I have said, the signature of a deed of gift of immoveable property made on behalf of a donor, but without his authority, clearly would have no efficacy The signature to be effectual must be by a duly authorized agent Now the Statute says nothing about a duly authorized agent, no doubt because the Legislature recognized the existence of the rule which enables a party to sign through the instrumentality of an agent, and by virtue of this rule a donor could authorize another to sign for him Therefore the rule in question was manifestly before the minds of the framers of the Act If the rule was before the minds of the framers of the Act, it appears to me obvious that if the intention had been to exclude its operation in the case of a mortgagor, it would have expressed that intention by requiring signature by the mortgagor personally, or with his own hand The Legislature has, however, abstained from doing this, and therefore as it seems to me, so far from there being anything in the Act to show an intention to exclude the rule, the reasonable inference to be drawn from the language of the Act is quite the contrary If in section 123 the words "by his agent duly authorized in that behalf" had been inserted, I could better have understood the argument which has been advanced on behalf of the respondents [328] In the case of *The Queen* v *The Justices of Kent* (4) the question of signature by an agent was considered In that case the Commissioners of the Rother Levels made a rate of certain sums per acre on all lands lying within their jurisdiction, and the lands of one Wells amongst

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(1) (1867) 8 W R 1
(2) (1873) 20 W R 375
(3) (1836) 2 Bing N C 776.
(4) (1873) L R 8 Q B 305

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of section 59. The learned Judges in their judgment say that "it is true that the manual act of signing was effected in this case by the hand of another, but the lady by her acts has acknowledged that the act was done with her consent and for her, and in this way is her act. We are unable to draw the distinction the Judge does between the words contained in section 59 and those contained in section 123 of Act No. IV of 1882.

I have said nothing as to the view adopted by my brother Knox in the case of *Moti Begam* v. *Zorawar Singh*, (1) as this view has not been pressed in argument before us on the part of the respondents, and I am aware that the learned Judge does not now support it. Having regard to the scope and object of the Transfer of Property Act and to its language, I see no good grounds for placing the limited construction on section 59, which was adopted in the case of *Moti Begam* v. *Zorawar Singh*, (1) and, with all deference to the views of my brother Aikman, I am of opinion, for the reasons which I have stated above, that the decision in that case cannot be supported. I would therefore allow the appeal in this case, set aside the decrees of the lower Courts, and remand the case to the Court of first instance for trial on the merits.

KNOX, J.—In *Moti Begam* v. *Zorawar Singh* (1) I laid it down in my judgment that the terms of section 59 of the Transfer of Property Act, 1882, required that a deed intended to operate as a mortgage deed must be signed either by the mortgagor himself or by some one vested by him with full power to act as and for the mortgagor. This power, I further held, must be a power contained in a written instrument. I was led to this result mainly, if not entirely, by arguments based upon the different language used in section 59 and in section 123 of the [332] Act. A closer examination, however, of section 123, and of the words used in it, as the learned Chief Justice has pointed out in the able and well-reasoned judgment which I have had the privilege of reading, and in which I fully concur, satisfies me that the words "signed by or on behalf of the (donor)" were never intended, either expressly or by implication, to conflict or to mark any difference between them and the words "signed by the (mortgagor)." In the present case I am not concerned with section 123. The words used in section 59 "signed by the mortgagor," when read by themselves, are clear and free from ambiguity. This being so, it is my duty to infer that the Legislature intended to mean what it has plainly expressed and to interpret these words as I should interpret them in any other document or Act. So interpreted they would mean signed by the mortgagor or by another for him and by his authority. To limit them to the mortgagor personally requires that there should be something either in the language or in the object of the Act which showed that a personal act was intended. There is nothing in the language of the section which expresses such an intention, and nothing that I know of—nothing has been pointed out to me—which expresses that such an intention was in the mind of the framers of the Act. The Act is set out in its preamble as an Act intended to define and amend certain parts of the law relating to the transfer of property by act of parties. Before Act No. IV of 1882 came into force, a transfer by mortgage was a good and valid instrument, whether it were executed by the mortgagor personally, or by some one signing for him. If there had been an intention to curtail

(1) Weekly Notes, 1899, p. 196.

petition by an attorney on behalf of the petitioner is a sufficient signature. I can entertain no doubt whatever that it is, provided that the power of attorney authorizes the signature." Again, in the case of *In re Whitley Partners, Limited*, (1) it was held that section 11 of the Companies' Act, 1862, was complied with by the signature of an agent. Section 6 of that Act provides that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company" and by section 11 it is provided that the memorandum of association shall be "signed by each subscriber in the presence of and [330] attested by one witness at least." It was contended that the Statute required the personal signature of each subscriber, and *Hyde* v. *Johnson* (2) was relied on in support of this contention, but the Court, consisting of Cotton, Bowen and Fry, L.JJ., unanimously held that, there being nothing in the Companies' Act, 1862, to show that the Legislature intended any thing special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient. Lord Justice Bowen says in the course of his judgment as regards the question of law:—"It is contended by the appellant that it is not sufficient for a man to sign the memorandum of association by an agent, but that he must sign it himself. In every case where an Act requires a signature it is a pure question of construction on the terms of the particular Act whether its words are satisfied by signature by an agent. In some cases on some Acts the Courts have come to the conclusion that the personal signature was required. In other cases on other Acts they have held that signature by an agent was sufficient." Commenting upon *Hyde* v. *Johnson* (2) he says:—"*Hyde* v. *Johnson* (2) was decided on the ground that Lord Tenterden's Act was to be read along with the Statute of Frauds, which expressly refers to the signature by an agent, and that a clause which contained no reference to an agent was therefore to be held to require personal signature. In the present Statute there is nothing in the way in which the memorandum of association is dealt with to show that the Legislature intended anything special as to the mode of signature."

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It appears to me upon these authorities to be indisputable that if there is no clear indication that the Legislature intended that the signature shall [illegible] common law rule *qui facit per alium facit* [illegible] the Legislature in this case had intended t[illegible] this country should not enjoy the privilege of employing an amanuensis to sign his name, it seems to me that it would have expressed its intention by the introduction of some such words in the section after the word "signed" as "personally" or "with his own hand." The introduction of the loose words to which I have referred in section 123 appears to me to furnish totally inadequate grounds for the conclusion that the Legislature [331] intended to exclude the application of the rule to section 59. In an unreported case in this High Court (*Khunni Lal* v. *Jhao Lal*, S. A. No. 48 of 1895) a Bench of this Court, consisting of my brothers Knox and Burkitt, decided this very question and held that the signing of a mortgage on behalf of an illiterate person by the scribe of the deed at the instance of the mortgagor was a good signature within the meaning

(1) (1886) L. R. 32 Ch. D. 337.

(2) (1836) 2 Bing. N. C. 776.

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as and for the mortgagor, can execute such a document," Mr. Justice Aikman held that section 59 requires the personal signature of the mortgagor.

In my opinion there is no warrant for holding that if the mortgagor authorized another to affix his signature to the instrument of mortgage, the authority should have been given by deed in writing. By section 4 of the Transfer of Property Act the chapters and sections of the Act which relate to contracts should be taken as part of the Indian Contract Act, 1872. Section 187 of the Indian Contract Act provides that the authority of an agent may be "given by words spoken or written." So that it is clear that an agent may be verbally authorized to Act for his principal. Further, the act of an agent may be ratified by the principal, and under section 196 of the Contract Act, upon such ratification the same effect will follow as if the act had been performed by the authority of the principal. By section 197 ratification may be expressed or may be implied from the conduct of the person on whose behalf the act is done. In this case the mortgagor having caused the mortgage deed to be registered by admitting execution of it, thereby ratified the act of Shiunandan Lal. It has also been found, as stated above, that the mortgagor Kukur Bind authorized Shiunandan Lal to affix his signature to the mortgage deed. Therefore upon the view of Mr. Justice Knox that a mortgage deed may be validly signed for the mortgagor by another who has been authorized in that behalf, the mortgage in this case was validly effected. And it was not invalid by reason of the fact that the authority was not granted in writing.

[335] We have next to consider whether, as held by Mr. Justice Aikman, section 59 of the Transfer of Property Act requires that a mortgage deed should be signed personally by the mortgagor.

That section runs as follows :—" Where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

The general rule is, that a man may sign by an agent. In *The Queen* v. *The Justices of Kent* (1) Blackburn, J., observed :—" No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it ; nevertheless there may be cases in which a statute may require personal signature." Quain, J, said in the same case :—" We ought not to restrict the common law rule, *qui facit per alium facit per se* unless the Statute makes a personal signature indispensable." Similar observations were made by Archibald, J. In *In re Whitley Partners, Ld.* (2) Cotton, L. J., said :—" I think it would be wrong to hold that an enactment simply referring to signature is not satisfied by signature by means of an agent." He added :—" Suppose seven persons sitting round a table with a view to signing a document, and one of them says to another ' sign it for me,' are we to say that the signature affixed under this authority is insufficient ? I am of opinion that it is quite effectual." These cases are clear authority for holding that where an enactment provides that a document should be signed by the executant, that alone does not make it indispensable that the signature should be affixed by the executant himself. Upon the question before us, the two cases referred to above are, in my opinion, very instructive, and are more in

(1) (1873) L. R. 8 Q. B. 305. (2) (1886) L. R. 32 Ch. D. 337.

this freedom, express words of limitation would have been used, and it would not have been left to be inferred by a construction drawn from words contained in another remote section of the Act dealing with another class of transfer If the framers of the Act then had intended to exclude the operation of the well known maxim *qui facit per alium facit per se*, they could easily have done so, and would have done so The presence of a deed in writing to act as and for the mortgagor is not required by any law that has been pointed out In the present case the signature of Kukur Bind, the mortgagor, who is an illiterate man, was made by the direction of Kukur Bind in his presence and by his direction the [333] patwari who performed the manual act of signing was, so to speak, the hand of Kukur Bind For those reasons I join in the order proposed by the learned Chief Justice

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BLAIR, J —I have also had the advantage of perusing at leisure the exhaustive judgment of the Chief Justice, and I concur in the order proposed by him, and the reasons upon which that order is founded

BANERJI J —This appeal arises in a suit brought by the appellant for recovery of possession of three bighas and odd biswas of land as mortgagees thereof under a deed of simple mortgage dated the 25th August, 1896, executed in their favour by the respondent Kukur Bind for a sum of Rs 381 The deed was not signed by him, nor does it bear his mark But his signature was written on it by one Shiunandan Lal, patwari It has been found that Kukur Bind is an illiterate person, unable to write his name, and that he authorized the patwari Shiunandan Lal, who is the writer of the document, to affix his signature to it Default having been made in the payment of interest in compliance with the terms of the deed, the present suit was brought against the mortgagor and subsequent transferees from him The defendants disputed the validity of the mortgage on the ground that it had not been effected in accordance with the provisions of section 59 of the Transfer of Property Act, 1882 Both the Courts below have allowed this contention, relying upon the ruling of this Court in *Moti Begam* v *Zorawar Singh*, (1) and have dismissed the suit The ruling referred to undoubtedly supports the decision of the Courts below It may, however, be observed that a contrary opinion was expressed by this Court in S A No 48 of 1895, decided by Knox and Burkitt, JJ, on the 3rd of April, 1897 That case unfortunately has not been reported

Doubts having been entertained as to the correctness of the ruling in *Moti Begam* v *Zorawar Singh* (1), this case was referred to a Full Bench The question we have to determine is, whether a mortgage is validly effected, where the principal money secured is Rs 100 or upwards, if the mortgage deed is not signed personally by the mortgagor, but is signed for him [334] by another under his authority, such authority not having been granted by deed in writing

With all respect for the learned Judges who decided the case of *Moti Begam* v *Zorawar Singh* (1), I am unable to agree with the view adopted by them in that case With reference to the provisions of section 59 of the Transfer of Property Act, the learned Judges do not appear to have held the same view Whilst Mr Justice Knox was of opinion that the Legislature "purposely intended that no one but the mortgagor, or some one vested by the mortgagor, by deed in writing with full power to act

(1) Weekly Notes, 1899, p. 196.

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[335] We have next to consider wh Aikman, section 59 of the Transfer of Prc gage deed should be signed personally by

That section runs as follows :—" W is one hundred rupees or upwards a n registered instrument signed by the two witnesses."

The general rule is, that a m *Queen* v. *The Justices of Kent* (1) at common law, where a person signature of the person so signin ing it ; nevertheless there may personal signature." Quain, J to restrict the common law r the Statute makes a personal ations were made by Archi' Cotton, L. J., said :—" I enactment simply referrin means of an agent." He r a table with a view to another ' sign it for me, this authority is insuffic' These cases are clear provides that a docun does not make it in the executant him referred to above a

(1) (1873) L. R.

point than the case of *Hyde* v *Johnson* (1), on which reliance has been placed on behalf of the respondents

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In *The Queen* v *The Justices of Kent* (2) the question was, whether a notice of appeal, signed in the appellant s name by the clerk to his attorney and not by the appellant himself, was sufficient under the Statute 12 and 13 Vict , Cap XLV, section 1, which required that a notice of appeal to a Court of Quarter [336] Sessions shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney on his, her or their behalf It was held that the signature by the clerk who had full authority from the appellant was sufficient

The case of *In re Whitley Partners, Limited,* (3) was one under the Companies' Act, 1862 Section 11 of that Act provides that "the memorandum of association shall be signed by each subscriber in the presence of, and attested by, one witness at least" It was contended in that case, as has been contended on behalf of the respondents in this case, that as nothing was said in the Statutes about signature by an agent, these expressions must mean that the signature is to be affixed by the subscriber himself, and *Hyde* v *Johnson* (1) was referred to Their Lordships repelled the contention, and held that there being nothing in the Companies Act to show that the Legislature intended anything special as to the mode of the signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient

Did the Legislature, in enacting section 59 of the Transfer of Property Act, intend anything special as to the mode of signing a mortgage deed, that is to say, did it intend that the signature should be affixed personally by the mortgagor? It is common knowledge that in this country an illiterate person when executing a document causes his signature to be written for him by the scribe, the executant himself only touching the pen and that such signature is regarded as the signature of the executant himself (see Gour's edition of the Transfer of Property Act, p 266) That this is so is also apparent from the fact that, except the case of *Moti Begam* v *Zorawar Singh* (4) and the unreported case to which reference has been made above, there was, as far as I am aware, no other case in this Court in which, before the ruling in *Moti Begam's* case, the validity of a mortgage was questioned on the ground now raised, and that since the decision of that case the question has been raised on the basis of it in a large number of cases now pending in this Court I may add that I am not aware of, nor have we been referred to, any case decided by any of the other High Courts in which the question now before us was raised, or the view adopted in *Moti* [337] *Begam's* case found favour Now, did the Legislature by enacting section 59 intend to abrogate the existing practice and make a new departure? In support of the contention that such was the intention of the Legislature, reference has been made to section 123 of the same Act, which provides that—" For the purpose of making a gift of immoveable property the transfer must be effected by registered instrument signed by or on behalf of the donor, and attested by at least two witnesses" From the difference in the language of the two sections and the use in section 123 of the words "or on behalf of,' which do not appear in section 59, it is urged that the law requires the personal signature of the mortgagor in the case of a mortgage With regard to this

(1) (1836) 2 Bing N C, 776
(2) (1873) L R 8 Q B 305
(3) (1886) L R 32 Ch. D 337
(4) Weekly Notes (1890), p 196

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of *Hyde* v. *Johnson* (1) for here we have not to consider different statutes, but one and the same Act dealing with one subject. The present case stands more on a par with the cases which were decided under Act No. XIV of 1859. That Act in dealing with acknowledgments which extend the period of limitation, provided as to two of the acknowledgments in section 1, sub-section (15) and section 4, that the acknowledgment should be signed by the person making it. In section 19 a third acknowledgment is referred to, and this last section provides that the acknowlegment may be signed by the person making it or his agent. In the case *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (2), the Privy Council had to consider a plea that an acknowledgment falling within section 1 (15) was sufficient if signed by an agent. Their Lordships repelled that contention. They said :—" The Statute must receive a construction according to its plain words. It requires the signature of the party himself, namely the mortgagee, and it would be a wrong construction of it to hold that any other signature would satisfy those words." They then go on to quote a passage from the judgment of the Chief Justice Tindal in the case of *Hyde* v. *Johnson* (1) referred to above, which runs as follows :—"When [341] therefore we find in the Statute now under consideration that it expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of the Statute, and that we should be legislating, not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent." Their Lordships say that they entirely adopt that principle of construction which they held to be applicable to the case before them. In the case of *Budoobhoosun Bose* v. *Enaet Munshee* (3) the effect of section 4 of Act No. XIV of 1895 had to be considered. Peacock, C. J. and Hobhouse, J., concurred in the view that it would be legislating not interpreting, to extend the operation of that section to acknowledgment signed, not by the party chargeable therewith, but by his agent. In the present case we have to construe an Act of the Indian Legislature dealing with the subject of transfers of property by act of parties. As to one species of transfer the Legislature has seen fit to enact that the necessary deed must be signed by the executant. As to another species of transfer the Legislature has seen fit to allow the necessary deed to be signed " by or on behalf of " the executant (*vide* section 123). It must be admitted that we have here a striking difference in the language of the two sections. As observed by my brother Knox in his judgment in the case of *Moti Begam* v. *Zorawar Singh*, (4) " it must be presumed that the difference in language was intentional." In my humble opinion we are bound to give effect to this difference. I do not think that it would be in accord with the true canons of construction, to hold that the Legislature, in using such different language in those two sections, meant exactly the same thing. It was suggested that the difference in the language might have arisen from careless drafting. I do not think that a Court is entitled to make any such assumption. If, however, the Legislature has made a mistake, then, in my humble judgment, it is for the Legislature, and not for the Courts, to correct that mistake. As was observed by Lord Brougham in the case of *Crawford* v. *Spooner* (5) :—" We cannot aid the Legislature's defective phrasing of the Act; we

(1) (1836) 2 Bing. N. C. 776.
(2) (1873) 20 W. R. C. R. 375.
(3) (1867) 8 W. R. 1.
(4) Weekly notes, 1899 p. 196.
(5) (1864) 6 Moo. P. C. 1 at p. 9.

p 127), with reference to the general rule which at one time prevailed that an acknowledgment must be signed personally by the debtor, that "notwithstanding this, a signature may, it seems, be so signed by an agent under the immediate direction and the supervision of the principal as to be in effect the signature of the principal, especially where the latter is incapacitated by illness or otherwise from signing himself '

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24 A 319= A W N 1902, 127

[339]

I am of opinion that section 59 of the Transfer of Property Act does not require the personal signature of the mortgagor, and that if his signature is affixed to the instrument of mortgage by another under his authority, that is in effect the signature of the mortgagor himself, and is sufficient to constitute a valid mortgage With all deference, I think the case of *Moti Begam* v *Zorawar Singh* (1) was wrongly decided and should be overruled I would allow the appeal, set aside the decrees of the Courts below, and remand the case to the Court of first instance for trial on the merits

AIKMAN, J —In this case I have the misfortune to differ from the opinion arrived at by the learned Chief Justice and my learned colleagues The question which we have to decide in the appeal is a short one, namely, whether Act No IV of 1882 requires a deed of mortgage to be signed personally by the executant I have already expressed my views as to this in the case of *Moti Begam* v *Zorawar Singh* (1) I have listened to the agrument of the learned counsel for the appellants based on section 4 of the Act and the provisions of the Contract Act, but his argument, ingenious though it was has failed to remove my difficulties, or induce me to depart from the conclusion I came to in the case mentioned above—a conclusion arrived at after much anxious consideration and with great reluctance

I have not much to add to the judgment I delivered in that case In the case of *The Queen* v *The Justices of Kent* (2), Blackburn J observed —"No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it Nevertheless there may be cases in which a Statute may require personal signature" In the case of *In re Whitley Partners, Ld* (3), Bowen Lord Justice, says —"In every case where an Act requires a signature, it is a pure question of construction on the terms of the particular Act whether its words are satisfied [340] by signature by an agent It being clear then that, notwithstanding the maxim *qui facit per alium facit per se*, there may be Acts which require the personal signature of an executant, the question for decision here is whether Act No IV of 1882 does require such a signature in the case of a mortgage Had we only to construe section 59 of the Act, I should have no difficulty in coming to the conculsion on the authority of the case last mentioned, that the provisions of the section are sufficiently complied with if the deed is signed by the authority of the mortgagor But that section does not stand alone In the case of *Hyde* v *Johnson* (4) the Court was considering one of a series of enactments dealing with the same subject As one of those enactments referred to signature by an agent and another enactment which was *in pari materia* did not, it was held that under the latter statute personal signature was required The present case is even stronger than the case

(1) Weekly Notes, 1899, p. 196.
(2) (1873) L R 8 Q B. 305
(3) (1886) L. R 32 Ch D 337
(4) (1836) 2 Bing N C. 776.

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24 A. 342= 22 A. W. N. 84.

of Aligarh brought Chabeli Ram upon the record, and then, apparently treating the appeal as if it was an appeal from the decree in the suit, made an order of remand under section 562 of the Code of Civil Procedure. Against this order of remand the defendants appealed to the High Court.

Pandit *Sundar Lal* for the appellant.

Mr. *Abdul Majid* and Munshi *Gobind Prasad* for the respondent.

KNOX and BLAIR, JJ.—To the suit out of which this appeal has arisen the original parties were Mewa Ram, plaintiff, and Tej Singh and others, defendants. The suit was decreed *ex parte*. An application, however, was made under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside, and the case reheard. This application was successful. Upon the suit being reinstated the present respondent, Chabeli Ram, prayed that his name might be brought on the record, alleging that an assignment had been made in his favour by the plaintiff of the plaintiff's right. The plaintiff consented to Chabeli Ram's name being substituted instead of his own. The defendants, on the other hand, objected, contending that the transfer was a fictitious one; the application under section 372 was accordingly disallowed, and on the same day, but after the order above-mentioned had been passed, the suit was dismissed. Chabeli Ram then appealed from the order rejecting the application made under section 372; this appeal was allowed, and his name was brought on the record. Apparently some confusion ensued which has [344] not been explained, as the matter before the lower appellate Court was treated when the appeal went to hearing as an appeal from the decree. The result was that an order was passed under section 562, remanding the suit to the Court of first instance for decision on the merits; and it is at this stage and from this order that this first appeal from order has been brought.

A preliminary objection has been taken before us that an appeal does not lie, and that the order passed under section 372 was not open to appeal. On looking back, however, into the record of the case we find that the lower appellate Court has dealt with the decree which was passed in the suit, and from which an appeal undoubtedly did lie under section 540 of the Code of Civil Procedure; so that what we have to consider now is really whether the lower appellate Court could have entertained any appeal against the order refusing to substitute the respondent as plaintiff in the cause.

Section 588, clause (21) provides that an appeal shall lie from an order disallowing an objection under section 372; but as the section does not allow appeals from any orders except those specially set out in section 588, it follows and has been held that no appeal lies under section 588 of the Code from an order allowing an objection under sec-
372. The case before us is such an order. But we were referred
case of *Moti Ram* v. *Kundan Lal* (1). The learned Judges who
that case viewed the order which was before them as an order
icated on the representative right claimed by the applicant
372, and therefore amounting to a decree, as that word is
2 of the Code. They appear in arriving at this
influenced by the case of *Indo Mati* v. *Gaya*
of *Indo Mati* v. *Gaya Prasad* (2) has been con-
High Court in the case of *Lalit Mohan Roy* v.

(2) (1896) I. L. R. 19 All. 142.

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cannot add and mend, and by construction make up deficiencies which are left there" For the [342] reasons set forth above, and also for the other reason given in my judgment in the case of *Moti Begam* v *Zorawar Singh*, (1) I am of opinion that the Lower Courts were right in holding, with reference to the language of Act No IV of 1882, that there was no valid mortgage, and I would dismiss this appeal with costs

Appeal decreed and cause remanded

1902 JUNE 20.

FULL BENCH.

24 A 319= A W N 1902, 127.

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24 A 342 (=22 A. W N 64)

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr Justice Blair

TEJ SINGH AND OTHERS (*Defendants*) v CHABELI RAM (*Applicant*) *
[24th February, 1902]

Civil Procedure Code, sections 2, 372, 588 (21)—Order allowing objection under section 372—Order or decree—Appeal

The plaintiff and the appli was dismissed. his application l his name was ated as also an order under sec

Held on appeal from this order that no appeal lay to the lower appellate Court from the order of the Court of first instance allowing the defendants' objections to Chabeli Ram s application under section 372 of the Code of Civil Procedure, neither was such order a decree within the meaning of section 2 *Moti Ram* v *Kundan Lal* (2) and *Inda Mati* v *Gaya Prasad* (3), distinguished *Lalit Mohan Roy* v *Shebock Chand Chowdhuri* (4), referred to [Ref 42 Mad 753]

IN this case one Mewa Ram brought a suit for sale on a mortgage, against Tej Singh and others The suit was originally decreed *ex parte*, but upon an application being made under section 108 of the Code of Civil Procedure, the *ex parte* decree was [343] set aside and the case reheard On the suit being reinstated one Chabeli Ram applied to the Court asking that his name might be substituted for that of Mewa Ram, the original plaintiff on the ground that Mewa Ram had assigned to him (the applicant) all his rights in the subject matter of the suit To this application the plaintiff made no objection, but it was opposed by the defendants, who alleged the transfer to be fictitious In the end Chabeli Ram's application was disallowed, and on the same day, but after the above-mentioned order had been passed, the suit was dismissed Chabeli Ram then appealed from the order rejecting his application under section 372 of the Code of Civil Procedure Upon this appeal the District Judge

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* First Appeal No 3 of 1901 from an order of L. G Evans, Esq , District Judge of Aligarh, dated the 17th of November 1900

(1) Weekly Notes, 1893, p 196
(2) (1900) I L. R 22 All 330
(3) (1896) I L. R 19 All 142
(4) (1900) 4 C W N 403

1902
MARCH 18.

REVISIONAL CRIMINAL.

24 A. 346=
22 A. W. N.
89.

24 All. 346 (=22 A. W. N. 89).

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF SHEIKH AMIN-UD-DIN.* [18th March, 1902].

Criminal Procedure Code, sections 435, 438, 439—Practice—Revision—Reference by District Magistrate recommending the re-consideration of an order of acquittal passed by a Subordinate Magistrate.

In the case of an acquittal by a Subordinate Magistrate, where the Local Government does not appeal, or where the District Magistrate does not move the Local Government to appeal, the High Court will not, as a general rule, entertain a reference direct from the District Magistrate under section 438 of the Code of Criminal Procedure.

[Fol: 4 Cr. L. J. 37=88 P. L. R. 1906; 28 M. L. J. 619=17 M. L. T. 457=1915 M. W. N. 411=16 Cr. L. J. 558 Ref. 9 Cr. L. J. 211=5 N.L.R. 4; 15 Cr. L. J. 304=12 A. L. J. 255=23 I. C. 512; 1 Ind. Cas. 238; 2 S. L. R. 25 Cr.=10 Cr. L. J. 237; 19 C. W. N. 184.]

THIS was a reference made by the District Magistrate of Aligarh under section 438 of the Code of Criminal Procedure. The circumstances out of which the reference arose are thus stated in the Magistrate's order :—

"On the 16th of November, 1901, seven logs of wood—three of *siris* and four of *semal* wood—were imported by Sheikh Amin-ud-din. As they passed the Russelganj octroi barrier, the six carts which carried them were stopped by the octroi officials for payment of duty. A question arose as to whether the logs were to be charged as firewood at the rate of three pies per rupee of their value or as building material at the rate of eight pies per rupee. The octroi muharrir and also the octroi superintendent, who happened to arrive on the spot, were of opinion that they were building material and should be charged accordingly. Amin-ud-din, accused, who had also turned up, wanted the duty to be levied as firewood. The dispute came to an end by the accused assuming a tone of authority, and ordering the octroi officials to charge the logs as firewood, which he declared them to be. The octroi officials submitted against their own judgment, and allowed the logs to pass into the town on payment of the lower duty, although the prosecution alleged they were not firewood, and were consequently liable to be charged as 'building [347] material.' The Secretary of the Municipality discovered these facts on his morning rounds and reported them to the Chairman. The logs were removed by the Secretary's orders from the accused's timber shop to the Municipal bonded warehouse where they were kept till the close of the trial. Two days later the Chairman himself visited the warehouse and inspected the logs, and being satisfied that they were not firewood, ordered the prosecution of Sheikh Amin-ud-din, as there could be no doubt that Sheikh Amin-ud-din, himself a timber merchant, could not have made a mistake as to how the logs could be used, and the only motive for making a statement so wilfully false could be the evasion of payment of the proper duty."

The case was tried by an Asssitant Magistrate, Mr. Badhwar, who acquitted the accused upon various grounds to which it is unnecessary now to refer.

The Magistrate of the District, being of opinion that the order of acquittal was entirely wrong, referred the case to the High Court, asking that the order of acquittal might be set aside.

On this reference

Colvin, for the person acquitted, raised a preliminary objection that the High Court could not interfere in revision, because an appeal might have been preferred by the Local Government from the order of acquittal passed by the Assistant Magistrate. He referred to section 439, clause (5) of the Code of Criminal Procedure.

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* Criminal Reference No. 149 of 1902.

Shebock Chand Chowdhry (1) That Court held that the case before them was as to its facts widely different from the facts disclosed in *Indo Mati* v *Gaya Prasad* (2) They had before them no question relating to the execution of a decree, inasmuch as no decree had at the time when the applica [345] tion was disallowed been passed, and no final decision in the suit had been given The *ratio decidendi* therefore in *Indo Mati* v *Gaya Prasad* (2) did not apply to the case before them, and was, in their opinion, clearly distinguishable

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In the case before us, while it is true that there had been an *ex parte* decree, that *ex parte* decree had been set aside, and had therefore become non existent While it was so non existent Chabeli Ram filed his application The refusal to allow his name to be brought upon the record, while it may have been a formal expression of an adjudication of a right claimed by him, did not, so far as the Court expressing it, decide the suit The decision of the suit resulted immediately from the order under which the suit was dismissed—an order passed after the order adjudicating upon Chabeli Ram's claim to be brought into the suit The case of *Indo Mati* v *Gaya Prasad* (2) is really an authority which holds that no appeal lay from the order passed under section 372 and it is in this respect against the respondent Chabeli Ram In the case reported at page 380 of the I L R, 22 All, 372, there was a decree ex tant, and the application under section 372 was made after that decree had been passed, no attempt moreover had been made by the applicants to have their names brought upon the record in the Court of first instance In any case the facts in *Moti Ram* v *Kundan Lal* (3) are not the same as the facts before us Chabeli Ram headed his petition of appeal as an appeal from the whole of the decree passed by the Subordinate Judge in *Moti Ram* v *Kundan Lal* (3) the applicant had only asked to be allowed to appeal, and it was with the order disallowing that application that this Court then dealt This is manifest from the terms of the final order which runs thus —" We direct that the applicants be now brought on the record, and we remand the record to the Court of the District Judge with orders to decide whether the memorandum of appeal, dated the 23rd August, 1897, should or should not be admitted, and if admitted, to hear and decide the appeal according to law"

It is enough for us to show that the facts in that case differ from the facts before us, they also differ from the facts in *Indo Mati* v *Gaya Prasad*, (2) and our decision is based upon these two points—(1) that no appeal is allowed by section 588, sub section [346] (21), from an order allowing an objection under section 372, and secondly, that the order passed in the present case was not a decree within the meaning of section 2, *viz*, an adjudication so far as regards the Court expressing it which decided the suit pending before the Court at the time when the order was passed

We decree the appeal with costs, and set aside the judgment of the appellate Court

Appeal decreed

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(1) (1900) 4 C W N 403
(2) (1896) I L R 19 All 142
(3) (1900) I L R 22 All 380

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FULL BENCH.

24 A. 348= 22 A. W. N. 86.

[349] Commissioner of Kumaun might be directed to enrol him as such pleader, and to permit him to practise in the said Courts and offices.

The applicant was duly enrolled as a pleader by the High Court on the 19th of August, 1898. He subsequently made several applications to the Commissioner of Kumaun for license to practice as a pleader in Garhwal or at Naini Tal or Almora, as also in Kumaun. These applications were refused on the ground that the Commissioner did not consider that the number of vakils and pleaders in his division should be increased. From this refusal the applicant appealed to the High Court.

Mr. *A. E. Ryves*, for the Commissioner of Kumaun, raised a preliminary objection to the hearing of the appeal on the ground that the order sought to be appealed was one passed by the Commissioner of Kumaun acting as the High Court for Kumaun under Act No. XVIII of 1879.

The High Court for the North-Western Provinces has no inherent jurisdiction over Kumaun. Its jurisdiction in Kumaun is limited to that provided for by the Criminal Procedure Code and the rules framed by the Local Government under Act No. XIV of 1874. Under these rules, which have the force of law, the High Court for the North-Western Provinces is appointed to be the High Court for Kumaun for all the purposes of the Criminal Procedure Code, the Indian Succession Act, the Indian Companies' Act, and the Indian Railways Act and for no other purposes. For all other purposes the Commissioner of Kumaun is appointed to be the High Court for Kumaun, and therefore for the purposes of the Legal Practitioners Act.

The Legal Practitioners Act enacts by section 8 that when a legal practitioner has been enrolled as such by a High Court, he shall be entitled to practise in all Subordinate Courts situate within the local limits of that High Court's appellate jurisdiction. The Kumaun Courts are not subordinate ordinarily to the appellate jurisdiction of the High Court for the North-Western Provinces : they are only so subordinate with reference to the four Acts previously mentioned.

Pandit *Baldeo Ram Dave* for the applicant argued that the High Court for the North-Western Provinces had appellate [350] jurisdiction over Kumaun and Garhwal at any rate in all criminal matters and in certain civil cases also. That High Court must therefore be considered to be the High Court mentioned in section 8 of the Legal Practitioners Act. The applicant having been enrolled as a pleader by the High Court for the North-Western Provinces was therefore entitled by virtue of such enrolment to be enrolled and admitted to practise in all Courts of Kumaun and Garhwal in regard to all matters alluded to above, in respect of which the High Court for the North-Western Provinces had appellate jurisdiction over such Courts. The rules of Court of the 14th August, 1897, also support this view, inasmuch as by Rule 2 it would appear to have been considered by the High Court at the time those rules were framed that the fact of a pleader being enrolled by the High Court would of itself entitle that pleader to practise in any Subordinate Criminal Court and in any "Revenue Office" throughout the North-Western Provinces, in which are included the Criminal and Revenue Courts of Kumaun and Garhwal. The certificate taken out by the applicant in this case was one entitling him to practise in all Subordinate Courts and in all Revenue Offices.

The Assistant Government Advocate (*Porter*), in support of the reference, argued that the hearing of the present reference, though it might be considered as "proceedings by way of revision, was not 'at the instance of the party who could have appealed The District Magistrate (who was not to be confounded with the Local Government) could not have appealed from the order of his assistant, but under section 435 of the Code of Criminal Procedure he could call for the record, and under section 438 of the Code he could examine the record, and report for the orders of the High Court the result of such examination It made no difference whether the record under examination happened to terminate with an order of acquittal and not an order of conviction

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KNOX and BLAIR, JJ —A preliminary objection has been taken to the hearing of this reference It is contended that the provisions of the last paragraph of section 439 apply We are not prepared to accede to this contention, or to say that we shall [348] in no case entertain a reference simply because of what is laid down in that paragraph At the same time the fact remains that it was open to the Local Government to present an appeal from this acquittal Where the Local Government do not adopt this procedure or where the Magistrate does not move the Local Government to adopt this procedure in cases where it could be adopted and sends to us direct, we think it expedient, as a general rule, not to exercise our powers of revision We refuse to entertain the reference Let the record be returned

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24 A 348 (=22 A W N 86)

FULL BENCH

Before Sir John Stanley, Knight Chief Justice, Mr *Justice Blair and Mr Justice Burkitt*

IN THE MATTER OF THE PETITION OF PADMA DAT JOSHI *

[2nd April, 1902]

Act I [illegible] *7 of* 1874 [illegible] *ly* 1894, [illegible] *vakils in* [illegible]

the Commissioner of Kumaun refusing to enrol a vakil on the roll of legal practitioners entitled to practise in the Courts of Kumaun and Garhwal

THIS was an application by one Padma Dat Joshi, a pleader, who had been enrolled as such by the High Court for the North Western Provinces, praying that certain orders of the Commissioner of Kumaun refusing to enrol him as a pleader under section 8 of the Legal Practitioners Act, 1879, qualified to practice in the Court of the Sessions Judge of Kumaun and of the Subordinate Magistrate, in all Revenue Offices and also in the Commissioner s Court in respect of the cases referred to in rule (11) of the Kumaun Rules might be set aside, and that the

* Miscellaneous No 175 of 1901

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third section of the Act the Local Government, with the previous sanction of the Governor-General in Council, is empowered to declare by notification in the *Gazette* what enactments are and what enactments are not in force in any scheduled district, or any part of such districts, which notification is to be binding on all Courts of law. Then by section 5 the Local Government with the like sanction is empowered to extend by notification to any of the scheduled districts, or to any part of any such districts, any enactment which is in force in any part of British India at the date of such extension. In pursuance of the powers given by this section the Code of Criminal Procedure, the Indian Succession Act, 1885, the Indian Companies' Act, 1882, and the Indian Railways' Act, were extended to Kumaun. By section 6 of the Act the Local Government is empowered from time to time to—"(*a*) appoint officers to administer civil and criminal justice . . . . and otherwise to conduct the administration within the scheduled districts; (*b*) regulate the procedure of the officers so appointed . . . . and (*c*) direct by what authority any jurisdiction, powers or duties incident to the operation of any enactment for the time being in force in such district shall be exercised or performed." Amongst the scheduled districts to which this Act is applicable is the Province of Kumaun and Garhwal. The High Court of the North-Western Provinces has as such High Court no inherent jurisdiction in the Province of Kumaun and Garhwal; any jurisdiction that it possesses in this province is derived from the Code of Criminal Procedure and from the orders of the Local Government passed in pursuance of the powers conferred by the Scheduled Districts' Act.

Under section 4 (*j*) of the Code of Criminal Procedure, this High Court is the High Court in reference to proceedings in the Kumaun Division against European British subjects. The rules and orders which have been passed in pursuance of the power conferred by section 6 of the Scheduled Districts' Act and which are now in force are, as we have said, the rules and orders of the 27th of June 1894. By Rule 2 of these rules and orders this High Court is appointed the High Court for the Kumaun Division for all purposes of the Code of Criminal Procedure other than [353] those which it already possessed under the Code. Therefore, for all the purposes of the Code of Criminal Procedure, this Court is the High Court for the Kumaun Division. By Rule (11) it is provided that for the purpose of the Indian Succession Act, the Indian Companies' Act, 1882, and the Indian Railways' Act, 1890, this High Court shall be the High Court for the Kumaun Division. For these purposes and for these purposes alone, has this High Court been appointed the High Court for the Kumaun Division. No further or other jurisdiction has been conferred upon it. The limited jurisdiction so conferred by the rules to which we have referred may apparently at any time be withdrawn by the Local Government, inasmuch as the Local Government is empowered from time to time to direct by what authority any jurisdiction, powers or duties incident to the operation of any enactment shall be exercised or performed. The tenure of the jurisdiction which this Court at present enjoys by virtue of these rules is therefore altogether precarious. It is what we may term extraordinary appellate jurisdiction as distinguished from the ordinary appellate jurisdiction of the Court.

We come now to sub-section (2) of Rule 11, which is an important sub-section; it provides as follows:—"Save as otherwise provided by any enactment for the time being in force, or by any notification issued

Mr *A E Ryves* in reply 1902 APRIL 2

The term "High Court" in section 8 refers to the same High Court mentioned in section 6 and other sections of the Act Wherever used "High Court" means the High Court which enrolled the legal practitioner If read otherwise there would be the anomaly of two High Courts having concurrent jurisdiction over legal practitioners in the same locality

FULL BENCH

24 A 348= 22 A W N. 86

STANLEY, C J, BLAIR and BURKITT, JJ —In this matter a petition has been presented to the High Court by Pandit Padma Dat Joshi, praying that certain orders of the Commissioner of Kumaun refusing to enrol him as a pleader under section 8 of the Legal Practitioners Act (XVIII of 1879) qualified to practise in the Courts of the Sessions Judge of Kumaun and of the Subordinate Magistrates, in all the Revenue Offices, and also in the Commissioner's Court in respect of the cases referred to in Rule (11) of the Kumaun Rules, may be set aside, and that the Commissioner of Kumaun may be directed to enrol him as such pleader, and to permit him to practise in the said Courts and Offices

[351] It appears that the pleader, being duly qualified in that behalf, applied to this High Court to be admitted and enrolled as a pleader of this Court, and was duly enrolled as such on the 19th of August 1898 Subsequently he made several applications to the Commissioner of Kumaun for license to practise as a pleader in Garhwal or at Naini Tal or Almora, as also in Kumaun These applications were refused on the ground that the Commissioner did not consider that the number of vakils and pleaders in his Division should be increased From this refusal the petitioner appeals to this Court on the ground that the Court of the Commissioner of Kumaun is a Court of Session subordinate to this High Court, and that the petitioner having been enrolled as pleader of this Court, is entitled, by virtue of such enrolment, to be enrolled and to practise in the Court of Session of Kumaun, and in all Courts subordinate to that Court, and in all Revenue Offices in the Province of Kumaun, and that the order of the Commissioner refusing to enrol him is contrary to law

A preliminary objection has been raised by counsel on behalf of Government and the Commissioner of Kumaun to the hearing of this application on the ground of want of jurisdiction His contention is that the Commissioner of Kumaun is the High Court of that Province for the purposes of the Legal Practitioners Act, and alone can make rules for the qualifications and admission of proper persons to be pleaders of that Court, and in this regard is in no way subordinate to, and cannot be controlled in his action by, this Court The decision of this question largely depends upon the true construction to be placed upon some of the provisions of the Scheduled Districts Act (Act XIV of 1874), and of the rules and orders passed thereunder on the 27th of June, 1894

The preamble to that enactment recites that various parts of British India have never been brought within, or have from time to time been removed from, the operation of the various Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature, it further recites that doubts have arisen as to what Acts and Regulations are in force in such parts, and that it is expedient to provide readier means than now exist for ascertaining the enactments in force in the territories specified in the [352] first schedule to the Act Accordingly, in the

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the Legal Practitioners' Act. The contention is based upon too wide an interpretation of the words "within the local limits of the appellate jurisdiction of the High Court" in section 8. It is argued that inasmuch as this Court exercises some appellate jurisdiction in the Kumaun Division, therefore the Courts of Kumaun are situate within the local limits of the appellate jurisdiction of this Court within the meaning of this section. It might as well, we think, be said that inasmuch as this Court is the High Court for the purposes of the Indian Divorce Act in the Province of Oudh, and is also the High Court in the same Province in the matter of references under section 57, clause (*b*), of the Indian Stamp Act, it is therefore the High Court in that Province for the purposes of the Legal Practitioners' Act. The language of this section cannot, we think, be so widely interpreted : the words to which we have referred appear to us to be co-extensive in meaning with the same words as used in section 6, sub section (*a*), and to denote the local limits or area in respect of which such High Court or Court having the powers of a High Court in that behalf is empowered to make rules for the qualification, admission, and certificates of pleaders, &c., and not to extend beyond this. In other words, that the words "appellate jurisdiction" as used in the section denote the ordinary as distinguished from what we have termed the extraordinary appellate jurisdiction of this Court. If this were not so, we should have two Courts exercising the powers of a High Court in the Kumaun Division for the purposes of the Legal Practitioners' Act, namely, the Commissioner of Kumaun appointed by and acting under the rules passed by the Local Government, and this Court acting in virtue of its extraordinary appellate jurisdiction. This cannot be. For the foregoing reasons we are of opinion that this Court has no jurisdiction to entertain this application. It is therefore rejected with costs.

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24 A. 356 (=22 A. W. N. 92.)

[356] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

NANDAN PRASAD (*Defendant*) *v.* W. C. KENNEY (*Plaintiff*).*
[2nd April, 1902.]

Civil Procedure Code, sections 25, 403 et seq.—Transfer—Application for leave to sue in forma pauperis filed in Court of Subordinate Judge—Application transferred by District Judge to his own file —District Judge not thereafter competent to send the suit back to the Subordinate Judge for trial.

A pauper plaintiff presented to a Subordinate Judge an application for leave to sue as a pauper. This application was, by means of an order under section 25 of the Code of Civil Procedure, taken on to the file of the District Judge and heard and granted by him. *Held* that the District Judge had no power subsequently to transfer the pauper suit thus initiated back to the file of the Subordinate Judge. *Amir Begam* v. *Prahlad Das* (1), referred to.

[Fol. 10 C. W. N. 902 ; Ref. 36 Cal. 193 ; 12 A. L. J. 1094=25 I. C. 141.]

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* Second Appeal No. 916 of 1899, from a decree of J. Sanders, Esq., District Judge of Cawnpore, dated the 9th of November 1899, confirming a decree of Sheikh Maula Bakhsh, Officiating Subordinate Judge of Cawnpore, dated the 20th of July, 1899.

(1) Weekly Notes, 1902, p. 66 ; see also page 304 *ante*.

in exercise of powers conferred by any such enactment for the purposes of all other Acts for the time being in force, the Commissioner, i e, of Kumaun, shall exercise the powers and perform the duties of a High Court for the Kumaun Division This is a very wide and far reaching rule It confers upon the Commissioner the powers of a High Court for the purposes of all Acts other than those in respect of and for the purposes of which this Court is declared to be the High Court Among others, it constitutes, as it seems to us the Commissioner the High Court in his Division for the purposes of the Legal Practitioners Act If it had been intended by the Local Government that this Court should be the High Court for the purposes of the Legal Practitioners Act it would no doubt have mentioned this Act in the Rules as it did in the case of the other enactments to which we have referred The maxim "*expressio unius est exclusio alterius*" appears to be not inapplicable [354] We are for these reasons of opinion that the Commissioner of Kumaun is the High Court for the purposes of the Legal Practitioners' Act in the Kumaun Division It is he who is appointed by the notification to exercise the powers and perform the duties of the High Court in respect of that Act But then it is contended on behalf of the petitioner that by reason of the fact that this High Court has been appointed the High Court of the Kumaun Division for some purposes, the Commissioner of Kumaun and the Courts in his Divisions are subordinate to this Court within the meaning of section 8 of the Legal Practitioners Act This section runs as follows —' Every pleader holding a certificate issued under section 7 may apply to be enrolled in any Court or Revenue Office mentioned therein and situate within the local limits of the appellate jurisdiction of the High Court by which he has been admitted and subject to such rules consistent with this Act as the High Court or the chief controlling Revenue Authority may from time to time make in this behalf, the presiding Judge or Officer shall enrol him accordingly, and thereupon he may appear, plead and act in such Court or Office, and in any Court or Revenue office subordinate thereto It is argued that the Province of Kumaun and Garhwal is within the local limits of the appellate jurisdiction of the High Court within the meaning of this section by reason of the jurisdiction which has been conferred upon this Court by the Code of Criminal Procedure and by the Rules and Orders passed under the Scheduled Districts Act, and that therefore the Commissioner of Kumaun was bound by law to grant the petitioner's application and to enrol him as a pleader in the Courts of his Province We do not accede to this argument It is clear to our minds that by virtue of Rule (11) of the Rules passed under the Scheduled Districts Act the Commissioner of Kumaun was constituted the proper authority for making rules for the qualifications, admission, &c, of proper persons to be pleaders of his Court and of the Courts subordinate to his Court situate within the local limits of his appellate jurisdiction It is clear to us also that he was by the same rule empowered to exercise the powers of a High Court in the admission of persons to be pleaders in his Court and in the Courts subordinate to it He exercises in his [355] Province appellate jurisdiction, except in so far as such jurisdiction has been withdrawn from him by the enactments and rules to which we have referred It cannot be said that the Province of Kumaun and Garhwal is within the local limits of the appellate jurisdiction of this High Court for all purposes It is so for limited purposes only, and certainly, as we have already pointed out, is not so for the purposes of

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[358] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MAZHAR ALI KHAN (*Plaintiff*) *v.* SAJJAD HUSAIN KHAN (*Defendant*).*
[2nd April, 1902.]

Civil Procedure Code, sections 31, 44—*Misjoinder of defendants and causes of action—Suit by transferee from heir of deceased Muhammadan against another heir and transferee from such other heir.*

A plaintiff came into Court claiming a portion of the inheritance of a deceased Muhammadan on the allegation that he had by two separate sale-deeds of different dates purchased the property from two of the heirs of the deceased, and that the said property was withheld from him by another of the heirs of the deceased, who was in possession of some of it, and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. *Held* that there was no misjoinder of parties or of causes of action in such a suit. *Indar Kuar* v. *Gur Prasad* (1), followed.

With reference to the objection that the claim included both moveable and immoveable property, and that the leave of the Court for the joinder of the two claims had not been obtained, it was *held* that section 44 of the Code of Civil Procedure did not apply to such a case *Ginyana Sambandha Pandara Sannadhi* v. *Kundasami Tambiran* (2), referred to.

[Ref. 29 All. 367 ; 30 All. 560 (F.B.).]

THE suit out of which this appeal arose was one brought under the following circumstances to recover shares of the inheritance of a deceased Muhammadan. The property in suit, comprising both moveable and immoveable property, had belonged to one Munawwar Ali Khan. The plaintiff alleged that after the death of Munawwar Ali he had purchased from one of the heirs of the deceased, Abul Hasan, two and a half *sihams* out of five *sihams* by a sale deed, dated the 10th of November, 1892, and from another of the heirs, Musammat Mashiat-un-nissa, two *sihams*, by a sale deed, dated the 28th of May 1887, the latter purchase having been made *benami* for him by one Sipahi Singh. Two-thirds of the property so purchased had been sold off; and the plaintiff accordingly sought to recover three-quarters of the four and a half *sihams* dealt with by his sale deeds. The plaintiff alleged that this property was in the possession of one Sajjad Husain, another of the heirs of Munawwar Ali, who, according to the plaintiff, had withheld possession from the plaintiff's vendors and had transferred a portion of the property to other persons, who were also named as defendants.

[359] The defendant pleaded, *inter alia*, that the suit was bad for misjoinder of parties and of causes of action, and that a necessary party, Musammat Munawwar-un-nissa, one of the heirs of Munawwar Ali Khan, had not been joined. The Court of first instance (Subordinate Judge of Muradabad) accepted the defendants' objections, and, holding that the suit was bad for misjoinder of both parties and causes of action, dismissed it. The plaintiff appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Babu *Jogindra Nath Chaudhuri*, Munshi *Gokul Prasad* and Pandit *Tej Bahadur Sapru*, for the respondents.

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* First Appeal No. 181 of 1899 from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 15th of July 1899.

(1) (1888) I. L. R. 11 All. 33. (2) (1886) I. L. R. 10 Mad. 375 at p. 506.

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THE respondent in this appeal presented in the Court of the Subordinate Judge of Cawnpore an application for leave to sue as a pauper, and a date was fixed for inquiry into his means At the respondent's request this application was transferred to the Court of the District Judge The Judge admitted the application for leave to sue *in formâ pauperis*, and having done so sent the suit back to the Court of the Subordinate Judge for trial. At the hearing before the Subordinate Judge it was objected that as the Judge had once tranferred the case to his own file, he was not competent to retransfer it to that of the Subordinate Judge This objection was, however, overruled, and a decree passed in favour of the plaintiff The defendant appealed to the District Judge, before whom the objection as to jurisdiction was repeated The objection was again disallowed, and the appeal was dismissed

The defendant appealed to the High Court

Pandit *Moti Lal Nehru* for the appellant

Mr *C Dillon* for the respondent

KNOX and BLAIR, JJ —The sole plea argued before us was that the learned Judge had no jurisdiction either to retransfer the trial of this case to the Subordinate Judge, or to hear the [357] appeal from the decree of the Subordinate Judge It appears that one Kenney, who is respondent before us, presented an application to sue *in formâ pauperis* in the Court of the Subordinate Judge of Cawnpore The District Judge of Cawnpore, acting under section 25 of the Code of Civil Procedure, withdrew this application and decided it himself After deciding it, he retransferred the suit for trial to the Court of the Subordinate Judge It is this order of transfer, and all that followed it, which is impugned by the appellant In support of this contention the learned advocate for the appellant drew our attention to the case of *Amir Begam* v *Prahlad Das* (1) That case is undoubtedly an authority The only way in which the learned counsel for the respondent tried to distinguish it is, that when the application for permission to sue as a pauper was decided, the suit, which then came into existence, returned automatically —to use his own expression—to the Court which had jurisdiction to hear and determine it, *i e*, the Court of the Subordinate Judge of Cawnpore We see no authority for holding that there is any breach of continuity between the application to sue *in formâ pauperis* and the suit into which that application matures According to section 410 of the Code of Civil Procedure, the application, as soon as it is granted, is deemed the plaint in the suit, and it has more than once been ruled by this Court that in such a case the plaint really dates back to the date of the application, not to the day when the application is granted and registered

This appeal must, therefore, succeed, and we decree this appeal and set aside all proceedings which have taken place after the date on which the District Judge granted the application to sue *in formâ pauperis* All these proceedings were without jurisdiction The case must go back to the learned Judge, with directions to take it up from that point and to determine it according to law The appellant will get the costs of this appeal

Appeal decreed

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(1) Weekly Notes, 1902, p 66, see also page 304 *ante*

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24 A. 358 (=22 A. W. N. 85.)

[358] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MAZHAR ALI KHAN (*Plaintiff*) v. SAJJAD HUSAIN KHAN (*Defendant*).*
[2nd April, 1902.]

Civil Procedure Code, sections 31, 44—Misjoinder of defendants and causes of action—Suit by transferee from heir of deceased Muhammadan against another heir and transferee from such other heir.

A plaintiff came into Court claiming a portion of the inheritance of a deceased Muhammadan on the allegation that he had by two separate sale-deeds of different dates purchased the property from two of the heirs of the deceased, and that the said property was withheld from him by another of the heirs of the deceased, who was in possession of some of it, and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. *Held* that there was no misjoinder of parties or of causes of action in such a suit. *Indar Kuar* v. *Gur Prasad* (1), followed.

With reference to the objection that the claim included both moveable and immoveable property, and that the leave of the Court for the joinder of the two claims had not been obtained, it was *held* that section 44 of the Code of Civil Procedure did not apply to such a case *Ginyana Sambandha Pandara Sannadhi* v. *Kundasami Tambiran* (2), referred to.

[Ref. 29 All. 367 ; 30 All. 560 (F.B.).]

THE suit out of which this appeal arose was one brought under the following circumstances to recover shares of the inheritance of a deceased Muhammadan. The property in suit, comprising both moveable and immoveable property, had belonged to one Munawwar Ali Khan. The plaintiff alleged that after the death of Munawwar Ali he had purchased from one of the heirs of the deceased, Abul Hasan, two and a half *sihams* out of five *sihams* by a sale deed, dated the 10th of November, 1892, and from another of the heirs, Musammat Mashiat-un-nissa, two *sihams*, by a sale deed, dated the 28th of May 1887, the latter purchase having been made *benami* for him by one Sipahi Singh. Two-thirds of the property so purchased had been sold off; and the plaintiff accordingly sought to recover three-quarters of the four and a half *sihams* dealt with by his sale deeds. The plaintiff alleged that this property was in the possession of one Sajjad Husain, another of the heirs of Munawwar Ali, who, according to the plaintiff, had withheld possession from the plaintiff's vendors and had transferred a portion of the property to other persons, who were also named as defendants.

[359] The defendant pleaded, *inter alia*, that the suit was bad for misjoinder of parties and of causes of action, and that a necessary party, Musammat Munawwar-un-nissa, one of the heirs of Munawwar Ali Khan, had not been joined. The Court of first instance (Subordinate Judge of Muradabad) accepted the defendants' objections, and, holding that the suit was bad for misjoinder of both parties and causes of action, dismissed it. The plaintiff appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Babu *Jogindra Nath Chaudhuri*, Munshi *Gokul Prasad* and Pandit *Tej Bahadur Sapru*, for the respondents.

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* First Appeal No. 184 of 1899 from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 15th of July 1899.

(1) (1888) I. L. R. 11 All. 33. (2) (1886) I. L. R. 10 Mad. 375 at p. 506.

[illegible] APRIL [illegible] — APPELLATE CIVIL. — 24 A. [illegible] 22 A. W. N. [illegible]

BANERJI and AIKMAN, JJ.—This is an appeal from a decree of the Subordinate Judge of Moradabad dismissing the plaintiff's suit on the ground of misjoinder of defendants and of causes of action. The property which was claimed originally belonged to one Munawwar Ali Khan. The plaintiff alleged himself to be the purchaser of the interests of [illegible] un nissa and Abdul Hasan, two of the heirs of Munawwar Ali Khan, and he claimed a portion of the shares purchased by him against Sajjad Husain Khan, another heir of Munawwar Ali Khan, who, he asserted, had withheld possession from the plaintiff's vendors, and had transferred a portion of the property to the other defendants. The plaintiff's title was acquired under two sale-deeds, one dated the [illegible] of May [illegible], and the other dated the 10th of November, 1892. The Court below has held that the plaintiff had separate causes of action; that those causes of action had accrued separately against the different defendants; and that there was a misjoinder both of causes of action and of defendants.

In the first place, it may be observed that the Subordinate Judge is wrong in saying that the claims of different purchasers have been included in one suit. If the plaintiff's allegation be true, he is the purchaser under both the sale-deeds mentioned above, so that this is not a case of different purchasers claiming in one suit, but it is a claim made by the same person who purchased the property claimed under different sale-deeds. This is the Subordinate Judge's first mistake. In the next place, the reference to the second paragraph of section 31 of the Code of Civil Procedure in the judgment of the Lower Court overlooks the important [350] words which appear in that paragraph. The paragraph runs as follows:—"Nothing in this section shall be deemed to enable a plaintiff to join in respect of distinct causes of action." The Subordinate Judge has read it as if it ran *nothing shall be deemed to enable a plaintiff* [illegible] *distinct causes of action*. That this is not the intention of the paragraph is clear from the provisions of section 45, which distinctly enables a plaintiff to join in the same suit several causes of action against the same defendant or the same set of defendants. In the third place, the learned Subordinate Judge has overlooked the fact that the defendants other than Sajjad Husain derive title from and claim through [illegible] defendant, and have for that reason been made defendants [illegible] the suit. The plaintiff's action is justified by the ruling of this Court in *Indar Kuar* v. *Gur Prasad* (1). In no point of view, therefore, has there been a misjoinder either of causes of action or of parties. On the part of the respondents reference was made to section 44 of the Code of Civil Procedure, and it was argued that as in this suit the plaintiff [illegible] [illegible] both moveable and immoveable property, and had done so without obtaining the leave of the Court, the suit was bad as contravening the provisions of that section. A complete answer is afforded to the [illegible] by the ruling of the Madras High Court in *Ganga* [illegible] [illegible] v. *Ex-* [illegible] *Tarabirun* (2). We may also remark that the Court below showed a want of discretion in not acceding to the [illegible] of the plaintiff and the principal defendants for a short adjournment to enable them to compromise the suit. The result is that we allow the appeal, set aside the decree of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure,

(1) [illegible] I. L. R. 11 All. 33.

(2) [illegible] I. L. R. [illegible] Mad. [illegible]

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with directions to readmit it under its original number in the register, and dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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24 A. 361 (=22 A. W. N. 95).

[361] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

SRI NATH SAHAI (*Defendant*) *v.* RAM RATAN LAL (*Plaintiff*).*
[24th April, 1902.]

Civil Procedure Code, section 583—Decree reversed on appeal after possession obtained thereunder—Application for possession and mesne profits—Disallowance of application—Separate suit for mesne profits.

S. N. obtained a decree for foreclosure on a mortgage against *R. R.* Against this decree *R. R.* appealed to the High Court; but pending the appeal *S. N.* obtained an order absolute for foreclosure, and got possession of the mortgaged property. Subsequently the High Court set aside the order for foreclosure and modified the decree of the first Court. *R. R.* paid up the amount found by the decree of the High Court to be due by him. He then applied to the Court for restoration of possession of the mortgaged property under section 583 of the Code of Civil Procedure, and for mesne profits for the time during which he had been out of possession. His application for mesne profits was rejected, and he thereupon filed a separate suit for mesne profits.

Held that such a suit would not lie, the plaintiff not having appealed from the order refusing his application for mesne profits. *Raja Singh* v. *Kooldip Singh* (1), referred to.

[Ref. 7 A. L. J. 1=4 I. C. 376=32 All. 79.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji* for the appellant.

Munshi *Gobind Prasad* for the respondent.

STANLEY, C. J. and BURKITT, J.—This is an appeal from a decree of the Additional Subordinate Judge of Ghazipur allowing the plaintiff's claim for mesne profits.

The circumstances out of which this appeal has arisen are shortly as follows:—The plaintiff Ram Ratan Lal on the 6th of June, 1884, executed in favour of one Bindeshri Prasad a mortgage of his share in certain property to secure the principal sum of Rs. 4,000 and interest. Bindeshri Prasad subsequently, in the year 1887, transferred his interest in this mortgage to Mahadeo Dat Singh, the father of the defendant Sri Nath Sahai. On his father's death the defendant Sri Nath Sahai brought a suit on foot of his mortgage, and obtained a decree on the 21st of June, 1892. On the 12th of November, 1892, the plaintiff filed an appeal from this decree to the High Court, and whilst this [362] appeal was pending the defendant, on the 6th of February, 1893, obtained an absolute order for foreclosure under section 87 of the Transfer of Property Act, and on the 2nd of March, 1893, obtained possession of

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* First Appeal No. 154 of 1899 from a decree of Munshi Achal Behari, Officiating Subordinate Judge of Ghazipur, dated the 23rd June, 1899.

(1) (1894) I. L. R. 21 Cal. 989.

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BANERJI and AIKMAN, JJ —This is an appeal from a decree of the Subordinate Judge of Muradabad dismissing the plaintiff's suit on the ground of misjoinder of defendants and of causes of action The property which was claimed orig'nally belonged to one Munawwar Ali Khan The plaintiff alleged himself to be the purchaser of the interests of Masit un nissa and Abdul Hasan, two of the heirs of Munawwar Ali Khan, and he claimed a portion of the shares purchased by him against Sajjad Husain Khan, another heir of Munawwar Ali Khan, who, he asserted, had withheld possession from the plaintiff s vendors, and had transferred a portion of the property to the other defendants The plaintiff's title was acquired under two sale deeds, one dated the 28th of May 1887, and the other dated the 10th of November, 1892 The Court below has held that the plaintiff had separate causes of action , that those causes of action had accrued separately against the different defendants , and that there was a misjoinder both of causes of action and of defendants

In the first place, it may be observed that the Subordinate Judge is wrong in saying that the claims of different purchasers have been included in one suit If the plaintiff s allegation be true, he is the purchaser under both the sale deeds mentioned above, so that this is not a case of different purchasers claiming in one suit, but it is a claim made by the same person who purchased the property claimed under different sale deeds This is the Subordinate Judge s first mistake In the next place, the reference to the second paragraph of section 31 of the Code of Civil Procedure in the judgment of the Lower Court overlooks the important [360] words which appear in that paragraph The paragraph runs as follows —" Nothing in this section shall be deemed to enable a plaintiff to join in respect of distinct causes of action The Subordinate Judge has read it as if it ran *nothing shall be deemed to enable a plaintiff to join distinct causes of action* That this is not the intention of the paragraph is clear from the provisions of section 45, which distinctly enables a plaintiff to join in the same suit several causes of action against the same defendant or the same set of defendants In the third place, the learned Subordinate Judge has overlooked the fact that the defendants other than Sajid Husain derive title from and claim through that defendant, and have for that reason been made defendants to the suit The plaintiff s action is justified by the ruling of this Court in *Indar Kuar* v *Gur Prasad* (1) In no point of view, therefore, has there been a misjoinder either of causes of action or of parties On the part of the respondents reference was made to section 44 of the Code of Civil Procedure, and it was argued that as in this suit the plaintiff claimed both moveable and immoveable property, and had done so without obtaining the leave of the Court, the suit was bad as contravening the provisions of that section A complete answer is afforded to the objection by the ruling of the Madras High Court in *Gnana Sambandha Pandara Sannadhi* v *Kundasami Tambiran* (2) We may also remark that the Court below showed a want of discretion in not acceding to the prayer of the plaintiff and the principal defendants for a short adjournment to enable them to compromise the suit The result is that we allow the appeal, set aside the decree of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure,

(1) (1888) I L R 11 All. 33. (2) (1886) I L R 10 Mad 375 at p. 506.

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24 A. 363=
22 A. W. N.
92.

24 A. 363 (=22 A. W. N. 92.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BHIM SEN (*Defendant*) v. SITA RAM (*Plaintiff*).* [24th April, 1902.]

Suit for damages for malicious prosecution—"Malice"—"Reasonable and probable cause."

"Reasonable and probable cause" in connection with actions for damages for malicious prosecution may be defined to be an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds of the existence which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. *Hicks* v. *Faulkner* (1), referred to.

"Malice" in a similar connection is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. *Mitchell* v. *Jenkins* (2), referred to.

The mere absence of reasonable and probable cause does not of itself justify the conclusion as a matter of law that an act is malicious. It is not [364] identical with malice, but malice may, having regard to the circumstatnces of the case, be inferred from it. *Gajpathi Rau* v. *Narsing Rau Garu* (3), referred to.

[Fol. 17 M. L. T. 301=29 I. C. 12=2 L. W. 428; Ref. 61 I. C. 970; Fol. 20 I.C. 180.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Sital Prasad Ghosh* for the appellant.

The Hon'ble Mr. *Conlan* for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal by the defendant from an order of the Additional Subordinate Judge of Aligarh, reversing the decision of the Munsif upon certain questions of fact, and remanding the case for the trial of the remaining issue in the case under section 562 of the Code of Civil Procedure. The suit was brought to recover damages for alleged malicious prosecution. It appears that the defendant Bhim Sen lodged a complaint against the plaintiff, Sita Ram, of an offence under section 215 of the Indian Penal Code, in the Court of the Magistrate of Bulandshahr, the charge being that the plaintiff stole cattle, and then restored the cattle to the owners on receipt of rewards. The complaint was heard and dismissed on the 21st of December, 1900. Thereupon, on the 21st of January, 1901, the present suit was instituted. In his plaint the plaintiff alleges that there was enmity between him and the defendant arising out of a dispute about a plot of land which was formerly under the cultivation of the father of the defendant, and was then in the possession of the plaintiff and his brothers, and that the false complaint was lodged against him in consequence of this enmity, that the charge was malicious and made without reasonable or probable cause. In his written statement the defendant denied that there was any enmity existing between him and the plaintiff, and he alleges that the charge made against the plaintiff was well-founded. The third paragraph of the written statement of the defendant runs as follows:—"The plaintiff is a cattle-thief. He receives a share in stolen cattle.

* First Appeal No. 123 of 1901 from an order of Munshi Achal Behari, Additional Subordinate Judge of Aligarh, dated the 17th July 1901.

(1) (1878) L. R. 8 Q. B. D. 167.
(2) (1833) 5 B. and Ad. 595.
(3) (1871) 6 Mad. H. C. Rep. 85.

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24 A 361= 22 A W N 95

the mortgaged property The High Court set aside the absolute order of the 6th February, 1893, and modified the decree of the 21st of June, 1892, and the plaintiff thereupon deposited in Court the amount found to be due on foot of the mortgage, except a small sum in respect of interest, which was subsequently paid On the 16th of February, 1895, the plaintiff applied to the Court for restoration of possession of the property under section 583, Civil Procedure Code, and also claimed mesne profits for the time during which the defendant held possession The Subordinate Judge held that the plaintiff could not in execution proceedings recover mesne profits because the decree did not provide for mesne profits, that the proper course for the judgment debtor was to institute a suit for mesne profits, and he dismissed the plaintiff's claim in respect of mesne profits It is now admitted that the decision of the Subordinate Judge was wrong, and that he had power under section 583 of the Code of Civil Procedure to make an order for mesne profits The plaintiff, however, acquiesced in the decision and instituted the present suit, with the result that by the decree of the Additional Subordinate Judge his claim has been in part allowed Against this decree the defendant has appealed to this Court on the ground, among others, that the respondent having claimed mesne profits in his application for restitution, and the Subordinate Judge having disallowed the claim, the remedy of the respondent was an appeal against the order of the Subordinate Judge under section 244 of the Code of Civil Procedure, and that the present suit was not maintainable

We are of opinion that the contention of the appellant is well founded The decree of reversal passed by the High Court on the 21st of June, 1894, carried with it the right of the defendant in the suit to restitution of all that had been taken under the erroneous decree, and authorized the lower Court to cause restitution to be made accordingly This was so held in the case of *Raja Singh v Kooldip Singh* (1), which followed other decisions to the like [363] effect of the same High Court, and is not, so far as we are aware, in conflict with any ruling of this Court. It is contended, however, on the part of the respondent that admitting that the lower Court was empowered to grant mesne profits in the execution proceedings, this fact did not preclude the plaintiff respondent from bringing a suit to establish his claim to such profits The answer to this contention is that, admitting that the plaintiff could have brought such suit he did not do so in the first instance, but elected to put forward his claim to mesne profits in the execution proceedings, and when the claim was dismissed acquiesced in the dismissal of it and has not appealed. So long as the order of dismissal remains unreversed, it is a bar to any further proceeding in respect of the same claim. The matter has been decided by a Court competent to decide it, and has become in fact *res judicata*

This, we think, furnishes a complete answer to this contention and also to the plaintiff's suit For the foregoing reasons we are of opinion that the appeal should be allowed, and we accordingly allow it, set aside the decree of the lower Court, and dismiss the suit with costs in both Courts

Appeal decreed

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(1) (1894) I L R. 21 Cal 989

1902 April 24.

Appellate Civil.

24 A. 136= 22 A. W. N. 92.

such charge is false to the knowledge of the party making it, the necessary inference is that there was no reasonable or probable cause for the making of the charge. The phrase "reasonable and probable cause" has been elaborately defined in the case of *Hikks* v. *Faulkner* (1) by Hawkins, J, in the following terms:—"Now I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. There must be—(1) an honest belief of the accuser in the guilt of the accused; (2) such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) such secondly mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; (4) the circumstances so believed and relied on by the accuser must be such as would amount to reasonable ground for belief in the guilt of the accused."

[367] The defendant in the present case could not have had any belief, much less an honest belief, in the guilt of the plaintiff, according to the finding of the lower appellate Court, for there was no foundation for the charge so soon as the allegation of the defendant that he was present when the plaintiff restored to the owners the stolen cattle was disbelieved, and his evidence was discredited. The basis of the charge was found to have, in fact, no existence, and this to the knowledge of the defendant. The Court, therefore, rightly found that there was no reasonable or probable cause for the prosecution.

Now the mere absence of reasonable and probable cause does not of itself justify the conclusion, as a matter of law, that an act is malicious. It is not identical with malice; but malice may, having regard to the circumstances of the case, be inferred from it. Whether malice should be inferred from the want of reasonable and probable cause or not, is a question which depends upon the circumstances of each case. In most cases of the kind the whole question will turn, as was said by the Madras High Court in *Gajpathi Rau* v. *Narsingh Rau Garu* (2), "on the cogency of the inference to be derived from the absence of reasonable and probable cause, the best test for which is partly abstract and partly concrete. Was it reasonable or probable cause for any discreet man? Was it so to the doer of the act? If these questions are answered in the negative, the inference of malice would appear to be irresistible." Now malice, as used in this cause of action, is not to be considered in the sense of spite or hatred, but in its wider sense as denoting any wrong or indirect motive. It can be proved by showing what the actual wrongful motive was or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some improper or indirect motive to the prosecutor. Park, J., in the well-known case of *Mitchell* v. *Jenkins* (3) thus defines it:—"The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." Whether or not

(1) (1878) L. R. 8 Q. B. D. 167.
(2) (1871) 6 Mad. H. C. Rep. 85.
3. (1833) 5 B. and A. D. 595.

The criminal case was not groundless. On the other hand, it was a *bond fide* case, and was instituted for public good " 1902 APRIL 24

In the Court of first instance (the Munsif) found that the defendant did not institute the prosecution of the plaintiff, but [365] *merely* laid an information of certain facts before the District Magistrate, and that the prosecution was therefore not instituted by the defendant. No attempt has been made before us to support this portion of the judgment It is clearly erroneous The Munsif also found that there was reasonable and probable cause for the prosecution, if there was a prosecution by the defendant, and that malice had not been proved, and accordingly he dismissed the suit On appeal the Additional Subordinate Judge reversed the finding of the lower Court, holding upon the evidence that the defendant did prosecute the plaintiff, and that he did so maliciously and without reasonable or probable cause

APPELLATE CIVIL

24 A 363= 22 A W N 93

It has not been contended before us, as we have said, that the finding of the lower appellate Court that the defendant did prosecute the plaintiff is wrong The appellant s learned pleader confined his argument to two grounds of appeal, namely, that the plaintiff did not prove, as he was bound to do, the want of reasonable and probable cause for the prosecution, and also malice on the part of the defendant The Additional Subordinate Judge found that "there was no evidence whatever to show that the plaintiff restored to the owners the stolen cattle when they paid for them,' that the allegation of the defendant that the stolen cattle had been restored to their owners by the plaintiff in his presence was absolutely false He finds in fact, that the charge was false, and that it was false to the knowledge of the defendant inasmuch as he purported to make it of his own personal knowledge, and not from information obtained from others, or from inferences reasonably drawn from matters which were brought under his notice In the criminal *Court the defendant*, he says, admitted that he only had heard of the plaintiff s bad reputation, and that the theft of the cattle and their restoration had not taken place before him, while at the trial the defendant swore that the cattle had been restored to two persons in his presence It is clear from his judgment that the Additional Subordinate *Judge* found, *not* merely that the charge brought against the plaintiff was a false charge, but that it was false to the knowledge of the defendant Under these circumstances he held that there was no reasonable or probable cause for the prosecution, and from the absence of such reasonable and 'probable cause, he inferred malice [366] on the part of the defendant In the course of his judgment the Subordinate Judge makes use of some loose and ill considered language, which has no doubt led to this appeal For example, he says, that the *defendant failed to prove* that the charge was true " Want of reasonable and probable cause should therefore be presumed, and malice will also be inferred from the fact that the charge was recklessly made

Read independently of the context this statement of the law is clearly incorrect It is not correct to say that the want of reasonable and probable cause should be presumed from the failure on the part of a defendant to prove that a charge was true No presumption of the absence of probable cause necessarily arises from failure to prove the truth of the charge Reading this passage, however, in connection with the earlier portion of the judgment, it becomes apparent that what *the* Judge intended to convey was that where a false charge is made, and

1902 April 30. — Appellate Civil. — 24 A. 368= 22 A. W. N. 96.

Dr. *Satish Chandra Banerji* and Babu *Jiwan Chandra Mukerji* for the appellant.

Maulvi *Ghulam Mujtaba* for the respondent.

BANERJI and AIKMAN, JJ.—This appeal arises in a suit brought by the respondent to recover from the defendant Rs. 5,000 as "compensation on account of mental distress and defamation". It appears that on the 18th of April 1898, Ori, a servant of the defendant, accompanied by the defendant, went to the Police station at Mirzapur and laid an information to the effect that the plaintiff, Muhammad Hadi, and several other persons entered the female aparatments of the defendant, broke open locks, plundered his goods, and caused hurt to his wife. Thereupon an inquiry was made by the Police, with the result that the information was found to be false, and a report was sent up to that effect on the 28th of April, 1898. The defendant was prosecuted under section 182 of the Indian Penal Code, convicted and sentenced to six months' imprisonment. The present suit was instituted on the 28th of April, 1899. In answer to it the defendant raised, among other pleas, the plea of limitation, which has been repeated in the appeal before us. The first question which we have to determine, therefore, is whether the claim was within time.

The Court below has held the suit to be governed by Art. 36 of the second schedule of the Indian Limitation Act, and not to be barred by limitation. That is a general article applying to all cases of torts which are not specially provided for in the other articles in the schedule, and is inapplicable if the suit [370] clearly comes within some other article. The other articles which may have any bearing upon the present suit are Arts. 23, 24 and 25.

Article 23 relates to suits for compensation for malicious prosecution: If the present suit is one of that description, it was within time, having been brought before the expiry of one year from the date on which the charge laid against the plaintiff was reported to be false. The learned vakil for the appellant contends this is not a suit for malicious prosecution, and relies on *Austin* v. *Dowling* (1) and *Yates* v. *The Queen* (2). In the former of these cases Willes, J., held that there can be no malicious prosecution until the plaintiff was brought before a judicial officer. In the latter, Brett, M. R. observed that laying the information before the Magistrate would not be the commencement of the prosecution because the Magistrate might refuse to grant summons, and if no summons, how could it be said that a prosecution against anyone ever commenced? And Cotton, L. J., was of opinion that "it was not laying an information or making a charge, but the summons before the Magistrate which ought to be considered the commencement of the prosecution." Whether, having regard to the provisions of the Code of Criminal Procedure, the same rule would apply in this country, it is not necessary for the purposes of this case to decide. But we are clearly of opinion that a prosecution does not commence until proceedings are initiated by a Magistrate taking cognizance of an offence under the Code of Criminal Procedure. Part V of that Code deals with "information to the Police and their powers to investigate." Part VI provides for "proceedings in prosecutions" and Chapter XV (B), which comes under that part, is headed "conditions requisite for initiation of proceedings." The first section under that head is section 190, which declares the materials upon which

(1) (1870) L. R. 5 C. P. 534. (2) (1885) L. R. 14 Q. B. D. 648.

the motive for the prosecution which has been attributed by the plaintiff to the defendant in this case [368] was the motive which really actuated the defendant to bring a false charge, the learned Subordinate Judge was in our opinion, justified in the circumstances of this case in inferring malice He says in his judgment that the charge was recklessly made, and he finds that it was made falsely and without any foundation of truth Under these circumstances we are of opinion that there are no grounds for this appeal on the merits

1902 APRIL 24 — APPELLATE CIVIL — 24 A 363=22 A. W. N. 92

The Subordinate Judge has, however, we think improperly, remanded the case to the Court of first instance for the trial of the remaining issue in the suit The only issue which was left undetermined by the lower Court was the question of damages This question the Subordinate Judge should have himself decided, and not have remanded the case to the Munsif We accordingly affirm the judgment of the lower appellate Court on the merits with costs, but while we reject the appeal on the merits, we set aside the order of remand, and direct the lower appellate Court to restore the case to its original number in the file of pending appeals, and proceed to try the issue as to the quantum of damages to which the plaintiff is entitled and give a decree accordingly The Subordinate Judge will of course be at liberty (should he think it necessary) to remit an issue for trial under section 566 of the Code of Civil Procedure to the Court of first instance

Appeal dismissed

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24 A. 368 (=22 A. W N. 96)

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

ISHRI *alias* HATIM ALI (*Defendant*) *v.* MUHAMMAD HADI (*Plaintiff*) *
[30th April, 1902]

Act No XV of 1877 (Indian Limitation Act), sch ii arts 23, 24, 25, 36—Limitation—Suit to recover damages on account of injury caused by a false report made to the Police—Suit for damages for malicious prosecution

The defendant laid information at a Police station against the plaintiff, alleging that the plaintiff and several other persons entered the female apartments of the defendant, broke open locks, plundered his goods, and caused hurt to his wife There upon an inquiry was made by the Police with the result that the information was found to be false The defendant was prosecuted under section 182 of the Indian Penal Code, convicted and [369] sentenced to six months imprisonment The plaintiff thereafter sued to recover damages from the defendant "as compensation on account of mental distress and defamation"

[illegible]

red to

[Ref 20 I C 768=18 C. L J 352.]

THE facts of this case sufficiently appear from the judgment of the Court

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* First Appeal No 211 of 1899, from a decree of Lala Shankar Lal, District Judge of Mirzapur, dated the 11th September 189)

(1) (1870) L R 5 C P. 531

(2) (1885) L. R 11 Q B D 648

(3) (1833) I L R 10 All 124.

1902
MAY 1, 2.
JUNE 6.

PRIVY
COUNCIL.

24 A.429=6
C.W.N. 889=
4 Bom. L. R.
827=29
I. A. 118=
8 Sar. 293.

24 A. 429 (=6 C. W. N. 889= 4 Bom. L. R. 827=29 I. A. 118=8 Sar. 293.)

[429] PRIVY COUNCIL.

PRESENT :

Lords Macnaghten and Lindley, Sir Ford North, Sir Andrew Scoble and Sir Arthur Wilson.

SRI GOPAL (*Plaintiff*) *v.* PIRTHI SINGH (*Defendant*).
[1st, 2nd May, and 6th June 1902.]
[*On appeal from the High Court at Allahabad.*]

Res judicata—Civil Procedure Code, section 13, Explanation II—Omission to set up mortgage bond as a defence in former suit—Subsequent suit on mortgage bond—Civil Procedure Code, section 43—Relinquishment of part of cause of action.

Where, to a suit by a mortgagee on a mortgage bond of certain property, a prior mortgagee of the same property is made a party and omits to set up his prior charge and claim to have it redeemed, a suit subsequently brought by him for that purpose is barred by explanation II of section 13 of the Civil Procedure Code.

In the same way, if, being a party to a suit on a mortgage prior to his own, he omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead.

Quære—Can a mortgagee who has several mortgages on the same property treat them, with respect to the provisions of section 43 of the Civil Procedure Code, as separate causes of action, or must he bring one suit on all his mortgages ?

[**Appl.** 17 M. L. J. 301=2 M. L. T. 330=30 Mad. 353 ; **Ref.** 9 C. L. J. 78=3 Ind. Cas. 686 ; 13 M. L. J. 448=26 Mad. 760 ; 30 Bom. 156=7 Bom. L. R. 811 ; **Fol.** 2 C. L. J. 574 ; **Rel.** 31 Cal. 428 ; **Expl.** 1 C. L. J. 248 ; 337 ; **Ref.** 7 O. C. 152 ; U. B R. 1906, 46 ; 36 Cal. 193=1 Ind. Cas. 913=5 C. L. J. 611 ; 12 C. W. N. 292=7 C. L. J. 504 ; 10 O. C. 146 ; 12 C. W. N. 862=8 C. L. J. 82=35 Cal. 979 ; 12 O. C. 347 ; **Fol.** 15 I. C. 611=10 A. L. J. 149 ; 1917 M. W. N. 336=38 I. C. 184 ; **Dist.** (1912) 1 M. W. N. 41=13 I C. 182 ; 35 All. 111; **Ref.** 9 M.L.T. 90=21 M. L. J 635=9 I. C. 285; 37 Mad. 70 ; 38 Mad. 927 ; 2 Pat. L. J. 313 ; 118; 39 Cal. 522; 35 Mad. 216; 49 I. C. 466=1918 M. W. N. 902 ; **Dist.** 1922 Lah. 358; **Fol.** 11. I. C. 346=14 O. C. 117.]

APPEAL from a decree (10th November, 1897) of the High Court at Allahabad, dismissing an appeal from a decree (12th June 1894) of the District Judge of Aligarh, which had affirmed a decree (12th August, 1893) of the Subordinate Judge of Aligarh dismissing the appellant's suit.

One Maya Ram and his sons Nek Ram, Pirthi Singh and Ram Singh owned a large number of biswas in mauza Manai in the Aligarh district, and the suit arose out of proceedings consequent on a series of mortgage transactions entered into by the three sons after the death of their father. In 1868, 1869 and 1870 they executed mortgages of portions of mauza Manai in favour of one Phul Chand. From 1871 to 1876 five mortgages of portions of the same property were executed by them. Three of these mortgages were in favour of one Ishur Das : on 21st July, 1871, a mortgage of 4 biswas as security for Rs. 1,000 ; on 7th February, 1874, a mortgage of 4 biswas for Rs. 250, and on 16th July, 1874, a mortgage of 3 biswas 10 biswansis for Rs. 1,500. Nek Ram, Pirthi Singh and Ram Singh also executed on 30th August, 1872, a mortgage of 4 biswas of the same property to [430] Murli Singh and Sarnam Singh as security for Rs. 800 ; and on 18th August, 1876, a mortgage of 4½ biswas to Bhagwan Das son of Phul Chand for Rs. 3,811. In this mortgage bond it was stated that the bonds executed in favour of Phul Chand in 1868,

or partly of both It follows, therefore, in this case that the appellant being an under proprietor is a member of the village community

1902 MAY 2

MISCEL LANEOUS CIVIL

24 A. 420= 22 A W N 106

There remains the second part of the question put to us, namely, has the appellant "as such (that is as a member of the village community) a "right of pre emption under clause 3, section 9 of Act XVIII of 876? If the interpretation I have put on section 7 be correct, I am of opinion that in the present case under the 3rd clause of section 9 the plaintiff appellant here is entitled to pre empt According to the interpretation for which the respondent vendee contends the 3rd clause of section 9 must be read somewhat in this way, namely, "3rd, to any member of the village community who is a proprietor in the case of the sale or foreclosure of a proprietary tenure, and to [428] any member who is an under proprietor in the case of the sale or foreclosure of an under proprietary tenure I am not prepared to cut down the very large words used in section 7 by putting on them the restricted meaning suggested above, and to hold that though the Legislature has given pre emptive rights to "any member of the village community, a certain class of such members shall be competent to exercise those rights, not generally and in all cases, but only when a certain class of property is sold or foreclosed To put such a meaning on clause 3 would, in my opinion, be an act of legislation, and not an interpretation of the law as it stands Further such an interpretation would to my mind be at variance with the scope and intention of section 6 to which I have already referred The respondent vendee is a stranger to the village community while the appellant is a resident under proprietor and a member of that community That being so, I think the latter must be considered to be such member for all pre emption purposes under the pre emption chapter of the Act, and should not merely be considered to be such when the property, the subject of pre emption, happens to be an under proprietary tenure The interpretation I would adopt has in the present case, the advantage of securing to the appellant the right I think him entitled to ' in preference to all others and also that of keeping out one who admittedly is a stranger to the village community

No argument can, I think be based on the provisions of the 4th clause of section 9 That clause was probably enacted with a view to giving to an absentee landlord a right of pre emption which he otherwise would not have possessed It is not necessary to discuss that matter further

For the above reasons I have come to the conclusion that the question put to us should be answered in the affirmative

BY THE COURT —Our opinion is that the appellant in this case is a member of the village community and as such entitled to pre empt the sale Let this reply be forwarded to the Judicial Commissioner of Oudh

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1902 MAY 1, 2. JUNE 6.

PRIVY COUNCIL.

4 A. 429=6 C.W.N. 889= Bom. L. R. 827=29 I. A. 118= 8 Sar. 293.

was then due Rs. 2,485, Kewal Singh and Ajola (or Rajola) as heirs of Nek Ram sold the property to Bechai Lal for Rs. 6,000, which was to be applied in satisfaction of the debt under that decree, and in part payment of Janki's claim under the bond of 18th August 1876. On the 20th June, 1892, Sri Gopal made the following application to have it notified that the property about to be sold was charged in respect of the bond of 7th February, 1874, as well as with that of 21st July, 1871 :—

"A 2¾-biswa share out of 4 biswas in village Manai, pargana Akrabad belonging to Nek Ram, deceased, and possessed by his heirs, has been advertised for sale to be held to-day in (satisfaction of) the applicant's decree, and the said property is hypothecated in the decree passed on the basis of the bond, dated 21st July 1871, the amount of which is Rs. 2,374, and in the bond, dated 7th February 1874, executed by the debtor's ancestor for Rs. 250. The amount of the principal and interest of the same is [432] Rs. 2,010. A mention of the said decree and bond has been made in the application for execution of decree, but by way of precaution this application is made, praying that the aforesaid debts may be notified at the time of sale.

"This having been presented along with the original bond it is ordered—

"That the notification be made."

The suit (instituted on 12th April, 1893), out of which the present appeal arose was brought on the mortgage bond of 7th February, 1874, by Sri Gopal representative of the original mortgagee Ishur Das against (1) Pirthi Singh; (2) Kewal Singh, son of Nek Ram; (3) Ajola (or Rajola), widow of a brother of Kewal Singh, and (4) Gaura, widow of Ram Singh, as first party, defendants, representing the original mortgagors; and against (5) Bechai Lal, son of Phul Chand; (6) Janki, wife of Bechai Lal; (7) Murli Singh and (8) Sarnam Singh, as second party defendants representing the mortgagees under the other bonds. The plaintiff alleged that the bond of 7th February, 1874, had priority over all charges except that of Murli and Sarnam under their bond of 30th August, 1872, and he prayed (*a*) for a decree against defendants (1) to (6) for the amount due on the bond of 7th February, 1874, (*b*) for a decree for redemption against Murli Singh and Sarnam Singh and a reconveyance by them as receiving payment of what was due on their bond of 30th August, 1872, of the 1¼ biswas purchased by them; and (*c*) for a decree for sale of the 4 biswas share hypothecated by the bond sued on.

In answer to the suit Bechai Lal and Janki [defendants (5) and (6)] pleaded that it was barred by section 43 of the Civil Procedure Code because the bond of 7th February, 1874, had not been sued on with the other bonds; and that it was also barred by section 13 of the Code as that bond had not been relied on as a defence in that suit (No. 150 of 1888). Janki also made the same claim as to her bond of 1876 as had been decided against her in her own suit.

Murli Singh and Sarnam Singh [defendants (7) and (8)] relied on section 13 of the Civil Procedure Code as barring the suit. The other defendants did not appear. On 12th August, 1893, the Subordinate Judge dismissed the suit. He held that a person having several mortgages on the same property was bound to sue on all at once, and that the suit was barred by the Civil Procedure Code, section 43. He also held that the plaintiff could and [433] ought to have set up the bond of 7th February, 1874, as an answer to the suit brought against him by

1869 and 1870 had been received back by the mortgagors as being paid off

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24 A 429=6 C W N 889=4 Bom L R 827=29 I A 118=8 Sar 293

Ishur Das died leaving two sons, Sita Ram and Daya Kishan who, on 11th July, 1883, brought a suit (No 121 of 1883) on the mortgage of 21st July, 1871, in which, on 3rd September, 1883, they obtained a decree for Rs 3,565 and for sale in default of payment, and under that decree the 1¼ biswa share hypothecated was sold and purchased by the decree holders None of the other mortgagees were made parties to that suit

On 15th August, 1883, Murli Singh and Sarnam Singh brought a suit (No 142 of 1883) on their mortgage of 30th August, 1872, in which they obtained a decree on 17th December 1883, for Rs 1,852 to be enforced by sale against the mortgaged property, and on the sale they became purchasers of the same 1½ biswas of mauza Manai To this suit also none of the other mortgagees were made parties

On 27th July, 1888, Daya Kishan having died, Sita Ram and Sri Gopal, son of Daya Kishan, brought a suit (No 129 of 1888) for sale on Ishur Das' mortgage of 16th July, 1874, and obtained a decree on 26th September, 1888, in execution of which 1 biswa 7½ biswansis of the property were sold and purchased by Bechai Lal, another son of Phul Chand None of the other mortgagees were parties to that suit

Bhagwan Das assigned his mortgage of 18th August 1876 to one Shiam Lal, who sold it to Sri Ram, who, on 18th August, 1888, brought a suit (No 150 of 1888) to enforce the bond, in which suit on Sri Ram s death his daughter Musammat Janki, the wife of Bechai Lal, was, as her father's assignee by gift, substituted for him as plaintiff That suit was brought against the mortgagors, against the representatives of Ishur Das, and also against Murli Singh and Sarnam Singh Janki claimed in that suit that as assignee of Bhagwan Das her bond took precedence over all the bonds created by Nek Ram, Pirthi and Ram Singh in favour of Ishur Das inasmuch as they were all subject to the hypothecations [431] in favour of Phul Chand which were satisfied by means of Bhag wan's money, but that claim was not allowed The representatives of Ishur Das pleaded their prior rights under the mortgage of 21st July 1871, but made no mention of their mortgage of 7th February 1874, nor did they raise any question as to their rights under that mortgage In that suit on 19th December, 1889, Janki obtained a decree for sale subject to her redeeming the mortgages of 21st July, 1871, 30th August, 1872, and 16th July, 1874

On 24th September, 1888, Murli Singh and Sarnam Singh brought a suit (No 166 of 1888) under section 92 of the Transfer of Property Act (IV of 1882) against Sita Ram and Sri Gopal, for redemption in res pect of the 1½ biswas which they had purchased in execution of the decree of 17th December, 1883, in their suit on the mortgage bond of 30th August, 1872, and on 25th July, 1889, they obtained a decree de claring their right to redeem the land from the prior mortgages on pay ment of the proportionate amount of the mortgage debt due to Sita Ram and Sri Gopal under the mortgage of 21st July, 1871 In that suit Sita Ram and Sri Gopal did not plead their rights under the mortgage of 7th February, 1874 On 1st May, 1892, when 4 biswas of mauza Manai was about to be sold in satisfaction of the decree in Sri Gopal's suit (No 121 of 1883) on the bond of 21st July, 1871, on which there

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24 A. 42=6 C.W.N. 889=4 Bom. L. R. 827=29 I. A. 118=8 Sar. 293.

The five following incumbrances on that property are material :—

Date of mortgage.	Amount.	Names of mortgagees.
	Rs.	
(1) 21st July, 1871 ...	1,000	Ishur Das.
(2) 30th August, 1872 ...	800	Murli Singh. Sarnam Singh.
(3) 7th February, 1874 ...	250	Ishur Das.
(4) 16th July, 1874 ...	1,500	Ishur Das.
(5) 18th August, 1876 ...	3,811	Bhagwan Das.

In 1883 Sita Ram and Daya Kishan (heirs of Ishur Das then deceased) commenced an action (No. 121 of 1883) on the bond of 21st July, 1871, against the mortgagors only; and on 3rd September, 1883, obtained a decree for payment, and, if necessary, for sale.

[435] In the same year Murli and Sarnam Singh commenced an action (No. 142 of 1883) on the bond of 30th August, 1872, in which action also the mortgagors were the only defendants; and on the 17th December 1883 they obtained a like decree for payment and, if necessary, for sale. Under that decree 1¼ biswas of the mortgaged property were sold, and were purchased by Murli and Sarnam Singh.

In July, 1888, Sita Ram and the present appellant Sri Gopal (the son of Daya Kishan, who was then dead) commenced an action (No. 129 of 1888) against the mortgagors only under the charge of 16th July, 1874; and on 26th September, 1888, obtained a decree for payment and sale in default. Part of the mortgaged property was sold in execution of that decree, and was purchased by the respondent Bechai Lal.

The charge of 18th August 1876 in favour of Bhagwan Das was sold by him to Shiam Lal, and by him to Babu Sri Ram, the father of the respondent Musammat Janki; and it was afterwards transferred by him to her by way of gift.

In August, 1888, Sri Ram commenced an action (No. 150 of 1888) to enforce the charge of 18th August, 1876; but having died on the eve of the trial the name of his daughter the respondent Musammat Janki was substituted as plaintiff. The mortgagors, Sita Ram and the appellant, and Murli and Sarnam Singh, were all made defendants in that action. The plaintiff therein sought to establish that charge as having priority over the earlier mortgages above referred to upon the ground that the money thereby secured had been borrowed to pay, and had been applied in paying, certain other charges on the same property of still earlier date, all being prior to 1871; but this claim to priority broke down, the plaintiff having failed to satisfy the Court that the earlier charges had been kept on foot, or that the money had been so applied. The decree gave the plaintiff judgment for payment against the mortgagors; and declared that in default of payment she would be entitled to sell ¼ biswa of the land comprised in the mortgage sued on, which was free from all incumbrances; and could also sell the remaining four biswas of the mortgaged

Murli Singh and Sarnam Singh (No 166 of 1888), and by Janki (No 150 of 1888), and that his suit was therefore barred by section 13 of the Civil Procedure Code

1902 MAY 1, 2. JUNE 6.

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24 A 428=6 C W N 889=4 Bom L R 827=29 I A 118=8 Sar 283

Against that decision the plaintiff appealed to the District Judge of Aligarh, who, on 12th June, 1894, affirmed the decision of the Subordinate Judge on both points and dismissed the appeal

The plaintiff preferred an appeal to the High Court, and a Bench of five Judges (EDGE, C J and BLAIR, BANERJI, BURKITT and AIKMAN, JJ) dismissed his appeal on 10th November, 1897 The judgment of the High Court is reported in I L R, 20 All, 110

On this appeal

Mr *Mayne* for the appellant contended that the suit was not barred by section 13 of the Civil Procedure Code The suit brought by Murli Singh and Sarnam Singh (No 166 of 1888) was brougnt by them as mortgagees of their bond of 30th August, 1872 to redeem the prior mortgage held by the appellant of 21st July, 1871 It was not a necessary defence to that suit, and it would have been no answer to it to set up the appellant's mortgage now sued on The decree obtained by Murli and Sarnam could not, and did not profess to, affect any rights other than those then in question As to Janki's suit (No 150 of 1888) the High Court's judgment now under appeal is based on a misapprehension of the nature of that suit She was not seeking to sell the property subject to any prior mortgage, which was the relief granted to her She only wanted a declaration that the mortgages of 1868, 1869 and 1870 which her charge of the 18th August, 1976, was executed for the purpose of paying off, were kept alive for the benefit of Bhagwan Das, and that her mortgage of 1876, though later in date than the other mortgages of 1871, 1872 and 1874, therefore created a prior charge on the property This relief she claimed as against both the appellants mortgages, and it was rejected against both, the judgment declaring that both mortgages had priority over hers and must be satisfied as a condition precedent to her selling the property on which they [434] were a charge This should have been stated in the decree, but the judgment, it is submitted, explains the decree Janki has in fact never paid off the mortgages which, in terms of the decree, she had to do before she could sell the property under it, and her right to execute that decree was barred by limitation before the present suit was brought It having been unnecessary for the appellant to set up his mortgage of 7th February, 1874, in the former suits, it is submitted that explanation II of section 13 of the Civil Procedure Code does not stand in the way of his present suit

Mr *G E A Ross* for the respondents, Bechai Lal and Mussammat Janki was not called upon

1902, *6th June* —The judgment of their Lordships was delivered by—

SIR FORD NORTH —

This action relates to certain incumbrances created by Nek Ram, Pirthi Singh and Ram Singh, the owners of several biswas in the mauza Manai in the Aligarh district One of them and the representatives of the other two are respondents in this appeal, and they are all included in the term " mortgagors '

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The five following incumbrances on that pro

Date of mortgage.		Amount
		Rs.
(1) 21st July, 1871	...	1,000
(2) 30th August, 1872	...	800
(3) 7th February, 1874	...	250
(4) 16th July, 1874	...	1,50
(5) 18th August, 1876	...	3,

In 1883 Sita Ram and Da
deceased) commenced an action
July, 1871, against the mortga
obtained a decree for payment

[435] In the same year
action (No. 142 of 1883) or
action also the mortgagor
December 1883 they obta
for sale. Under that de
sold, and were purchase

In July, 1888, S
son of Daya Kishan,
of 1888) against the
and on 26th Septer
default. Part of
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land after fully paying and satisfying the amount of the prior debts detailed at the foot of the judgment [436] *viz*, the bond in favour of Murli and Sarnam Singh, dated 30th August, 1872, and the bond in favour of Sita Ram and Sri Gopal dated the 21st July, 1871

In the month of April, 1893, the appellant Sri Gopal as sole plaintiff (Sita Ram being then dead, and all the securities in favour of Ishur Das being then vested in him alone) brought this present action (No 67 of 1893) to enforce the bond of 7th February, 1874, against the mortgagors, the respondents Bechai Lal and Musammat Janki, and the respondents Murli and Sarnam Singh, all of whom were made defendants The defendants Bechai Lal and Musammat Janki pleaded *inter alia* that in the action No 150 of 1888 the parties represented by the appellant did not set up the bond of 7th February, 1874, and that therefore this action was barred by section 13 of the Code of Civil Procedure, and this view was sustained by the Subordinate Judge of Aligarh in 1893, by the District Judge in 1894, and by the High Court of the North Western Provinces in 1897 The latter Court said in its judgment :—" In our opinion not only might the representatives of Ishur Das have pleaded their mortgage of the 7th February, 1874, but they ought to have done so, and if they had done so no decree for sale could have been made without these rights being protected by the decree They not having done what they might and ought to have done as an answer *pro tanto* to the suit of Sri Ram, we are of opinion that section 13 of the Code of Civil Procedure applies '

The materiality of the mortgage here referred to is evident If Musammat Janki's claim had succeeded to its full extent she would have established her priority over all the four bonds in question As it was, she only established her claim subject to the specified securities of Sri Gopal and Murli and Sarnam Singh, which did not include the bond now sued on The appellant would have been entitled to plead and prove this bond as a bar to any decree being made for sale except subject to that bond Had he done so, it would have been included in the " details of liens " at the end of the decree, and the right of Musammat Janki would have been expressly subordinated to that charge also The judgments are clearly right and the appeal would have been unarguable, but for an ingenious point [437] raised by the appellant's Counsel He set up at the bar (notwithstanding the statement in the appellant's case that no facts are in dispute) that all the Judges were mistaken in saying that this bond of February, 1874, was not set up by the appellant · that in fact it was set up, and that the decree was wrong in not dealing with it But that decree might have been corrected, if not in accordance with the judgment or appealed against, if both judgment and decree were wrong and neither of these courses having been adopted their Lordships cannot go behind it No pleadings in that action are before the Court, except the statement of Sita Ram, which does refer to the " bonds " (without saying what bonds) in his favour. It does indeed appear from the reasons given by the learned Judge that the existence of Sri Gopal's three bonds was within his knowledge, but for some reason the two later bonds were dropped, no issue was directed about either of them, although an issue (2) was directed as to the bond of 21st July, 1871, and the parties were apparently content that they should not be dealt with by the decree That

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24 A. 439=
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After the passing of this bye-law one Bal Kishan, a servant of one of the residents of Naini Tal, was found on the Upper Mall, not in attendance on his master, but apparently going on a message by his master's order. Bal Kishan was prosecuted under section 132 of the Municipalities Act and fined Rs. 15. His appeal was dismissed by the Sessions Judge, and he accordingly preferred an application in revision to the High Court.

Pandit *Sundar Lal*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*) for the Crown.

KNOX, J.—One Bal Kishan, a servant, has been convicted of an offence falling under Rule No. 10 of Rules under section 128, clause (*c*) of the N.-W. P. and Oudh Municipalities Act, 1900, and been sentenced to pay a fine of Rs. 15. I am asked to revise this order, upon the ground that the Municipal Board had no authority in law under section 128, clause (*c*), to frame a rule of this kind; further, because the rule was not necessary for the prevention of danger or grave inconvenience to the public; and thirdly, because the bye-law is unreasonable in itself. The bye-law in question runs as follows:—"No coolie, whether bearing loads or not, no servant, except in attendance on his master, and no prostitute shall use the Upper North Mall at any time." The [441] facts of the case are not questioned. They are very briefly that the petitioner, a servant, and not in attendance on his master, was found at 2 P.M., on the 13th August, 1901, walking with a letter towards Talli Tal along the Upper North Mall.

Now the power given to Municipalities under section 128, clause (*c*) of the N.-W. P. and Oudh Municipalities Act, 1900, is undoubtedly a very large and wide power, and therefore one to be exercised with great discretion. The Board is under it authorized to make rules for prohibiting any description of traffic in the streets of Naini Tal, where such prohibition appears to the Board to be necessary for the prevention of danger or grave inconvenience to the public. It is contended on behalf of the Board that as the law has made them sole arbiters of what is necessary for the prevention of danger or grave inconvenience to the public, and that as they consider the use of the Upper North Mall by a servant, except when in attendance on his master, and at any hour of the day and night, a matter of grave inconvenience to the public, there is nothing further to be said. If the matter be one of grave inconvenience, the proof of it must be an easy matter. It does not appear from the judgment, nor from any arguments addressed to me, wherein consists the grave inconvenience to the public of servants using the Upper North Mall. No inconvenience, grave or otherwise, was shown even in argument, nor is it apparent at first sight wherein the grave inconvenience lies. It is intelligible that strings of coolies bearing loads may be inconveniences, and might be, under certain circumstances, grave inconveniences, to the public. But it is difficult to distinguish between the case of a servant carrying a letter, as in the present instance, and a person of similar position in life, say a carpenter or a blacksmith passing along the Upper North Mall. The servant would be under the bye-law, if it be a good bye-law, committing an offence: the independent carpenter or blacksmith would be committing none. Both are or are not doing acts of a precisely similar nature. All bye-laws and rules of the same nature have to be very carefully construed, and the invariable rule of law

to be a bar to his suit in the two first Courts The Court of appeal ex pressed some doubt whether that was correct There might have been a nice question to be argued, but the appellant's Counsel did not open it, and did not even read the section to the Committee

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Their Lordships will humbly advise His Majesty that the appeal should be dismissed The appellant must pay the costs of the respon dents Bechai Lal and Musammat Janki, who alone defended this appeal

Appeal dismissed

24 A 429=6 C W N 889=4 Bom L R 827=29 I A 118=8 Sar 293

Solicitors for the appellant—Messrs *Pyke* and *Parrott*

Solicitors for the respondents (5) and (6)—Messrs *Thomson & Co*

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24 A 439 (=22 A W N 117)

REVISIONAL CRIMINAL

Before Mr Justice Knox

EMPEROR v BAL KISHAN * [29th April, 1902]

Act (Local) No 1 of 1900 (N W P and Oudh Municipalities Act) sections 128 (c), 132 *—Municipal Board, powers of—Bye law—Bye law held to be unreasonable and its enforcement refused*

The English law as to the necessity of bye laws being reasonable is applic able to bye laws framed in the exercise of their statutory powers by Municipal Boards in India

The Municipal Board of Naini Tal passed a bye law under the powers con [illegible] the fol [illegible] servant [illegible] he upper [illegible] e of the [illegible]

Held that, as regards the words "no servant, except in attendance on his master', this was under the circumstances an unreasonable bye law and the Court declined to give effect to it

[Ref 52 I C 785, 61 I. C. 129]

WITHIN the limits of the Naini Tal Municipality were two roads running alone the north side of the lake parallel with each other, but at slightly different levels The upper road was a fairly broad metalled road, on the north side of which were shops and houses, the lower was more of the nature of a foot-path [440] close down by the margin of the lake The upper road was in fact used chiefly by the better classes of the inhabitants of the station, the lower road mostly by coolies The two roads were known by the names respectively, of the Upper and Lower North Mall The Municipal Board of Naini Tal, purporting to act under the power conferred upon it by section 128, clause (c), of the N-W P and Oudh Municipalities Act, 1900,† passed, with the view of regulating traffic on the two roads above referred to, a bye-law, the material portion of which was as follows :—" No coolie, whether bearing loads or not, no servant, except when in attendance on his master, and no prostitute shall use the Upper North Mall at any time '

* Criminal Revision No 136 of 1902

† This section (so far as is material to the present case) runs as follows —128 Any Board may, by rules—

(c) Provide for the regulation or prohibition of any description of traffic in the streets, where such regulation or prohibition appears to the Board to be necessary for the prevention of danger or grave inconvenience to the public

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After the passing of this bye-law one Bal Kishan, a servant of one of the residents of Naini Tal, was found on the Upper Mall, not in attendance on his master, but apparently going on a message by his master's order. Bal Kishan was prosecuted under section 132 of the Municipalities Act and fined Rs. 15. His appeal was dismissed by the Sessions Judge, and he accordingly preferred an application in revision to the High Court.

Pandit *Sundar Lal*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*) for the Crown.

KNOX, J.—One Bal Kishan, a servant, has been convicted of an offence falling under Rule No. 10 of Rules under section 128, clause (*c*) of the N.-W. P. and Oudh Municipalities Act, 1900, and been sentenced to pay a fine of Rs. 15. I am asked to revise this order, upon the ground that the Municipal Board had no authority in law under section 128, clause (*c*), to frame a rule of this kind; further, because the rule was not necessary for the prevention of danger or grave inconvenience to the public; and thirdly, because the bye-law is unreasonable in itself. The bye-law in question runs as follows:—"No coolie, whether bearing loads or not, no servant, except in attendance on his master, and no prostitute shall use the Upper North Mall at any time." The [441] facts of the case are not questioned. They are very briefly that the petitioner, a servant, and not in attendance on his master, was found at 2 P.M., on the 13th August, 1901, walking with a letter towards Talli Tal along the Upper North Mall.

Now the power given to Municipalities under section 128, clause (*c*) of the N.-W. P. and Oudh Municipalities Act, 1900, is undoubtedly a very large and wide power, and therefore one to be exercised with great discretion. The Board is under it authorized to make rules for prohibiting any description of traffic in the streets of Naini Tal, where such prohibition appears to the Board to be necessary for the prevention of danger or grave inconvenience to the public. It is contended on behalf of the Board that as the law has made them sole arbiters of what is necessary for the prevention of danger or grave inconvenience to the public, and that as they consider the use of the Upper North Mall by a servant, except when in attendance on his master, and at any hour of the day and night, a matter of grave inconvenience to the public, there is nothing further to be said. If the matter be one of grave inconvenience, the proof of it must be an easy matter. It does not appear from the judgment, nor from any arguments addressed to me, wherein consists the grave inconvenience to the public of servants using the Upper North Mall. No inconvenience, grave or otherwise, was shown even in argument, nor is it apparent at first sight wherein the grave inconvenience lies. It is intelligible that strings of coolies bearing loads may be inconveniences, and might be, under certain circumstances, grave inconveniences, to the public. But it is difficult to distinguish between the case of a servant carrying a letter, as in the present instance, and a person of similar position in life, say a carpenter or a blacksmith passing along the Upper North Mall. The servant would be under the bye-law, if it be a good bye-law, committing an offence: the independent carpenter or blacksmith would be committing none. Both are or are not doing acts of a precisely similar nature. All bye-laws and rules of the same nature have to be very carefully construed, and the invariable rule of law

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24 A 440—
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is that they are to be construed in favour of the subject The rule of law prevailing in England that a bye-law may be examined in order to discover whether it is reasonable in [442] itself is a very sound rule, and no authority has been shown to me confining such a construction to bye laws in England This is indeed conceded by the argument of the counsel for the Municipality, in that he contended that the present bye law is not an unreasonable one After fully considering all the arguments that have been addressed to me, it appears to me that the bye law is not a reasonable one The distinction made between a person who is a servant and a person of similar degree who is not a servant is both invidious and unreasonable It would also appear that the bye law, if strictly construed, would lead up to impossibilities There are shops and places which abut immediately on the Upper North Mall How is a servant at point *A*, abutting upon the Mall, to proceed to point *B*, similarly abutting on the Upper North Mall, without using the Upper North Mall for the purpose? The only answer given was, that the spirit of the bye law must be looked to, not the strict letter This Court has held on previous occasions that where such grave power as this is entrusted to Municipalities, it behoves them to be extremely careful in framing their bye laws so as to leave no room for doubt as to what is meant by them

There are certain remarks in the judgment which I cannot pass over as unimportant The learned Magistrate who tried the case speaks of the case as being a trivial one, and adds, "but where it is well-known that defiance has been and is being offered to these rules, some fine must be imposed which would be held by the accused to be a real punishment These remarks are distinctly out of place in a case where the evidence discloses no intention to act in defiance of the law The act of the servant is in itself a harmless act, there is no evidence that he or any one else acted contumaciously There is no presumption in law in favour of the existence of contumacy or wilful defiance The learned Magistrate was wrong in making any such presumption It was suggested that the case was a test case If it be so, there is no defiance of law in instituting a test case

I hold that the present rule is one which, as it stands, the Board had no authority to pass It seems to me doubtful whether the passing of a servant along a road falls within the term [443] 'traffic This point was, however, not argued, and my judgment proceeds upon the ground that grave inconvenience to the public has not been shown, and the rule, as it stands, is an unreasonable one I confine my judgment to the immediate matter before me, viz, the using the Upper North Mall by a servant not in attendance on his master No other point in the bye-law arises for decision I accordingly set aside the conviction and the fine, and direct the latter to be refunded

1902
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REVISIONAL CRIMINAL.

24 A. 443=
22 A. W. N.
111.

24 A. 443 (=22 A. W. N. 111).

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF BEHARI LAL. *
[29th April, 1902].

Criminal Procedure Code, section 145—No decision come to by Magistrate as to party in possession—Application for revision at instance of party who could not in his own right be entitled to immediate possession—Practice.

Held that where a Magistrate, after entertaining proceedings under section 145 of the Code of Criminal Procedure, had declined to make any order declaring one or other of the contending parties in possession, the High Court would not interfere in revision at the instance of a person who, though apparently the next reversioner to the estate, could for the time being have no possible right on his own behalf to present possession. *Laldhari Singh* v. *Sukhdeo Narain Singh* (1) and *Anesh Molla* v. *Ejaharuddi Molla* (2), distinguished.

[Ref. 15 Cr. L. J. 708=26 I. C. 156.]

THIS was an application in revision arising out of certain proceedings under section 145 of the Code of Criminal Procedure held before the Joint Magistrate of Moradabad. The facts as found by the Magistrate were as follows :—One Har Sahai Patak died, leaving a widow, but apparently no direct male heir. After his death a dispute arose about mutation of names. This ended in a compromise, whereby it was settled that the widow Musammat Chunno, should be entered in the khewat as owner for her lifetime, and that Behari Lal the grandson of the deceased should be entered as her manager. It was also clearly laid down that Musammat Chunno had not reserved the right to remove Behari Lal from his possession. Musammat Chunno granted leases of certain villages belonging to the estate to Ram Sarup and others, and this action of hers led to the [444] initiation, at the instance of Behari Lal, of proceedings under section 145 of the Code of Criminal Procedure. The Magistrate relying upon certain rulings of the High Court at Calcutta declined to make any order on these proceedings, holding that such proceedings were bad *ab initio* as having been entered upon between parties who had not an actual proprietary right in the property in dispute.

Against this order of the Magistrate Behari Lal applied in revision to the High Court.

Mr. *W. M. Colvin*, for the applicant.

Mr. *B. E. O'Conor* and Munshi *Gukul Prasad*, for the opposite parties.

BLAIR, J.—This is an application to revise an order of a Magistrate made in proceedings under Chapter XII of the Code of Criminal Procedure. The circumstances are these. Har Sahai Patak, the owner of the property in dispute, died, leaving him surviving a widow and two sons of daughters. It is not disputed that under the ordinary law of inheritance the widow would take a life estate, and the daughter's sons' interest would open up upon her decease. It is alleged that the deceased, Har Sahai Patak, made a will, the validity and the provisions of which became the subject of dispute between the widow of Har Sahai and Behari Lal and others. It was concluded by a compromise, which defined the relations of the parties to be established from that moment. It provided that the widow should retain her life estate, but that Behari

* Criminal Revision No. 229 of 1902.

(1) (1900) I. L. R. 27 Cal. 892. (2) (1901) I. L. R. 28 Cal. 446.

is that they are to be construed in favour of the subject The rule of law prevailing in England that a bye-law may be examined in order to discover whether it is reasonable in [442] itself is a very sound rule, and no authority has been shown to me confining such a construction to bye laws in England This is indeed conceded by the argument of the counsel for the Municipality, in that he contended that the present bye law is not an unreasonable one After fully considering all the arguments that have been addressed to me, it appears to me that the bye law is not a reasonable one The distinction made between a person who is a servant and a person of similar degree who is not a servant is both invidious and unreasonable It would also appear that the bye law, if strictly construed, would lead up to impossibilities There are shops and places which abut immediately on the Upper North Mall How is a servant at point *A*, abutting upon the Mall, to proceed to point *B*, similarly abutting on the Upper North Mall, without using the Upper North Mall for the purpose? The only answer given was, that the spirit of the bye law must be looked to, not the strict letter This Court has held on previous occasions that where such grave power as this is entrusted to Municipalities, it behoves them to be extremely careful in framing their bye laws so as to leave no room for doubt as to what is meant by them

1902 APRIL 29 — REVISIONAL CRIMINAL — 24 A 439 = 22 A W N 117

There are certain remarks in the judgment which I cannot pass over as unimportant The learned Magistrate who tried the case speaks of the case as being a trivial one, and adds, "but where it is well known that defiance has been and is being offered to these rules, some fine must be imposed which would be held by the accused to be a real punishment These remarks are distinctly out of place in a case where the evidence discloses no intention to act in defiance of the law The act of the servant is in itself a harmless act there is no evidence that he or any one else acted contumaciously There is no presumption in law in favour of the existence of contumacy or wilful defiance The learned Magistrate was wrong in making any such presumption It was suggested that the case was a test case If it be so, there is no defiance of law in instituting a test case

I hold that the present rule is one which, as it stands, the Board had no authority to pass It seems to me doubtful whether the passing of a servant along a road falls within the term [443] "traffic This point was, however, not argued, and my judgment proceeds upon the ground that grave inconvenience to the public has not been shown, and the rule, as it stands, is an unreasonable one I confine my judgment to the immediate matter before me, *viz*, the using the Upper North Mall by a servant not in attendance on his master No other point in the bye law arises for decision I accordingly set aside the conviction and the fine, and direct the latter to be refunded

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APPELLATE
CIVIL.

24 A. 446=
22 A. W. N.
119.

THE pedigree of the family to which both the plaintiff and the defendants belonged was as follows:—

[446] Bishan Singh.

- Ajit Singh.
  - Bhawani Singh.
  - Pitam Singh.
    - Umrao Singh.
    - Bhup Singh.
      - Kehri Singh= Dhan Kunwar, (defendant).
        - Lachman Singh (?) (defendant).
- Sundar Singh.
  - Parbat Singh.
  - Shiv Shankar Singh.
    - Daya Ram.
      - Zorawar Singh.
      - Harnam Singh.
      - Sultan Singh.
      - Balwant Singh. (defendant).
    - Daryao Singh.
      - Chaturbhuj Singh (defendant).
    - Chet Singh.
      - Tikam Singh, (plaintiff)
      - Sher Singh, (defendant).
      - Megh Singh.

The plaintiff, Tikam Singh, in his suit asked for a declaration that the defendant Lachman Singh was not the son and heir of Kehri Singh, deceased, and that the plaintiff was one of the nearest reversionary heirs of the said Kehri Singh.

The facts on which the plaintiff's case was based were as follows:—Kehri Singh died on the 15th of May, 1890, leaving the defendant, Dhan Kunwar, his widow, him surviving. The defendant, Lachman Singh, who was the son of Dhan Kunwar, was born on the 7th of May 1891, that is, 357 days after the death of Kehri Singh. The plaintiff alleged on that ground alone that Lachman Singh could not be the son of Kehri Singh, and further alleged that the moral conduct of Dhan Kunwar during the lifetime of Kehri Singh was doubtful and that after the death of Kehri Singh she had become more or less notoriously immoral. The defendant, Dhan Kunwar, had been married to Kehri Singh for ten years at the time of his death, and had had no children during that period. She stated that Lachman Singh was the son of Kehri Singh her husband, the last intercourse [447] with whom she alleged to have taken place some eight or ten days before his death, and she denied any intimacy with any one else except her husband.

The Court of first instance (Subordinate Judge of Agra) found upon the medical authorities and the evidence that the interval between the death of Kheri Singh and the birth of Lachman Singh did not render it impossible for Lachman Singh to be the lawfully begotten son of

Lal should manage the property on her behalf, not, however, taking any steps with regard to it without her consent The Magistrate made the orders, having received information that a dispute dangerous to the public peace was likely to arise in respect of the possession of the property These proceedings were set on foot by the present applicant in revision, Behari Lal The Magistrate upon hearing the parties came to the conclusion that he could pass no orders, and accordingly no order was passed deciding the possession of either one side or the other of the disputants He held that Behari Lal had in effect no *locus standi* to claim possession at all He was an agent and manager, and had in himself no right to possession whatever It is true that he had a reversionary [445] interest, but that is a very different thing from being a person interested in the present possession of the property It seems to me that Behari Lal is not entitled to be heard in revision, upon the ground that he is not a person concerned in the dispute as to possession Whatever present right he has is a purely derivative one, and comes to him as agent for the widow, just as much as if there had been no compromise at all, and he had been chosen by the widow to act for her

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Two cases decided by the Calcutta High Court were cited, one that of *Laldhari Singh* v *Sukhdeo Narain Singh* (1) and the other of *Anesh Mollah* v *Ejaharuddi Mollah* (2) I think by both those cases the revisional jurisdiction of that Court has been extended to an extent which is beyond the practice of this Court That, however, is unnecessary for me to decide, as they are not in point In this case it is enough for me to say that the applicant Behari Lal has no *locus standi* in respect of the proceedings For these reasons I reject his application

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24 A 445=(22 A W N 110)

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Burkitt

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TIKAM SINGH (*Plaintiff*) v DHAN KUNWAR AND OTHERS (*Defendants*) *
[1st May, 1902]

Evidence—Legitimacy—Possible length to which the period of gestation may be protracted discussed

[illegible]

[Ref. 38 Mad 466 14 M L T 447]

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* First Appeal No 227 of 1899 from a decree of Munshi Rajnath Prasad, Subordinate Judge of Agra, dated the 16th November, 1899

(1) (1900) I L. R. 27 Cal 892. (2) (1901) I L. R 28 Cal 446.

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legitimum tempus pariendi. Each case in which legitimacy is contested must be decided on its own merits. Dr. Playfair in his valuable treatise on the Science and Practice of Midwifery, at p. 188, 9th edition, sums up his conclusion upon this question as follows:—

"On the whole, it would hardly be safe to conclude that pregnancy can go more than three or four weeks beyond the average time. This conclusion is justified by the cases we possess in which pregnancy followed a single coitus, the longest of which was 295 days." He refers as examples of protraction of pregnancy to four instances recorded by Simpson, in which pregnancy extended [449] respectively to 336, 332, 319 and 324 days after the cessation of the last menstrual period; but he points out that in these, as in all cases of protracted gestation, there is the possible source of error that impregnation may have occurred just before the expected advent of the next period. Making an allowance, however, for this, he points out that even then we have a number of days much above the average, and admits that such cases of protracted pregnancy may be more common than is generally supposed. In the present case Lachman Singh was admittedly born 365 days after the last coitus with her husband alleged by his mother that is nearly three months after the *legitimum tempus pariendi* had elapsed. Dr. Taylor in his well known work on Medical Jurisprudence, at p. 265, Vol. 2, 4th edition, writes as follows:—"In works on midwifery will be found authentic reports of cases in which gestation continued to the forty-first, forty-second, forty-third and even to the forty-fourth week. Murphy regards 301 days or forty-three weeks as the average limit of gestation (Obstet. Rep., p. 4). Lee met with a case in which he had no doubt that the pregnancy lasted 286 days, the labour did not take place until forty-one weeks after the departure of the husband of the lady for the West Indies (Med. Gaz., Vol. 31, p. 917). William Hunter met with two instances in which gestation was protracted until the forty-second week. Montgomery met with a case in which delivery did not ensue until between the forty-second and forty-fourth weeks (Med. Gaz., Vol. 19, p. 646)." And again he writes:—"There is no doubt a limit to gestation, but it is not in our power to fix it, hence we find obstetric writers of repute adopting periods which have no point of agreement among themselves. Some stop short at 280 days, others like Reid fix the maximum yet known at 293 days. Murphy allows from his experience at least 324 days, and Meigs considers that gestation may be continued to twelve months or 365 days." Dr. Lyon in his work on Medical Jurisprudence for India sums up the matter thus:—"On the whole, therefore, as regards the question, what is the longest period which, in natural human gestation, may intervene between coitus and delivery—the form which the question under consideration assumes for forensic purposes—it may be stated that—

[450] (1) it may be regarded as proved that this may be 296 days;

(2) most authorities agree in considering that the interval may be as long as 44 weeks or 308 days; indeed in the Gardner Peerage case several eminent obstetricians gave it as their opinion that the interval might extend to, at any rate, 311 days;

(3) some authorities consider that the interval may extend to the forthy-sixth week—315 to 322 days."

Kehri Singh, and that there was no sufficient evidence that Dhan Kunwar had become unchaste before the death of her husband or that she had been guilty of misconduct subsequently The suit was therefore dismissed

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From this decree the plaintiff appealed to the High Court

Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the appellant

Mr *D N Banerji* (for whom Dr. *Satish Chandra Banerji*), for the respondents

STANLEY, C J and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Agra dismissing the plaintiff s claim for a declaration that the defendant, Lachman Singh, *alias* Mahar Singh, was not the son of one Thakur Kehri Singh, deceased The plaintiff claimed as one of the reversionary heirs of Thakur Kehri Singh, who died on the 15th May, 1890, leaving the defendant, Thakurain Dhan Kunwar, his widow, him surviving The defendant, Lachman Singh, who is the child of Thakurain Dhan Kunwar, was born on the 7th May, 1891, that is 357 days after the death of Thakur Kehri Singh The plaintiff alleges that Lachman Singh is not the child of Kehri Singh, and charges that the moral conduct of Thakurain Dhan Kunwar during the lifetime of her husband was doubtful, but that after his death she became immoral, and contracted improper intimacy with several persons whom we shall presently mention The learned Subordinate Judge found that Lachman Singh was the legitimate son of Thakur Kehri Singh, and consequently dismissed the plaintiff's suit He held upon the medical authorities and evidence that pregnancy might be protracted for the period which elapsed from the death of Kehri Singh to the birth of Lachman Singh, and that there was nothing in the evidence to lead him to suppose that Dhan Kunwar had, immediately after the [448] death of her husband, become unchaste The evidence of misconduct on the part of Dhan Kunwar adduced by the plaintiff he held to be unsatisfactory and unreliable From this decree the plaintiff has appealed upon the ground that in view of the interval which elapsed between the death of Kehri Singh and the birth of Lachman Singh, Lachman Singh could not be the son of Kehri Singh, and that a finding to the contrary was against the weight of the evidence

Thakurain Dhan Kunwar was cited by the Court for examination on the 4th January, 1896, at or about the time of settlement of issues, when she stated that except Lachman Singh she had no other issue by Kehri Singh, but that she had had miscarriages on two or three occasions She says that there was coition for the last time between herself and her husband 8 or 10 days before his death, and that he was in a good state of health at that time that she never had connection with any man except her husband, and that Lachman Singh was begotten by him She did not tender herself for examination or cross examination on the trial of the suit, notwithstanding that serious allegations of misconduct were made against her by several witnesses who were examined on behalf of the plaintiff

The only question for our determination is whether or not Lachman Singh is the son of Kehri Singh The answer to this question depends upon the weight which ought to be attached to the scientific and other evidence which has been given According to the law in England and America, there is no period defined beyond which gestation cannot be protracted, although a period of 280 days appears to be accepted as the

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than four persons who were in her service from time to time, namely, Durga Prasad, Bhulan Singh, Nasrat, and Bairi Singh. The defendants did not examine any of these persons. Nasrat was in Court at the trial, but was not examined. One Chameli, who had been in the service of Kehri Singh, and was also his mistress, deposed that she remained in the service of Thakurain for five or six years after the death of Kehri Singh. She says that the Thakurain had the usual monthly course twice after the death of Kehri Singh. This evidence was given with [452] the object of showing that at the time of her husband's death she was not pregnant. She also said that she, at the bidding of the Thakurain, used to invite the four persons whom we have mentioned to the room of the Thakurain, and that they used to stay with her in that room. Her suggestion is that these persons had improper intimacy with the Thakurain, and thus Luchman Singh is the son of one of them. She is corroborated in her story by a witness Hardeo, who deposed that Bhulan Singh, Durga Prasad and Nasrat slept at night in the Thakurain's house. If the evidence of these witnesses be reliable, it is difficult to believe in the legitimacy of the defendant Lachman Singh. The learned Subordinate Judge discredited the evidence of Chameli and did not believe her statements, saying that she was herself a half prostitute and a dismissed servant of the Thakurain. If she was a woman of a loose character there is this to be said, that the Thakurain, retained a woman of such character in her service for a number of years, both before and after her husband's death, which would not be to her credit. The Subordinate Judge seems to have considered that the evidence of Chameli, that the four persons named by her were permitted to go inside the zenana, was true, for he excuses this by saying that "her (Dhan Kunwar's) husband being dead and there being no male member in her family to look after her affairs, and the collateral heirs of her husband not being on good terms with her, it is not suspicious if she being in greater need of their services than in the lifetime of her husband, permitted them to come inside the zenana quarters." Two servants of the Thakurain, namely, Musammat Naulo and Musammat Kesar, contradicted the evidence of Chameli in some particulars, but we are not disposed to attach much importance to their evidence. A witness of the name of Kundan, who is in the service of the Thakurain, denied that any male person was allowed to go inside the female apartments. It is a remarkable thing, however, that not one of the four persons who were mentioned by Chameli as having visited and stayed at night with the Thakurain in her room was examined on behalf of defendants to deny the allegations made against them. Nasrat was present in Court, as we have said, and yet he was not called as a witness. Besides this [453] the Thakurain herself did not venture into the witness-box to deny the charges so made against her. It is true that she was examined by the Court at the time of the settlement of the issues, and that she then denied that she had improper familiarity with any person. This was, however, before the evidence of Chameli had been given, and she was not and could not be subjected to any cross-examination. It is difficult to understand how it came about, if her case be true, that she did not go into the witness-box and categorically deny the charges made by Chameli, and that she did not produce the persons who were alleged to be her paramours to corroborate her in her denial of misconduct.

The question for us to determine is not whether it is within the

These then are the limits assigned by the best medical experience We gather from the foregoing that the utmost which can be said is that it is not outside the bounds of possibility that gestation may be protracted for a period of 365 days, but that so protracted a period of gestation is in the highest degree improbable A Miss Yerbury, who is an M D, and who has been in charge of the Maternity Hospital at Agra for nine years, was examined in this case, and she expressed her opinion that the longest period of gestation is from 300 to 308 days Dr Wilcocks, Civil Surgeon of Agra, stated that the longest periods of gestation that have been admitted in America were 317 and 308 days, and that the ordinary period of gestation is 278 days He would say that any period exceeding 317 days for gestation was impossible Dr Amullya Ratan Bysack, who is an Assistant Surgeon, and has been a lecturer in the Medical School at Agra from the year 1888, deposed that to his knowledge, personal or acquired by study, it is not possible that a legitimate child can be born to a woman 350 days subsequent to the death of her husband On the other hand, two native gentlemen who practise as physicians have been examined on behalf of the defendant, and have deposed that pregnancy may be extended for more than a period of 12 months One of them, Gauri Shankar, says that he treated a woman whose pregnancy lasted for more than 12 months, namely the wife of one Hira Lal, who gave birth to a child 14 months after her pregnancy He also mentioned the case of the wife of one Ude Kachhi, who was under his treatment, and also remained pregnant for more than twelve months In cross examination he states his means of knowledge in the case of the wife of Hira Lal as follows — [451] "I came to know from the woman that the child had been born in 14 months," and then "I came to know from the child's father that it had been born in 14 months from the day of conception' In the other case he appears to have derived his knowledge from a statement made by the father Little weight can be attached to examples of protracted pregnancy so loosely verified The other witness, one Khurshaid Ali, said that a child might be born "after it had remained in the womb *for two years or more*' and that one Thakur Daryao Singh, living in the district of Aligarh, had a son after one year and nine months He also mentioned other instances of protracted pregnancy In cross examination he said that he came to know from Daryao Singh that his wife was pregnant for 12 months, and that he had mentioned this fact to him 16 years ago He did not know the name of the Kachhi whom he referred to as having had a son after 13 months, and he admitted that the mother was not under his treatment In another case which he gave as an illustration of protracted gestation, he says that it was through the mother that he had ascertained that she had been with child for 14 months Such evidence as this appears to us to be of little value, if it is not absolutely worthless Now having regard to the fact that no child was born alive to Kehri Singh by his wife Takurain Dhan Kunwar and to the fact that Lachman Singh was not born until the period of 357 days had elapsed from the death of Kehri Singh, and 365 days at least from the last coitus, the story told by Dhan Kunwar appears to us highly improbable

The case, however, does not rest with the medical evidence Positive charges of misconduct have been made against Dhan Kunwar by the plaintiff She is accused of having misconducted herself with no less

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REVISIONAL CRIMINAL.

24 A. 454= 22 A. W. N. 123.

of the district of Ghazipur, being the owner of a pistol which was in need of repairs, gave the pistol to the son of one Harpal Rai, that he might take it into the neighbouring town of Zamania and have it repaired there. The pistol was passed on to Harpal Rai, who was taking it to Zamania, when he was arrested and charged with an offence under section 19 of the Arms Act, 1878. He was convicted by a Magistrate of the first class and sentenced to pay a fine of Rs. 5. Harpal Rai applied in revision to the Sessions Judge, who reported the case to the High Court for orders under section 438 of the Code of Criminal Procedure, with a recommendation that the conviction and sentence should be quashed, being of opinion that, having regard to the case of *Alexander William* (1), the conviction was erroneous.

On this reference the Assistant Government Advocate (Mr. *W. K. Porter*) appeared and laid before the Court to subsequent cases—*Queen-Empress* v. *Bhure* (2) and *Queen-Empress* v. [455] *Tota Ram* (3) in which the case of *Alexander William* (1) had been considered.

The following order was passed on the reference :—

KNOX and BLAIR, JJ.—Harpal Rai has been found guilty of an offence under section 19 of the Arms Act. The learned Magistrate who has convicted him found on the evidence that on January the 9th one Mr. Colin Nichols gave a pistol to the son of Harpal Rai, and asked him to get it repaired for him in Zamania. As Harpal Rai was taking the pistol to the blacksmith in accordance with his instructions, he was charged with the offence of going armed with the aforesaid pistol. This Court has pointed out, first, in the case of *Queen-Empress* v. *Alexander William* (1) and again in the case of *Queen-Empress* v. *Bhure* (2) and again in *Queen-Empress* v. *Tota Ram* (3) that the mere temporary possession, without a license, of arms for purposes other than their use as such is not an offence within the meaning of section 19 of the Indian Arms Act of 1878. The learned Magistrate apparently thought that the principle that underlies these decisions was confined to the case of a servant carrying his master's gun, and had no application to a friend performing the same office for a friend. The essential of the offence is the going armed, that is, carrying a weapon with the intention of using it as a weapon when the necessity or opportunity arises.

It is difficult to understand how a pistol which was in need of repairs could be seriously looked upon either as a weapon of offence or defence.

Another difficulty which appears to have weighed with the learned Magistrate is that if this principle be accepted, the Arms Act would become a dead letter for a district like Ghazipur.

The learned Assistant Magistrate is bound to follow the rulings of this Court, and not to hesitate because he conceives that their results will be, in his opinion, disastrous in some direction or other.

We set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

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(1) Weekly Notes, 1891, p. 208

(2) Weekly Notes, 1892, p. 221.

(3) Weekly Notes, 1894, p. 82.

bounds of possibility that Lachman Singh was the child of Kehri Singh, but whether upon the evidence, and having regard to the probabilities, the reasonable finding upon the issue of legitimacy is one in favour of the defendants Now we have the fact that the defendant, Dhan Kunwar, had been married to her husband for ten years and had not had any child, that the defendant Lachman Singh was born 357 days after the death of Kheri Singh, and 365 days at least after the last coitus, that is, nearly three months after the ordinary period of gestation had elapsed, that grave charges of immorality were made against the Thakurain, which were not refuted by her or by the parties implicated In the face of these facts it is difficult to find any ground for accepting the truth of the defendant's strange and improbable story We have come to the conclusion that the finding of the lower Court is entirely erroneous, and that the only finding consistent with the evidence and the probabilities of the case is that the defendant Lachman Singh is not the son of Kehri Singh The evidence leads irresistibly to this conclusion We accordingly so find, allow the appeal, set aside the decree of the lower Court, and declare that the defendant Lachman Singh is not the son and heir of Thakur Kehri Singh, deceased, and that the plaintiff is one of the nearest reversionary heirs of Kehri Singh. The defendants Thakurain Dhan Kunwar and Lachman Singh must pay the costs of this appeal in this Court and also the costs of the suit in the lower Court

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Appeal decreed

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24 A 454 (=22 A W N 123)

[454] REVISIONAL CRIMINAL

Before Mr Justice Knox and Mr Justice Blair

EMPEROR v HARPAL RAI,* (5th May, 1902)

Act No XI of 1878 *(Indian Arms Act), section* 19—" *Going armed* —*The mere carrying of arms for purposes other than their use as such not an offence*

One *C N*, a person entitled to possess and use fire arms, gave a pistol to an acquaintance, who was not entitled to possess and use fire arms, asking him to take it and get it repaired in a neighbouring town This acquaintance gave the pistol to his father Harpal Rai, who was taking it into the town to get it repaired, when he was arrested, and charged with an offence under section 19 of the Indian Arms Act, 1878

Held that Harpal Rai was under the circumstances guilty of no offence under the Arms Act

The mere temporary possession, without a license, of arms for purposes other than their use as such is not an offence within the meaning of section 19 of the Arms Act *Queen Empress* v *Alexander William* (1), *Queen Empress* v *Bhure* (2) and *Queen Empress* v *Tata Ram* (3) referred to

[Fol 37 Bom 181=1 Bom Cr Cas 208=14 Bom L R 964=13 Cr L J 860=17 Ind Cas 796, 12 Cr L J 122=9 Ind Cas 720=4 S L R 214 ("going armed'—servant using gun) Ref 5 L B R 83 4 N L R 146=8 Cr L J 406 7 Cr L J 350=148 P L R 1908=6 P R 1908 Cr=14 P W R 1908, 5 L B R 83=10 Cr L J 361=3 Ind Cas 712

THE facts of this case are briefly as follows:

One Mr Colin Nichols, a European British subject, and a resident

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* Criminal Reference No 248 of 1902

(1) Weekly Notes, 1891, p 208
(2) Weekly Notes, 1892, p 221
(3) Weekly Notes, 1894, p 82

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MAY 6.

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24 A. 456= 22 A. W. N. 114.

should be practically allowing the plaintiff to alter his suit for sale into a suit of another and inconsistent character. We fail to follow this argument. Looking to the words in which the relief was couched, we are satisfied that the plaintiff all along asked for a simple money decree, if for any reason the decree against the property mortgaged were to prove ineffectual. No provision has been pointed out to us in the Transfer of Property Act, nor do we know of any, which forbids a simple money decree being granted under circumstances like these. Since hearing the arguments we have been furnished with an unreported case of this Court, Letters Patent Appeal No. 35 of 1901, *Lala Bishun Sarup* v. *Mangal Sen*, decided on the 15th February 1902,* [458] and we find on looking into that case that the view which we now take is shared by two other Judges of this Court.

The decree of the Commissioner of Kumaun should be set aside, and that of the Court of first instance restored with costs in all Courts. Let this be the answer returned to the reference made to us.

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* The judgment in this case was as below :—

BANERJI and AIKMAN, JJ.—This is an appeal under section 10 of the Letters Patent. The suit was brought for sale upon a mortgage. It having been discovered that there was a prior mortgage upon the property, the plaintiff withdrew his claim against the property and asked for a simple money decree. It was contended in the appeal to this Court that the suit was of the nature cognizable in a Court of Small Causes, and therefore no second appeal lay. This contention was repelled by the learned Judge of this Court who heard the appeal, and has been repeated in the appeal before us. We are of opinion that the objection was rightly overruled. The jurisdiction of the Court depends upon the nature of the suit as brought and not upon the character which it ultimately assumes. The suit as brought was clearly one which a Court of Small Causes could not entertain. Therefore a second appeal to this Court did lie. The mortgage upon which the suit was based was made by one Nand Lal, the uncle of the defendant appellant before us, and it was alleged by the plaintiff that Nand Lal and the appellant formed a joint Hindu family, of which Nand Lal was the manager. This allegation was denied by the appellant. The Additional Subordinate Judge of Saharanpur, from whose decree the second appeal to this Court was preferred, did not decide the issue whether Nand Lal and the defendant were or were not members of a joint Hindu family. He was of opinion that as the defendant was the legal representative of Nand Lal, the plaintiff was entitled to a decree for the amount of his claim, and to recover it from the property, if any, left by Nand Lal, deceased. In the judgment now under appeal our learned brother says :—" It has been found that the amount borrowed was borrowed by the deceased uncle as *karta* of the joint Hindu family, consisting of himself and his nephew." This, as we have shown above, is not correct. Our learned colleague goes on to say that, under the circumstances stated by him, the law of agency prevailed. This view is opposed to the ruling in *Muhammad Askari* v. *Radhe Ram Singh*, (1) in which it was held that the manager of a Hindu family is not in the position of an ordinary agent as representing the other members of the family. For the determination of the appeal preferred to this Court it was, in our opinion, necessary to have findings on the issues—(1) Whether Nand Lal and the defendant formed a joint Hindu family, and whether Nand Lal was the managing member of that family. (2) Whether the debt in question was incurred for the purposes of the joint Hindu family. We refer the above issues to the Court of first appeal under section 566 of the Code of Civil Procedure. The Court will try the above issues, taking such additional evidence as may be necessary. On receipt of the findings ten days will be allowed for objections.

(1) (1900) I. L. R. 22 All. 307.

24 A 456 (=22 A W N 114)

[456] MISCELLANEOUS CIVIL

Before Mr Justice Knox and Mr Justice Blair

1902 MAY 6

MISCELLANEOUS CIVIL

24 A 456= 22 A W N 114

SUKHDEO PRASAD (*Plaintiff*) v LACHMAN SINGH AND OTHERS (*Defendants*) * [6th May, 1902]

Civil Procedure Code section 53—Suit on a mortgage for sale or "any other relief to which the plaintiff might be entitled —Subsequent prayer for money decree relinquishing claim for sale

The plaintiff a mortgagee came into Court asking for a decree for sale on his mortgage or 'any other relief to which the plaintiff might be entitled

[Ref 2 L B R 4]

THIS was a reference by the Local Government, based upon an application under section 17 of the Kumaun Rules for revision of an appellate judgment and decree of the Commissioner of Kumaun

The facts of the case sufficiently appear from the order of the Court

Pandit *Moti Lal Nehru*, for the applicant

Babu *Satya Chandar Mukherji*, for the opposite parties

KNOX and BLAIR, JJ —In this case the final decree of the Commissioner has been referred to this Court for report and opinion under rule 17 of the rules for the administration of justice in the Kumaun district The suit in which the decree and judgment were passed was an ordinary suit brought by a mortgagee, asking for the sale of property mortgaged under section 88 of the Transfer of Property Act In his prayer for relief the plaintiff, in addition to the prayer for sale, added a prayer that "any other relief which the plaintiff may be entitled to may be granted, because the mortgaged property is at present under kham management The suit was heard out and had proceeded up to judgment and decree when the plaintiff by a fresh application withdrew his prayer for sale of the mortgaged property and asked for a simple money decree The [457] Court of first instance granted a money decree The Commissioner, however, in appeal set aside the decree, the only reason given in his judgment being that if the plaintiff had originally wanted a money decree he should have sued for it at first It is admitted that the mortgage deed contains the usual covenant for payment in addition to the further covenant that in default of payment proceedings will be taken against the mortgaged property

We do not see on what grounds the prayer for a simple money decree can be refused When the mortgage covenants were entered into both parties contemplated the possibility of a simple money decree, indeed the decree for sale pre supposes and gives specific time for payment of the money, and it is only in default of payment that the sale can be resorted to

One objection was taken by the learned vakil for the opposite party, which was to the effect that if we granted a simple money decree we

* Miscellaneous No 19 of 1902

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22 A. W. N.
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Jadu Rai and the sons of Gajadhar and Birj Lal, defendants. These persons were joined as defendants, as they were members of a joint Hindu family with their father and grandfather, and it was sought to make the mortgaged property, which was the joint family property of all these persons, liable under the mortgage. The Courts below, relying on the ruling of this Court in *Jamna* v. *Nain Sukh* (1) have exempted from liability the shares of the defendant Mul Chand and the grandsons. The plaintiff has preferred this appeal. It is true that the ruling referred to above has not in express terms been overruled; but having regard to the later Full Bench ruling in *Badri Prasad* v. *Madan Lal* (2), and to the ruling of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (3), it can no longer be considered as law. The sons and grandsons of a mortgagor can only dispute the validity of the mortgage either on the ground that the debt was never incurred or is no longer in existence, or that it was tainted with immorality. None of these pleas were set up in this case. The plaintiff was therefore entitled to the decree which he had asked for. We allow the appeal and vary the decree of the Court below by decreeing the plaintiff's claim against the whole of the property comprised in the mortgage, and we fix the 9th of November, 1902, as the date by which the mortgage money must be paid. The appellant will have his costs in this Court and in the Courts below. We direct that our decree be drawn up in accordance with the terms of section 88 of the Transfer of Property Act.

Appeal decreed and decree modified.

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24 A. 461 (=22 A. W. N. 135.)

[461] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

BEHARI LAL (*Plaintiff*) *v.* RAM GHULAM AND OTHERS (*Defendants*).*
[12th May, 1902.]

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 83, 84—*Mortgage—Repayment of money lent—Lender not bound to accept payment by instalments unless he has so agreed.*

Where no stipulation or covenant has been made between the contracting parties as to the repayment of a sum borrowed, the lender is entitled to decline to receive payment of a sum due to him in instalments and he can claim that the whole sum due be paid at one and the same time.

[**Fol.** 38 Mad. 959; **Ref.** 1 N. L. R. 24; **Ref.** 26 M. L. J. 331=1914 M. W. N. 256=15 M. L. T 206=23 I. C. 581.]

ON the 9th of May 1891 Narain Das and others mortgaged to Ganga Ram two shops and a share in mauza Silsanda. On the 9th of March 1892 the mortgagors sold the share in mauza Silsanda to Muhammad Azim Khan and others, and on that sale Rs 660 were left with the vendees to be paid to the mortgagee in discharge of the mortgage of 1891. In March 1893 Ram Ghulam and others brought a suit for pre-emption against Muhammed Azim Khan and his co-vendees, and

* Second Appeal No 830 of 1899, from a decree of Pandit Sri Lal, District Judge of Farrukhabad, dated the 30th of August 1899, modifying a decree of Pandit Rai Indar Narain, Subordinate Judge of Fatehgarh, dated the 13th of April 1899.

(1) (1887) I. L. R. 9 All. 493.
(2) (1893) I. L. R. 15 All. 75.
(3) (1885) I. L. R. 13 Cal. 21.

DEBI DAT v JADU RAI

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24 A 459= 22 A W N. 123

24 A. 459 (=22 A W N 123)

[459] APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

DEBI DAT (*Plaintiff*) v JADU RAI AND OTHERS (*Defendants*) *

[9th May, 1902]

Hindu law—Joint Hindu family—Mortgage—Liability of non-executant members on a mortgage executed by some only of the members of a joint Hindu family—Burden of proof

In a suit for sale on a mortgage of the joint family property executed by the father and three of his sons the plaintiff made defendants besides the executants, the fourth son, who was a minor, and four grandsons, also minors *Held* that the non-executant members of the family were properly arrayed as defendants to the suit, inasmuch as their own interests in the joint family property would be liable under the mortgage, unless they could show either that the mortgage debt was never incurred, or that it no longer subsisted, or that it was tainted with immorality *Jamna* v *Nain Sukh* (1) held to be no longer law *Badri Prasad* v *Madan Lal* (2), and *Nanomi Babuasin* v *Modhun Mohun* (3), referred to

[Dists 29 Mad 200=16 M L J 69=1 M L T 28 (F B) Ref 27 Mad 326=14 M L J 181, 1 A L J 316 28 All 508=3 A L J 274=1906 A W N 117 34 Cal 795=11 O W N 613=5 O L J 569, 10 O C 360 30 All 156=5 A L J 175=1908 A W N 61 31 All 176 (F B)=6 A. L J 263 54 I C 946=5 Pat L J 120=1920 Pat 67 62 I C 132]

THIS was an appeal arising out of a suit for sale brought by one Debi Dat upon a mortgage of joint family property executed by Jadu Rai, the father, and three of his sons, Gajadhar Lal, Birj Lal and Bhajan Lal The bond was dated the 5th of November, 1895 In his suit the plaintiff arrayed as defendants not only the executants of the bond, but also Mul Chand a minor son of Jadu Rai, Raghu, Baggu and Narain minor sons of Gajadhar Lal, and Debi the minor son of Birj Lal The Court of first instance (Subordinate Judge of Bareilly) decreed the suit as against the executants, but exempted Mul Chand and the other minors The plaintiff appealed, urging that the Court of first instance was wrong in exempting the minors, and that it was not for the plaintiff to prove that the mortgage debt was incurred for family necessity, but, on the contrary, for the minor defendants to show that for one reason or another they were not liable for the debt incurred by their father and the other executants of the bond The lower appellate Court (District Judge of Bareilly) overruled this plea and dismissed the appeal The plaintiff thereupon appealed to the High Court, against raising the [460] question of the liability of the remaining members of the joint family other than the executants of the mortgage deed

Pandit *Jwala Dat Joshi* and Pandit *Baldeo Ram Dave*, for the appellant

Babu *Durga Charan Banerji*, for the respondents

BANERJI and AIKMAN, JJ —This was a suit for sale upon a mortgage dated the 5th of November, 1895, executed by the first four defendants, namely, Jadu Rai and his three sons The other defendants are a son of

* Second Appeal No 950 of 1899, from a decree of C L M Eales, Esq, District Judge of Bareilly, dated the 27th September 1899, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 27th April 1899

(1) (1887) I L R 9 All 493
(2) (1893) I L R 15 All 75
(3) (1885) I L R 13 Cal. 21

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135.

the principal and interest in one lump sum within the term of three years, and as the sum of Rs. 660 more than covered the principal sum secured by the deed, the appellant acted unreasonably in rejecting the deposit made under the orders of a competent Court, and he could not equitably claim interest upon the sum so deposited. It accordingly granted the appellant only the sum of Rs. 873-4-0, together with interest on Rs. 113-7-6.

The main plea urged before us is that the plaintiff was not bound to accept payment of part of the mortgage money and not being so bound, he is entitled to interest and compound interest as if it had never been deposited. Neither on the part of the appellant nor of the respondents were we referred to any precedents either of English or of Indian law. The appellant took his stand upon the principle to be found in sections 83 and 84 of the Transfer of Property Act. It seems to us that where no stipulation or covenant has been made between the contracting parties as to payment of a sum borrowed, the lender is entitled to decline to receive payment of a sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time. Such seems to us to be the principle which governs the payment of moneys lent in English law, and we know of no opposite authority in the Indian law. It is, moreover, in general accordance with the principles of contract law as laid down in Leake and other leading authorities. We might go further and say that on the principle of common sense a lender who wants to put his money to use would be obviously embarrassed if he were repaid a large amount in continual driblets, and we do not see why he should be compelled to undergo this loss. We accordingly set aside the judgment and decree of the lower appellate Court, and restore that of the Court of first instance, with costs in proportion to success and failure. This disposes of the objection under section 561.

The decree will contain provisions for payment within six months from this date.

Appeal decreed.

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24 A. 464 (=22 A. W. N. 136.)

[464] APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Banerji.

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GULAB KUNWAR (*Defendant*) v. THAKUR DAS (*Plaintiff*).*
[14th May, 1902.]

Civil Procedure Code, sections 556, 558, 591—*Appeal—Order for re-admission of appeal dismissed for default not capable of being used by the appellant as a ground of objection to the decree.*

An order under section 558 of the Code of Civil Procedure readmitting an appeal which had been dismissed for default under section 556 is not appealable; neither is it an order "affecting the decision of the case" which may be set forth as a ground of objection in the memorandum of appeal from the decree in the suit within the meaning of section 591 of the Code. *Chintamony Dassi* v. *Raghoonath Sahoo* (1), followed.

[**Fol.** 25 All. 280=23 A. W. N. 39; 9 C. W. N. 584; 2 N. L. R. 179; **Ref.** 29 I. C. 1004; 59 I. C. 676.]

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* Second Appeal No. 157 of 1900, from a decree of Rai Bahadur Babu Baij Nath, Subordinate Judge of Agra, dated the 20th of January 1900, reversing a decree of Khwaja Abdul Ali, Munsif of Agra, dated the 19th of July 1899.

(1) (1895) I. L. R. 22 Cal. 981.

obtained a decree, which directed that a deposit of Rs 881-5 0 was to be made by the pre emptors to the credit of the vendees In that amount the abovementioned sum of Rs 660 was included On the 11th of July 1893 Ram Ghulam sent a post card to Ganga Ram informing him that Rs 660 had been paid into Court on his account This money Ganga Ram declined to receive on the ground that the amount due to him was Rs 773 On the 7th of December 1898, Behari Lal, as the representative of his father Ganga Ram, who was then deceased, instituted a suit against the mortgagors and the pre emptors for recovery of a sum of Rs 1,444, and odd as due on the mortgage The Court of first instance (Subordinate Judge of Farrukhabad) gave the plaintiff a decree for practically the whole of his claim The defendants pre emptors appealed, raising the plea that as they had paid into Court Rs 660 and had given notice of that deposit to the mortgagee, no interest was thereafter due from them The lower appellate Court (District Judge of Farrukhabad) held that as there was nothing in the mortgage deed which bound the mortgagors to repay the principal and interest in one lump sum within the [462] term of three years, and as the sum of Rs 660 more than covered the principal sum secured by the deed, the mortgagee acted unreasonably in rejecting the deposit made under the orders of a competent Court and could not equitably claim interest upon the sum so deposited That Court accordingly granted the mortgagee only the sum of Rs 873 4 0, together with interest on Rs 113 7 6

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APPELLATE CIVIL

24 A 461= 22 A W N 135

Against this decree the mortgagee appealed to the High Court

Babu *Jogindro Nath Chaudhri* and Munshi *Gulzari Lal*, for the appellant

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the respondents

KNOX and BLAIR, JJ —Certain of the respondents had, on the 9th May, 1891, executed a bond, whereby they hypothecated two shops and a certain share in mauza Silsanda to the father of the present appellant On the 9th of March, 1892, the mortgagor sold the share in mauza Silsanda to other parties, and left the sum of Rs 660 out of the consideration money with the vendees, saying that it was to be paid to the appellant in satisfaction of the bond of 1891 In March, 1893, Ram Ghulam and others, who are also arrayed as respondents in this Court, brought a pre emption suit against Muhammad Azim Khan and his co vendees, and obtained a decree, which directed that a deposit of Rs 881 5 0 was to be made by the pre emptors to the credit of Azim Khan and others aforesaid The sum of Rs 660 is included in the amount of Rs 881 5 0 Ram Ghulam, on the 11th of July, 1893, had sent a post card to Ganga Ram, informing him that Rs 660 had been paid into Court on his account Ganga Ram declined to take this on the ground that the amount due to him was Rs 773 Nothing further was done in the matter until the present suit was instituted by the representative of Ganga Ram, claiming to recover the sum of Rs 1,444 and odd as due on the mortgage The Court of first instance gave a decree for Rs 1,378, practically for all that the appellant claimed The lower appellate Court gave force to the plea raised by the respondents Ram Ghulam and others, which was to the effect that as they had deposited Rs 660, and had given notice of that deposit, no [463] interest was thenceforward due The Court held that as there was nothing in the mortgage deed which bound the mortgagors to repay

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APPELLATE CIVIL.

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22 A. W. N.
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24 A. 465 (=22 A. W. N. 137.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MADAN MOHAN LAL (*Plaintiff*) *v.* DILDAR HUSAIN (*Defendant*).*
[14th May, 1902.]

Act No. XII of 1881 (*N.-W. P. Rent Act*), *section* 23—*Suspension of revenue and consequent suspension of rent—Lessee entitled to the benefit of suspension of rent.*

Held that when the Local Government, under section 23 of the N.-W. P. Rent Act, suspends payment of revenue, and when suspension of rent has in consequence been ordered, a lessee is entitled to the benefit of the latter suspension.

THIS appeal arose out of a suit for arrears of rent under clause (*a*) of section 93 of the North-Western Provinces Rent Act. The suit was based upon a lease granted by the plaintiff [466] to the defendant of a share in a certain village for three years, *viz.*, 1302 to 1304 Fasli. Various pleas were urged by the defendant, but more particularly a plea that he was entitled to have set off against the plaintiff's claim for rent certain sums remitted to the tenants in consequence of the action of the Local Government under section 23 of the N.-W. P. Rent Act. The Court of first instance (Assistant Collector) allowed this plea, and found as a matter of account that nothing was due to the plaintiff by the defendant. The lower appellate Court (District Judge of Allahabad) also took the same view and dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *E. A. Howard*, for the respondent.

AIKMAN, J. (BANERJI, J., concurring).—This appeal arises out of a suit brought by the plaintiff, who is appellant here, to recover from his lessee arrears of rent for the years 1303 and 1304 Fasli. The short question raised in this appeal is whether, when the Local Government, under section 23 of the Rent Act, suspends payment of revenue, and when suspension of rent has in consequence been ordered, a lessee is entitled to the benefit of the latter suspension. If he is, this appeal must fail. We are clearly of opinion that under the terms of section 23 the defendant lessee was entitled to suspension of payment of the money payable by him under his lease. The result is, that the finding of the learned District Judge, that at the date of the suit nothing was due from the defendant as to the first two instalments of rent, and that the suit as regards the remaining instalments of rent was premature, is correct. We dismiss the appeal with costs.

Appeal dismissed.

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* Second Appeal No. 59 of 1900, from a decree of Khan Bahadur Mir Akbar Husain, District Judge of Allahabad, dated the 3rd of October 1899, confirming a decree of Babu Badri Nath, Assistant Collector, Allahabad, dated the 2nd of September 1899.

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24 A 464= 22 A W N 136

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Sundar Lal* (for whom Munshi *Gokul Prasad*) for the appellant

Dr *Satish Chandra Banerji* (for whom Pandit *Mohan Lal Nehru*) for the respondent

AIKMAN, J (BANERJI, J, concurring) —This appeal arises out of a suit brought by the plaintiff respondent upon two hundis drawn by Musammat Mohan Kunwar in favour of the plaintiff Mohan Kunwar being dead the suit was brought against the defendant appellant as her legal representative The defence was a denial of the hundis The Court of first instance (the Munsif of Agra) dismissed the suit, holding that the execution of the hundis was not proved On appeal by the plaintiff the learned Subordinate Judge came to an opposite finding upon a consideration of the evidence, and holding that the hundis were proved, granted the plaintiff a decree for the amount claimed, to be recovered from the estate of Mohan Kunwar Against this decree the present appeal has been filed The first ground taken in the memorandum of appeal is admittedly one which cannot be supported It is to the effect that the appellant is not liable in law for the payment of Mohan Kunwar s debt The appellant has not been made personally liable, but only to the extent of any assets which Mohan Kunwar may have left, and which may be in the appellant's hands

[465] The two remaining grounds impugn an order of the lower appellate Court, which, under the provisions of section 558 of the Code of Civil Procedure, restored the appeal, which it had dismissed for default under section 556 The law allows an appeal from an order refusing to grant an application under section 558 for the restoration of an appeal But it does not provide for an appeal from an order granting such an application The learned vakil relies upon section 591 of the Code of Civil Procedure That section provides that, if a decree be appealed against, any error, defect or irregularity in an order not otherwise appealable affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal We are of opinion that the meaning of the words in section 591 "affecting the decision of the case is that it must be shown that the error, defect or irregularity has affected the decision of the case on the merits In this view an order such as that complained against in this case is not an order contemplated by section 591 In so holding, we are borne out by the decision in the case of *Chintamony Dassi* v *Raghoonath Sahoo* (1), with which we are in entire accord For these reasons we dismiss this appeal with costs

Appeal dismissed

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(1) (1895) I L R 22 Cal 981

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APPELLATE CIVIL.

24 A. 467= 22 A. W. N. 116.

with the permission of the Collector, to the defendants Nos. 6 and 7. The money raised by this mortgage was paid into Court in discharge of the decree, and satisfaction of the decree was entered up, and on the 21st of December, 1891, the execution case was struck off as satisfied. On the day following that of the dismissal of the plaintiff's appeal to the Commissioner, she withdrew from Court the amount of sale proceeds which she had paid in. On the 11th of March, 1893, the defendant No. 9 obtained from the judgment-debtors a sale deed of a part of the property sold by auction. On the date on which the mortgage in favour of the defendants Nos. 6 and 7 was made, and on the date on which the sale to the defendant No. 9 took place, there was no subsisting sale in favour of the plaintiff of the property comprised in the said mortgage and sale. On the 12th of September, 1894, the plaintiff brought the present suit, and she asked that the sale in her favour of the 22nd of September, 1891, be confirmed, that the order of the revenue court setting aside the sale, in so far as it affected her rights, be declared ineffectual, and that possession of the property purchased by her be delivered to her. At the time she brought her suit the whole of the sale proceeds had, as stated above, been received back by her from the Court, and no part of it was either in deposit with the Court or was tendered by her for payment to the parties entitled to receive it. The Courts below have decreed the claim.

The first question which we have to determine in this appeal, which has been preferred by the mortgagees, the second purchaser [469] Daya Kishan and one of the judgment-debtors, is whether the claim was barred by limitation on the date on which it was brought. It is clear that it was brought after one year from the 30th of October, 1891, the date on which the sale in favour of the plaintiff had been set aside by the Collector. It was also beyond one year from the date on which the order of the Collector was confirmed by the Commissioner. It was contended on behalf of the respondent that the order of the Collector, dated the 30th of October, 1891, was not an order setting aside the sale. The order, as stated above, was passed on an application to set aside the sale and ran as follows:—"I will give the judgment-debtors a fresh chance, and hereby fix the 20th of December for a new sale." This order clearly implies that the sale which had already taken place was set aside. That being so, before the plaintiff could succeed in this suit, it was necessary for her to get the order of the Collector dated the 30th of October, 1891, out of her way. Whilst that order stands good, her suit for possession cannot be maintained. This principle was affirmed by their Lordships of the Privy Council in the recent case of *Malkarjun* v. *Narhari* (1). That was a case in which, after an auction sale had taken place, a suit was brought for the redemption of a mortgage. Their Lordships of the Privy Council observed at page 348:—"It is then necessary for the plaintiff to set aside the sale in order to clear the ground for redemption of the mortgage." Similarly it is necessary in this case for the plaintiff to set aside the order by which the sale in her favour was set aside by the Collector in order to clear the ground for her suit for recovery of possession. It is true that the plaintiff does not in so many words ask that the order of the Collector should be set aside, but she does pray for a declaration that the order be declared ineffectual, so far as it is prejudicial to her rights. That

(1) (1900) I. L. R. 25 Bom. 337.

24 A 467(=22 A W N 116)

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22 A W N
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[467] APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

RAGHUNATH PRASAD AND OTHERS (*Defendants*) v KANIZ RASUL AND ANOTHER (*Plaintiffs*) * [14th May, 1902]

Execution of decree—Civil Procedure Code, sections 320 *et seqq —Sale held by Collector, but afterwards set aside—Suit by auction purchaser to have sale confirmed—Limitation—Act No XV of* 1877 (*Indian Limitation Act*) *Schedule II, Article* 14

In execution of a decree which had been transferred to the Collector for execution under the provisions of section 320 of the Code of Civil Procedure, certain immoveable property was sold by auction on the 22nd of September 1891 But the judgment debtors applied to the Collector to have the sale set aside, and on the 30th October, 1891, the Collector set aside the sale and ordered a fresh proclamation of sale to be issued The order of the Collector setting aside the sale was on appeal confirmed by the Commissioner on the 4th of May, 1892 After the setting aside of the sale the judgment debtors, on the 14th of December, 1891, with the permission of the Collector, mortgaged the bulk of the property The mortgage money was paid into Court in discharge of the decree and satisfaction of the decree was entered up and on the 21st of December, 1891, the execution case was struck off On the 12th of September 1894, the auction purchaser, who after the sale had been set aside had withdrawn the purchase money paid in by her, brought a suit to have the sale in her favour confirmed *Held* that, inasmuch as the plain [illegible]

Narain (2), referred to *Ayyasami* v *Samiya* (3) and *Debi Charan* v *Bari Bahu* (4) held not to be of effect since the ruling of the Privy Council in *Malkarjun* v *Narhari* (1) *Moti Lal* v *Karrabuldin* (5) distinguished

[Fol 8 C L J 470=11 C W N 44 Ref 19 C L J 187 33 All 93 Dist 17 C W N 374=17 I C 504 Ref 31 I C 267, 1915 M W N 915]

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) and Babu *Durga Charan Banerji*, for the appellants

Messrs *Abdul Raoof* and *R Malcomson*, for the respondents

BANERJI, J —The defendants Nos 4 and 5 obtained a decree against the defendants Nos 1, 2 and 3, and in execution thereof caused the immoveable property of those defendants to [468] be attached That property being ancestral, execution of the decree was transferred to the Collector under section 320 of the Code of Civil Procedure On the 22nd of September, 1891, the property was sold by auction and was purchased by the present plaintiff The judgment debtors applied to the Collector to have the sale set aside, and thereupon, on the 30th of October, 1891, the Collector set aside the sale and ordered a fresh proclamation of sale to be issued This order of the Collector was confirmed by the Commissioner on appeal on the 4th of May, 1892 After the setting aside of the sale the judgment debtors mortgaged, on the 14th of December, 1891, the bulk of the property,

*Second Appeal No 29 of 1900, from a decree of Syed Muhammad Ali, District Judge of Shahjahanpur, dated the 22nd September 1899, confirming a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 24th of March 1896

(1) (1900) I L R 25 Bom 337
(2) (1900) I L R 22 All 168
(3) (1884) I L R 8 Mad. 82
(4) Weekly Notes, 1894, p 78
(5) (1897) I L R 25 Cal 179

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REVISIONAL CRIMINAL.

24 A. 471= 22 A. W. N. 122.

24 A. 471 (=22 A. W. N. 122)

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

EMPEROR *v.* NABBU KHAN.* [17th May, 1902.]

Criminal Procedure Code, section 110 et seqq.—Security for good behaviour—Power of Court to assign geographical limits within which the sureties required must reside.

Held that a Court in ordering security for good behaviour to be given with sureties is competent to assign some geographical limits within which the sureties required must reside. *Queen-Empress* v. *Rahim Bakhsh* (1) referred to.

[Ref. 8 Cr. L. J. 166=1 S. L. R. 46; 8 Cr. L. J. 344=11 O. C. 267.]

THE facts of this case were briefly as follows :—

Security for good behaviour was demanded of two persons, Nabbu Khan and Mosul Singh, residents of Mirzapur. After the usual proceedings they were ordered to furnish their own bonds for Rs. 500 each, with two sureties in Rs. 1,000 each, to be of good behaviour for one year. It was further ordered that the sureties should be resident within the limits of the Mirzapur Municipality. Against this order Nabbu Khan and Mosul Singh appealed to the District Magistrate, who declined to interfere. They thereupon applied in revision to the High Court, where it was contended that the Joint Magistrate had no power to specify in his order the place where the sureties must reside.

[472] Mr. *C. Dillon*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—In this case the Magistrate in binding over a person to be of good behaviour under section 110 and other sections, in prescribing the class of sureties required, has limited them to residents in the Municipal borough of Mirzapur. Having regard to the ruling of the late Chief Justice Sir John Edge, reported in I. L. R. 20 All. 206, and several rulings of the Calcutta Court to which my attention has been called, I find myself unable to say that it is not in the power of the Court in ordering securities to be given to assign some geographical limit within which such sureties must reside. It is obvious that sureties from a remote spot would not be in a position to keep an eye on or exercise any control over a person bound over. I think, however, in this case for reasons put before me, that the narrowness of the limit might impose upon the person to be bound over an inability to find sureties at all, and he might therefore be sent to prison because such persons who might be willing to become his sureties live some short distance beyond the Municipal limits.

I therefore modify the order of the Magistrate by adding to the words "to the limits of Mirzapur Municipality" the words "or to some place in the immediate neighbourhood." Let the papers be returned.

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* Criminal Revision No. 268 of 1902.

(1) (1898) I. L. R. 20 All. 206.

amounts in effect to a prayer to set aside the order of the Collector, and, as we have already said without such a prayer and without having the order of 30th of October, 1891, set aside, the plaintiff cannot obtain a decree for possession The order of the Collector is an order of an officer of Government in his official capacity, and as it is not an order to which [470] any other article in schedule (ii) of the Limitation Act expressly applies, it falls within article 14 of that schedule The suit is therefore one to set aside an order of an officer of Government in his official capacity not otherwise expressly provided for, and having been brought after one year from the date of the order, is barred by limitation The learned counsel for the respondents referred to the ruling of the Madras High Court in *Ayyasami* v *Samiya* (1), and the decision of this Court in *Debi Charan* v *Bari Babu* (2) Having regard to the ruling of the Privy Council to which we have referred above the observations made in those cases cannot be held to have any force The learned counsel also referred to the ruling of the Privy Council in *Moti Lal* v *Karrabuldin* (3) That case is clearly distinguishable from the present That was a suit between two rival auction purchasers of the same property in execution of different decrees and the question was whether a valid title was acquired by the second purchaser after the sale in favour of the first purchaser In such a suit no question arose as to the setting aside of a sale or of an order of Court In support of the view taken above I would refer to the dictum of the late learned Chief Justice Sir Arthur Strachey in *Banke Lal* v *Jagat Narain* (4), which was a somewhat similar case He observes —" The previous sale having been set aside, a suit for confirmation of the sale and for reversal of the order setting aside the sale might be brought at any time up to a year from the date of the order ' For the above reasons I would allow this appeal, and setting aside the decrees of the Courts below, dismiss the plaintiff s suit with costs

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APPELLATE CIVIL

24 A 467= 22 A W N 116

AIKMAN, J —I am also of opinion that this appeal must succeed In the first place, I agree with my learned colleague, for the reasons set forth by him, in holding that the plaintiff s suit was beyond time In the next place, I hold that at the time the mortgagees took their mortgage and the appellant vendee bought a part of the property, there was nothing to prevent the judgment debtors transferring the property in the manner in which they did, and the judgment debtors were capable [471] of conferring and did confer a good title by the deeds which they
o what was said by the
the case of *Banke Lal*
v *Jagat Narain* (4), at page 174 His view is likewise entirely in accord with the principle of the decision of their Lordships of the Privy Council in the well known case of *Nawab Zain ul Abdin Khan* v *Muhammad Asghar Ali Khan* (5) I agree in the order proposed

BY THE COURT —The order of the Court is that the appeal is allowed, the decrees of the Courts below are set aside, and the plaintiff s suit is dismissed with costs in all Courts

Appeal decreed

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(1) (1881) I L R. 8 Mad 82
(2) Weekly Notes, 1894, p 78
(3) (1897) I L R 25 Cal 179
(4) (1900) I L R 22 All 168
(5) (1887) L R 15 I A 12 (=10 All 166)

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paramount authority in the Maharashtra school, the daughter has a fixed place in the order of succession. She comes immediately after the widow, and takes precedence over such *gotraja sapindas* as come after the brother's son. As Mr. Mayne observes at page 771 of his work on Hindu law, sixth edition :—" In Bombay the widows of *gotraja sapindas* stand in the same place as their husbands, if living, would respectively have occupied, subject to the right of any person whose place is specially fixed, as a sister, mother, or the like." The learned Judge has overlooked the important qualification set forth in the concluding portion of the sentence quoted above. We may also observe that the Bombay High Court has held in *Nahalchand Harakchand* v. *Hemchand* (1) that the sons of a separated brother inherit in preference to the widow of the son of an undivided brother and the learned Judges remark :—" The members of the 'compact series' of heirs specially enumerated take in the order in which they are enumerated (Mayukha, Chapter IV, section VIII, 18) preferably to those lower in the list, and to the widows of any relatives, whether near or remote, though where the group of specified heirs has been exhausted, the right of the widow, is recognized to take her husband's place in competition with the representative of a remoter line." This is a clear authority for holding that a daughter must have precedence over the widow of a deceased son who is not enumerated as one of the heirs and only comes in as a *gotraja sapinda*. The learned vakil for the respondent has referred to a passage in the Vaijayanti by Nanda Pandit as supporting the view of the learned Judge. We cannot regard that work as of any authority in comparison with the Mayukha, which, as we have said above, is the paramounnt authority in the Maharashtra school. He also cited to us a judgment of the Bombay Suddar Dewani Adalut of 1822. No reasons have been given in that judgment for the conclusion at which the Court arrived, nor is any authority cited.

The result is that the daughter of Sita Ram being alive, no portion of his estate vested in Annapurna, and by adopting [475] Chintaman the plaintiff she could convey to him no interest in Sita Ram's estate. We allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

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24 A. 475 (=22 A. W. N. 145).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

AMIR KAZIM AND ANOTHER (*Defendants*) *v.* DARBARI MAL AND OTHERS (*Plaintiffs*).* [1st May, 1902.]

Civil Procedure Code, section 316—Execution of decree—Sale in execution—Time for which the auction purchaser's title accrues.

When immoveable property is sold in execution of a decree the title of the auction-purchaser to mesne profits or possession does not accrue until the

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* First Appeal No. 3 of 1900 from a decree of Lala Anant Prasad, Subordinate Judge of Moradabad, dated the 19th September, 1899.

(1) (1884) I. L. R. 9 Bom. 31.

24 A 472 (=22 A W N 124)

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MAY 27

APPELLATE
CIVIL

24 A 472=
22 A W N
124

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

SITA RAM (*Defendant*) v CHINTAMAN (*Plaintiff*) * [27th May, 1902]

Hindu law—Maharashtra School—Succession—Place of daughter in the list of heirs

Held that according to the Maharashtra school of Hindu law the daughter is a preferential heir to the widow of a predeceased brother s son, or to the adopted son of such widow, where no authority for the adoption has been given by the deceased husband of the adop er *Nahalchand Harakchand* v *Hemchand* (1) referred to

[473] THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Sunder Lal* and Pandit *Madan Mohan Malaviya*, for the appellant

Babu *Devendra Nath Ohdedar* and Dr *Satish Chandra Banerji* for the respondent

BANERJI and AIKMAN, JJ —The suit out of which this appeal has arisen relates to certain money left in the firm of a banker of Benares by one Sita Ram Dikshit a Marattha Brahmin governed by the Maharashtra school of Hindu law He had two sons, Bishan Dikshit and Gobind Dikshit, both of whom pre deceased him Musammat Parbati is the widow of Bishan Dikshit, and Musammat Annapurna is the widow of Gobind Dikshit Chintaman, the plaintiff, was adopted by Musammat Annapurna after the death of her husband Before that Musammat Parbati had adopted Sita Ram, the appellant before us, who is the son of Salu Bai, the daughter of Sita Ram Dikshit Salu Bai is admittedly alive Chintaman claims a half share of the money by virtue of his adoption by Musammat Annapurna

The suit was dismissed by the Court of first instance, but decreed in appeal by the lower appellate Court It is conceded that by virtue of the adoptions made by the two daughters in law of Sita Ram Dikshit, the adopted sons could inherit only such property as had vested in their adoptive mothers, the adoptions not having been made under the authority of their respective husbands We have therefore to see whether any portion of the estate of Sita Ram Dikshit passed to Musammat Annapurna, the plaintiff s adoptive mother It was contended on behalf of the defendant that Salu Bai, the daughter of Sita Ram being alive she was the heir to Sita Ram s estate, and that no part of that estate passed to any of the daughters in law of Sita Ram In our opinion this was a valid contention The learned Judge of the lower appellate Court was of opinion that under the Maharashtra law a daughter in law excludes a daughter, and the reason upon which the learned Judge came to that conclusion was that the daughter being a *bhinna gotra sapinda*, and the daughter in law a *gotraja sapinda*, the latter takes precedence over the former The learned Judge is wrong in thinking that the daughter [474] succeeds to her father by reason of her being a *bhinna gotra sapinda* Under the Mitakshara and the Mayukha, which is the

* Second Appeal No 43 of 1900 from a decree of R Greeven Esq District Judge of Benares dated the 31st August 1899 reversing a decree of Kunwar Mohan Lal, Subordinate Judge of Benares dated the 17th January 1899

(1) (1884) I L R 9 Bom 31

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clearly the intention that a purchaser is only to be entitled to possession or to the rents and profits from the date of his obtaining a certificate. A number of authorities, however, have been quoted to us in order to show that, notwithstanding the clear and express provisions of the section, the purchaser under an auction sale acquires some equitable interest in the property, which will entitle him to mesne profits, not merely from the date on which his title accrues, but from the date on which [477] the purchase is made. We do not say that there may not be some equitable rights arising out of such a purchase, which could be enforced notwithstanding the provisions of this section, but what appears to us to be abundantly clear is, that the title to mesne profits (or possession) does certainly not accrue until the sale has been confirmed. If an authority for this were required, it is to be found in a decision of this Court reported in the Weekly Notes of 1887, p. 217, in the case of *Gobind Ram* v. *Tulsi Ram*. In that case Mr. Justice Brodhurst and Mr. Justice Mahmood, on an application to recover mesne profits by way of damages for a period anterior to the obtaining of a certificate of sale, held that "the plaintiffs appellants as auction purchasers had no title to the property before the sale was confirmed." "This view," the learned Judges say, "is borne out by the express provisions of section 316 of the Code of Civil Procedure, which regulates questions of this kind. The plaintiffs having no right to the property before the confirmation of the sale, they could not sue for the recovery of the mesne profits thereof in the nature of damages," etc. In the case, decided in the High Court at Calcutta, of *Prem Chand Paul* v. *Purnima Dasi* (1) Mr. Justice Norris, in dealing with this section says:—"I think, having regard to the provisions of section 316 of the Code of Civil Procedure, that this contention is not sustainable," (that is the contention that a title dated back beyond the date of the certificate.) "It has been urged that, although the section says that 'the certificate shall bear the date of the confirmation of sale, and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before,' yet as regards third parties the property vests in the purchaser from the date of sale. No doubt the Legislature does not introduce the words 'third parties' but if, as regards the parties to the suit and persons claiming through or under them, the title of the purchaser is not to be considered complete, nor the property to vest in him until the confirmation, we see no reason for holding that, as regards third parties, the title of the auction purchaser is complete, and the property vested in him [478] before the date of the confirmation of the sale." We fully concur in the view taken by the learned Judges in these cases. Several cases have been cited in which it appeared that the Court had not granted the certificate at the time of confirmation, in fact had failed to perform the duty cast upon it by the Legislature, and notwithstanding mesne profits had been allowed from the date of confirmation of sale, but we do not think that the decisions come to in cases of that kind govern cases such as the present. For these reasons we must modify the decree of the learned Subordinate Judge, and dismiss the claim for mesne profits between the 20th September, 1897, and the 23rd November, 1897, the date on which the sale was confirmed and the certificate was granted.

The other question for our determination is in respect of the

(1) (1888) I. L. R. 15 Cal. 516.

sale has been confirmed *Gobind Ram* v *Tulsi Ram* (1) and *Prem Chand Paul* v *Purnima Dasi* (2) followed

[Dist 28 M L J 666=1915 M W N 15=26 I C 353 Ref 7 C L J 1 9 I C 25 15 C W N 812=8 I C 657 2 I C 81 33 All 45 Fol 33 All 63]

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24 A 475= 22 A W N 145

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Sundar Lal*, for the appellants

Pandit *Madan Mohan Malaviya*, for the respondents

STANLEY, C J, and BURKITT, J —The facts of this case are few and simple One Ganeshi Lal was the owner of the village called Benipur He mortgaged 15 biswas of the village to the plaintiffs on the 21st of March, 1892 Subsequent to this mortgage the entire village was sold at the instance of the creditor under a simple money decree on the 21st of September, 1896, and was purchased by the defendant Lakhpat Rai Subsequently on the 27th of January, 1897, the mortgagees instituted a suit for the sale of the 15 biswas of the village on foot of the mortgage of the 21st of March, 1892, and to this suit they made Lakhpat Rai a party A decree was passed on the 5th of May, 1897 Before, however, the decree was obtained, namely, on the 27th of April, 1897, Lakhpat Rai granted a lease of the village to the defendants, Amir Kazim and Mohan Lal, for a term of ten years, at a rent of Rs 1 800, and under this lease, the defendants went into possession After the date of the lease, namely, on the 20th of September, 1897, the 15 biswas share of the village was sold in execution of the decree of the 5th of May, [476] 1897, and was purchased by the plaintiffs, who were the mortgagees On the following 23rd of November, 1897, the sale was confirmed and a certificate granted

The present suit was instituted by the purchasers against Lakhpat Rai and his lessees and others to set aside the lease of the 27th of April, 1897, for recovery of possession of the property and for mesne profits, the plaintiffs' case being that, inasmuch as the lease was granted during the pendency of the suit it was not binding on the plaintiffs It is admitted that, having regard to the provisions of section 52 of the Transfer of Property Act, it was not binding, and that the lease was properly set aside The only two points which have been argued in appeal before us are, that the learned Subordinate Judge was in error, first, in calculating the mesne profits to which the plaintiffs are entitled from the date of the sale instead of from the date of the confirmation of the sale and grant of certificate, and secondly, in awarding to the plaintiffs mesne profits calculated upon the basis of the recorded rental of the property instead of upon the actual receipts of the defendants lessees, or the amount of rent which they might have received if they had exercised due diligence

That the plaintiffs are only entitled to mesne profits from the date of the certificate, appears to us to be clear beyond any question upon the provisions of section 316 of the Code of Civil Procedure That section provides that when a sale of immovable property has become absolute, the Court shall grant a certificate to the purchaser, and that such certificate shall bear the date of the confirmation of the sale, and, so far as regards the parties to the suit and persons claiming through or under them, *the title to the property sold shall vest in the purchaser from the date of such certificate and not before* Words could not express more

(1) Weekly Notes, 1887, p 217 (2) (1888) I L R 15 Cal 516

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24 A. 479=
22 A. W N.
125.

In a suit for sale on a mortgage in which there were prior mortgages to be redeemed, the plaintiff obtained a decree for sale conditioned on his redeeming the prior mortgages within two months. He did not do so, but about four months after the date of the decree paid the money due on the prior mortgages into Court. *Held*, that the defendant having taken no steps to redeem, the plaintiff was entitled to the benefit of this payment, though made after time, and to a decree absolute for sale. *Nihali* v. *Mittar Sen* (1), *Raham Ilahi Khan* v. *Ghasita* (2), and *Sita Ram* v. *Madho Lal* (3), referred to. *Ram Lal* v. *Tulsa Kuar* (4) distinguished.

[Ref. 1 A. L. J. 300 ; 2 N. L. R. 137 ; 28 All. 328=3 A. L. J. 81=1906 A. W. N. 40 ; 36 Cal. 122=8 C. L. J. 547=13 C. W. N. 36 ; Dist. 7 I. C. 36.]

[480] THE facts of this case sufficiently appear from the first order of remand made by the High Court.

Munshi *Kalindi Prasad*, for the appellant.

Munshi *Gokul Prasad* (for whom Babu *Sital Prasad Ghosh*), for the respondents.

AIKMAN, J.—The appellant got a decree for sale under the provisions of section 88 of the Transfer of Property Act. The decree was for sale on redemption by the appellant of two prior mortgages, one simple and one usufructuary. He paid into Court certain sums for satisfaction of the prior mortgages, and applied for the sale of the property. The Court of first instance disallowed his application on the ground that the payments by him had not been made within the time prescribed by the decree. The decree-holder appealed. The learned District Judge dismissed his appeal, although not on the ground upon which the Court of first instance had proceeded. The learned District Judge states that the decree-holder had paid the principal only of the two prior mortgages. It is admitted by the vakil for the respondent that the learned Judge has fallen into error as regards one of the mortgages, *viz.*, the simple mortgage, inasmuch as the record shows that the appellant paid not only the principal, but also the interest due upon that mortgage. With regard to the usufructuary mortgage, the learned Judge says that the mortgagee had possession in lieu of interest, and he appears to be under the impression that so far as the usufructuary mortgage is concerned the appellant decree-holder had paid all that was due under it This is not admitted by the respondent. It is stated that there is still a considerable sum due to the usufructuary mortgagee on account of interest. In order to enable me to dispose of this appeal, I find it necessary to refer to the lower appellate Court the following issue for trial under the provisions of section 566 of the Code of Civil Procedure, *viz.*, whether the amount paid by the decree-holder, Lala Debi Prasad, was sufficient to discharge the amount due under the prior usufructuary mortgage. On the return of the finding, ten days will be allowed for objection.

[A return was made to this reference that the decree-holder had paid all that was due under the two prior mortgages. But it was argued that the **[481]** decree-holder, not having paid the amount which he had to pay within the time limited by the decree, he lost the right to redeem the prior incumbrances. A further reference was therefore made to the lower appellate Court as to whether the appellant, on or before the 30th July, 1899, had tendered to the prior mortgagees, defendants 2 and 3, the amount due under their mortgages. It was found that the decree-holder had not tendered the amount due on the prior mortgages on or before the 30th of July 1899, but had deposited it in Court after the period limited by the decree had expired. On the question whether the decree-holder could avail himself of the deposit so made, the appeal was referred to a Division Bench, by which, on the 28th May, 1902, judgment was delivered as below.]

(1) (1898) I. L. R. 20 All. 446.
(2) (1898) I. L. R. 20 All. 375.
(3) (1901) I. L. R. 24 All. 44.
(4) (1896) I. L. R. 19 All. 180.

calculation of mesne profits The learned Subordinate Judge has allowed the plaintiff as mesne profits the entire amount of the rental of the property irrespective of the consideration whether the entire amount was collected or not, or might, with reasonable diligence, have been collected, and this he has done by way of penalty, as he states "by reason of the improper conduct of the lessees in accepting the lease of the property, and in keeping the plaintiffs out of possession' We have asked the learned counsel for the respondents if he could point out to us any evidence in the case going to show that the lessees were guilty of either collusive or fraudulent conduct, and we have been unable to elicit from him anything to satisfy us that they were guilty of such misconduct The learned Subordinate Judge, in issue No 6, in which he decided that Lakhpat Rai, the lessor, granted the lease at an undervalue, and granted it collusively, does not venture to state that the lessees colluded with him, or acted wrongfully in the matter, nor does he show that the lessees had any knowledge of the pending suit The rent which they are paying under the lease is a substantial rent It may not be, having regard to the evidence, a full rent This, however, does not justify, as it seems to us, the penalising of the lessees by exacting from them rents and profits which they may not have received Section 211 of the Code of Civil Procedure explains what mesne profits should be awarded in a case of this kind, i e [479] in suits for recovery of possession of immoveable property, as follows—" Mesne profits mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received therefrom together with interest on such profits" We have not materials before us to enable us to say what amount should be allowed for mesne profits in this case, and moreover we do not know when the plaintiffs got possession of the disputed property We shall, therefore, leave the actual amount of profits to which the plaintiffs are entitled for the determination of the execution department directing attention, however, to the true criterion for estimating the mesne profits as laid down in section 211 In calculating such mesne profits the execution department should not award the gross rental of the property unless it is satisfied that the entire rental was received by lessees defendants, or with ordinary diligence might have been received by them We may also point out that the ordinary collection expenses ought to be allowed to the defendants in this case, if any have been incurred We accordingly so far modify the decree of the Court below with costs

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24 A 475= 22 A W N 145

Decree modified

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24 A 479 (=22 A W N 125)

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

DEBI PRASAD (*Decree holder*) v JAI KARAN SINGH AND OTHERS (*Judgment debtors*) * [28th May, 1902]

Act No IV of 1882 (*Transfer of Property Act*), *sections* 88 89—*Mortgage—Decree for sale after redemption of prior mortgages—Payment of money due on the prior mortgages after the time limited by the decree—Effect of such payment*

* Second Appeal No 378 of 1900 from a decree of H E Holme Esq, District Judge of Azamgarh dated the 26th January 1900, confirming a decree of Munshi Rai Izzat Rai, Munsif of Azamgarh, dated the 18th November 1899

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24 A. 481= 22 A. W. N. 126.

an application to the Court which had attached Brij Bhukan's decree against Chajmal Das, and prayed that the amount of his decree, dated the 5th October, 1882, should be set off under section 246 of the Code of Civil Procedure against the amount of the decree held against him by Brij Bhukan Lal and others. The lower Court has refused this application, and from the order of the lower Court this appeal has been preferred.

In our opinion the application of Chajmal Das was premature. Section 246 of the Code of Civil Procedure clearly contemplates that when a decree is sought to be set-off against another, the decree against which the set-off is asked for must be before the Court for execution. This is evident from the position of section 246 in the Code. Chap. XIX, in which the [483] section appears, relates to "the execution of decrees," and the sub-head E, under which section 246 occurs, provides "the mode of of execution of decrees." It was observed by their Lordships of the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh* (1) that the Court before which cross-decrees may be produced "is the Court to which the application is made for execution, and which is dealing with the case as to whether execution shall be issued or not." These observations of their Lordships leave no room for doubt that the decree against which a set-off is claimed must be before the Court for execution. As the decree of Brij Bunkan Lal against Chajmal Das was not before the Court for execution, Chajmal Das was not entitled to claim a set-off under section 246, and his application was premature. On this ground alone his application ought to have been dismissed. The result is that we affirm the order of the Court below and dismiss this appeal with costs.

Appeal dismissed.

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24 All. 483=(22 A. W. N. 137).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

AMOLAK RAM AND OTHERS (*Plaintiffs*) v. CHANDAN SINGH AND OTHERS (*Defendants*).* [10th June, 1902.]

Hindu law—Joint Hindu family—Mortgage of an undivided share—Effect on such mortgage of a subsequent partition.

A mortgage of an undivided share which under a partition has been allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, but the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. *Byjnath Lall* v. *Ramoodeen Choudhry* (2) and *Hem Chunder Ghose* v. *Thako Moni Debi* (3) referred to.

[Ref. 7 M. L. T. 143=5 Ind. Cas. 92; Appr. 38 Mad. 684; Ref. 39 I.C. 586; 34 Mad. 175; 42 All. 596=18 A. L. J. 807=58 I. C. 171; 16 O. C. 161.]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *C. C. Dillon*, Dr. *Satish Chandra Banarji* and Munshi *Jang Bahadur Lal*, for the appellants.

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* Second Appeal No. 426 of 1900 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 3rd of February, 1900, confirming a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 20th of April, 1899.

(1) (1886) L. R. 13 I. A. 106, p. 110.
(2) (1874) L. R. 1 I. A. 106.
(3) (1893) I. L. R. 20 Cal. 533.

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BANERJI and AIKMAN, JJ —The ruling in *Ram Lal* v *Tulsa Kuar* (1) is distinguishable from the present case Besides, the view taken in that case was departed from by one of the learned Judges who was a party to that decision in the later case of *Nihali* v *Mittar Sen* (2) There is also in favour of the appellant the ruling in *Raham Ilahi Khan* v *Ghasita* (3), and the principle of the Full Bench ruling in *Sita Ram* v *Madho Lal* (4), also supports the case for the appellant That being so, the payment of the amount of the prior mortgages by the appellant was sufficient to discharge those mortgages We allow the appeal, and, setting aside the order of the Court below, we remand the case to the Court of first instance, with directions to re admit it under its original number in the register and proceed to try it on the merits The appellant will have his costs of this appeal Other costs will follow the result

Appeal decreed and cause remanded

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24 A 481 (=22 A W. N 126)

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji

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CHAJMAL DAS (*Objector*) v LAL DHARAM SINGH (*Opposite Party*) *
[31st May, 1902]

Civil Procedure Code, section 216—Execution of decree—Cross decrees—Set-off—Decree against which set off is claimed not before the Court for execution

[Fol 32 Mad 336=5 M L T 144=1 Ind Cas 247, 22 I C 73=1914 M W N 85]

THE facts of this case sufficiently appear from the judgment of the Court

Munshi *Gokul Prasad* and Munshi *Haribans Sahai*, for the appellant

Pandit *Sundar Lal*, for the respondent

STANLEY, C J, and BANERJI, J —The facts out of which this appeal has arisen are these One Dharam Singh obtained a decree against Brij Bhukan Lal and others on the 21st September 1895 That was a decree for sale upon a mortgage After the sale of the mortgaged property the decree holder obtained, on the 10th February, 1900, a decree under section 90 of the Transfer of Property Act In execution of this decree he caused a decree held by Brij Bhukan Lal and others against one Chajmal Das, dated the 9th September, 1892, to be attached It is common ground that the decree last mentioned was passed by the Court of the Subordinate Judge of Mainpuri, and was not in course of execution at the time when it was attached It is also admitted that Dharam Singh by virtue of the attachment did not apply for the execution of the decr[illegible] 5th October, [illegible] rward with

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[illegible] Subordinate Judge of Aligarh, dated the 28th June 1901

(1) (1896) I L R 19 All 180
(2) (1898) I L R 20 All 416
(3) (1898) I L R 20 All 375
(4) (1901) I L R 24 All 44
(5) (1886) L R 13 I A 106, p. 110.

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24 A. 483= 22 A. W. N. 137.

both the Courts below, and those Courts, holding that it was intended that the mortgage should not be enforced against the village Muzaffra, and that the village in question was consequently not liable under the mortgage of 1878, have dismissed the suit.

The plaintiffs have preferred this appeal, and two contentions have been raised on their behalf. The first is that, notwithstanding the partition, the share in Muzaffra was still liable under the mortgage; the second contention is, that the defendants are estopped from asserting that the village in question is no longer liable under the mortgage of 1878 and the decree obtained on foot of it.

As regards the first contention, it may be observed that the lower appellate Court has found that at the time of partition both the parties to the mortgage intended that the mortgage should not be enforced against Muzaffra. That must be taken to be a finding of fact, and cannot be challenged in second appeal. In the next place, it has been held by their Lordships of the [486] Privy Council in *Byjnath Lall* v. *Ramoodeen Chowdry* (1) that the mortgage of an undivided share which under a partition has been allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, and that the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. The principle of this ruling was followed by the Calcutta High Court in *Hem Chunder Ghose* v. *Thako Moni Debi* (2). The learned Judges observed in that case:—"The mortgage was subject to the right of those sharers to enforce a partition, and, as their Lordships held in the cases referred to, thereby to convert what was an undivided share of the whole into a defined portion held in severalty. In the absence, therefore, of any fraud in effecting the partition, plaintiff has no right to proceed against that portion of the undivided mortgaged property which, on partition, was allotted to the defendants, but he can proceed against that portion of the undivided property which was allotted to the mortgagors defendants in substitution of their undivided share in the portion mortgaged." Consequently after the partition which took place in 1878, as to which there is no suggestion at all of fraud or collusion, the mortgage of 1878 could not be enforced against the 5 biswa share in the village Muzaffra which passed out of the share of the mortgagor under the partition. The plaintiffs, therefore, cannot claim that the said share was still liable to contribute towards the payment of the mortgage debt.

As to the plea of estoppel, it is based upon the fact that Mukand Singh and the heirs of Munna Singh, in suing upon their mortgage, asked for a decree for the sale, among other property, or the share in Muzaffra, and obtained a decree for the sale of that share; and it is urged that after having obtained such a decree, it is no longer open to their representatives to contend that the share in their possession is not liable under the decree. This might probably have been a valid contention had it been alleged that the plaintiffs had been induced by the fact of existence of th[illegible] decree to purchase the shares rised in that decree w[illegible] did purchase and to discharge e decree. Before th[illegible] the decree has been assigned to arain, who applied [illegible] on, and in the deed of assign- distinctly provid[illegible] are in Muzaffra should not gainst, but shou[illegible] to be released from liability.

(1) [illegible] 1 I. A. 106.

(2) [illegible]93) I. L. R. 20 Cal. 533.

Messrs D N Banarji and *G W Dillon*, and *Munshi Gobind Prasad*, for the respondents

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24 A 483= 22 A W N 137

[484] STANLEY, C J, and BANERJI, J —This appeal arises out of a suit for contribution brought by the plaintiffs appellants under the following circumstances —On the 1st of June, 1878, one Naubat Singh executed a mortgage in favour of Mukand Singh and Munna Singh, the predecessors in title of the defendants first party The mortgage comprised a 5 biswa share in the village Muzaffra, and shares in three other villages, Naubat Singh, Sher Singh and the mortgagees Mukand Singh and Munna Singh were joint owners of certain property On the 6th of June, 1878, that is, five days after the mortgage, a partition took place between these persons, under which the whole of the village Muzaffra, including, of course, the five biswas mortgaged under the mortgage of the 1st of June, 1878, was allotted to the share of Mukand Singh and Munna Singh On the 28th of June, 1880, Mukand Singh and the heirs of Munna Singh, who had in the meantime died, obtained a decree upon their mortgage against Naubat Singh That was a decree for the sale of all the property comprised in the mortgage, including the 5 biswa share in Muzaffra Before that decree was obtained, Naubat Singh and Sher Singh had executed a mortgage in favour of the present plaintiffs on the 21st of May, 1880, mortgaging to them all the property which had fallen to their share under the partition referred to above, and another village Atrauli That mortgage included shares in two of the villages which had been mortgaged to Mukand Singh and Munna Singh in 1878 The plaintiffs were not made parties to the suit brought by Mukand Singh and the heirs of Munna Singh upon their mortgage The plaintiffs brought a suit upon their own mortgage of 1880 without joining in that suit the prior mortgagees, and obtained a decree on the 20th of September, 1881 In execution of that decree they purchased, on the 20th of November, 1885, a 5 biswa share in Chalessar and a 10 biswa share in Khera Buzurg, which included the shares in those villages comprised in the mortgage of 1878 On the 30th of November, 1884, the decree obtained by Mukand Singh and the heirs of Munna Singh was assigned by them to Lachmi Narain, defendant No 6 The deed of assignment contained a stipulation to the effect that Lachmi Narain was not to proceed against the 5 biswa share of Muzaffra [485] Execution of the decree was taken out by Lachmi Narain, and he applied for the sale of the shares in the villages Khera Buzurg and Chalessar, which the plaintiffs had purchased in execution of their own decree The plaintiffs preferred an objection, which prevailed in the Court executing the decree Thereupon Lachmi Narain brought a suit, and obtained a decree on the 5th of November, 1886, declaring that the villages purchased by the plaintiffs were liable to sale in execution of the decree of 1880 In order to save the property from sale in pursuance of this decree, the plaintiffs discharged the decree of 1880, and brought the present suit for contribution against the principal defendants the legal representatives of Mukand Singh and Munna Singh, upon the ground that the 5 biswa share of Muzaffra mortgaged to Mukand Singh and Munna Singh in 1878, and allotted to their share by partition, was liable to contribute rateably towards the mortgage debt The suit was resisted [illegible] the partition it was agreed between the [illegible] that the 5 biswa share in the village [illegible] liability, and should not be deemed to be a part of the mortgaged property This contention found favour with

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24 A. 487= 22 A. W. N. 157.

whether the defendants were or were not tenants of the mortgaged property was not one which arose on the pleadings, but if they were, they could be no more than non-occupancy tenants, and by accepting the mortgage they had by their own act changed the nature of their possession from that of tenants to that of mortgagees. The defendants appealed to the High Court, where the appeal came before Banerji, J., sitting singly, by whom the following judgment was delivered :—

"In my opinion the lower appellate Court arrived at a right conclusion. The suit was one for the redemption of a mortgage alleged to have been made in favour of the appellants in 1890. The quantity of land mortgaged is 17 bighas 17 biswas, and the amount of the mortgage money was Rs. 360. It is admitted that a mortgage of that quality of land was made in favour of the appellants for that amount. Their defence to the suit was that the land mortgaged to them was not the land of which the plaintiff claimed possession. They asserted that they were mortgagees of a different piece of land, and that the land of which possession was claimed was their occupancy holding. The Court of first instance held that the land which was claimed by the [489] plaintiff in this suit was the land which he had mortgaged to the defendants under the mortgage of 1890. This finding has been accepted by the defendants and has become final. The Court of first instance, however, was of opinion that the defendants were non-occupancy tenants of the said land before the mortgage was made, and that Court, holding that they are still tenants of the land and cannot be ousted from it, made a decree for redemption, but dismissed the claim for possession. The plaintiff appealed. The lower appellate Court set aside that portion of the decree which refused to award possession to the plaintiff.

"The lower appellate Court was right in saying that the Court of first instance had granted to the defendants a relief which they had never asked for, and had arrived at a finding contrary to the pleadings of the parties. The defendants denied that they were mortgagees of the land in suit. They never asserted that they were both mortgagees and tenants of that land ; so that the Court of first instance, in holding that they continued to be tenants in spite of the mortgage, came to a finding which was not in accordance with the defendants' plea. I take the lower appellate Court to hold that when the defendants took a mortgage of the land of which they had been non-occupancy tenants, they gave up the tenancy and became mortgagees, and thus ceased to be tenants. There can be no doubt on the findings that the defendants had at the date of the mortgage no right of occupancy in respect of the mortgaged land. It is also noticeable that the mortgage deed does not purport to mortgage the zamindari rights of the mortgagor maintaining the tenancy rights of the mortgagees. It is not the defendants' case that they were both mortgagees and tenants. From these circumstances it may be rightly inferred, and that I take to be the inference at which the lower appellate Court has arrived, that the defendants ceased to be the tenants of the plaintiff, and took a mortgage of the land of which they were tenants. That being so, no question of the acquisition of a right of occupancy or of the existence of a tenancy arises, and the mortgagor is entitled to possession of the land which he mortgaged to the defendants under the usufructuary mortgage in question. This case is different from that of a mortgage, which included land in [490] which the mortgagee had a right of occupancy before the mortgage. I dismiss the appeal with costs."

It is not asserted on behalf of the plaintiffs that they were ignorant of the provisions of this sale deed On the contrary, the allegations contained in the plaint show that they were fully cognizant of what that sale deed provided They have set out among the terms of the sale deed the clause which was to the effect that the decretal amount would not be recoverable from the 5 biswa share of Muzaffra So far, therefore, from the plaintiffs having been misled by the decree of 1880, they were fully aware when they satisfied that decree that the share of Muzaffra was no longer liable under it That being so they cannot plead estoppel against the defendants, and claim contribution from them upon the ground of the liability of that share to contribute rateably towards the mortgage debt

1902 JUNE 10 — APPELLATE CIVIL — 24 A. 483= 22 A W N 137

In our opinion this appeal must fail We dismiss it with costs

Appeal dismissed

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24 A 487 (=22 A W N 157)

APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Aikman

KALLU AND ANOTHER (*Defendants*) v DIWAN (*Plaintiff*)*
[10th June, 1902]

Land holder and tenant—Mortgage of holding by land holder to tenant—Mortgagee s rights as tenant not merged in his rights as mortgagee

The fact of a tenant s taking a mortgage of land comprised in his holding from his landlord does not of itself extinguish the tenancy by merging the [illegible] mortgage [illegible] When [illegible] former [illegible] he land [illegible]

[Ref 11 O C 75 Fol 13 I C 735]

IN the suit out of which this appeal arose the plaintiff claimed a decree for redemption of a usufructuary mortgage of 17 bighas and 17 biswas situated in mauza Kaserwa Kalan, pargana Shamli, executed on the 1st of May 1890 in favour of the defendants and their deceased brother Tarif The plaintiff alleged that on the date mentioned he (the plaintiff) put the mortgagees in possession, and "accordingly they have been in [488] possession as mortgagees up to this time' The defendants admitted that the plaintiff had mortgaged some land to them, but asserted that of that land the plaintiff had never in fact given them possession They stated further that they were in possession of 17 bighas and 17 biswas of the plaintiff s land but that they were in possession as tenants and not as mortgagees, and that that land was not mortgaged The defendants averred that the plaintiff had brought the present suit in collusion with the patwari in order to get possession of their tenancy and prevent any occupancy rights accruing in their favour

The Court of first instance (Munsif of Kairana) found that the mortgaged land was identical with that which the defendants asserted to be their tenancy, and therefore gave the plaintiff a decree for redemption, though not for possession The plaintiff appealed, and the lower appellate Court (Additional Subordinate Judge of Saharanpur) modified the decree of the first Court by decreeing possession in favour of the plaintiff The lower appellate Court apparently held that the question

* Appeal No 59 of 1901 under section 10 of the Letters Patent

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were affirmed, the result would be that the occupancy tenant referred to would be in a much worse position after his possession as mortgagee had ceased than before. For according to the Additional Judge he would have ceased to be an occupancy tenant. I cannot assent to this doctrine. I see no reason why in such a case the occupancy tenure should be forfeited, and it is the first time I have heard such a doctrine mooted.

As to the fact that the defendant was an *occupancy* tenant, there can be no doubt. It is admitted that a suit for his ejectment was dismissed by the Revenue Court on the ground that he was an occupancy tenant. The Additional Judge says he was not. That, however, is not a matter within his cognisance to decide. It is for the rent Court—and rent Court alone—to decide the nature of a tenancy. The rent Court in this case has held that the defendant is an occupancy tenant.

The Courts below have given the plaintiff a decree for redemption on payment of one hundred and thirty rupees. As far as it goes, that decree is right. But there must be this added to it, *viz.*, that as the defendant is an occupancy tenant, the plaintiffs on redemption will not be entitled to physical possession by ouster of the defendant.

I allow this appeal as stated above with costs.

[492] AIKMAN, J.—I am of the same opinion, but as we are differing from our learned colleague, I think it necessary to add a few words. The suit was, as has already been stated, one for redemption of a mortgage and for actual possession of the mortgaged land. The mortgage deed contains no materials by which the land mortgaged can be earmarked. The defendants pleaded that the land which the plaintiff sought to get possession of had been for a long period anterior to the date of the mortgage held by them as agricultural tenants. It is true that they denied that the mortgage related to the land claimed by the plaintiff, and in this respect the finding of the Court of first instance was against them and to that finding they submitted. But with reference to the defendant's plea that they had prior to the mortgage been tenants of the land in suit, the learned Munsif found in favour of the defendants, and that finding the plaintiff did not in his appeal venture to challenge. The Munsif came to the conclusion upon the evidence that the defendants had been in possession of the land in suit for ten years prior to the mortgage. He went on to discuss the question whether the defendants' occupation of the land during the term of the mortgage would go to make up the term necessary to give them a right of occupancy in the land, and he came to the conclusion that the defendants had acquired a right of occupancy. In my judgment the Munsif's conclusion was wrong and the status of the defendants was not a matter which he as a Civil Court was empowered to determine. The finding as to the status of the defendants is, however, quite irrelevant to this case. The lower appellate Court and our learned colleague came to the conclusion that the effect of the mortgage was to put an end finally to the defendants' tenancy. In my opinion that is a conclusion which is not warranted by law. It is not pretended that the inference as to the effect of the mortgage is based upon any evidence. I entirely agree with my brother Blair in what he has said upon this question. The effect of the mortgage was to suspend for the time being the relationship of landholder and tenant between the parties. When the mortgage is redeemed, the parties are relegated to the position which they occupied immediately before the mortgage was executed. Our learned colleague, whose judgment is under [493] appeal, distinguishes the case decided by Mr. Justice Burkitt on the 20th of December, 1898, on the ground that the tenancy there was an occupancy tenancy. I cannot draw any such distinction. If the

On appeal under section 10 of the Letters Patent by the defendants mortgagees from this judgment— 1902 JUNE 10

Maulvi *Muhammud Ishaq*, for the appellants

Mr *Abdul Raoof*, for the respondent APPELLATE CIVIL

BLAIR, J —The plaintiff sued for the redemption of a usufructuary mortgage, dated the 1st of May, 1890 The mortgagees pleaded that the mortgage in question did not apply to the land which was sought to be redeemed, and they alleged that in the land sought to be redeemed they had a tenancy The Court of the Munsif held that the mortgage did apply to the plot in which the tenancy of the mortgagees lay, and gave the plaintiff a decree for redemption, but, having regard to the fact of the existence of the tenancy declined to give him a decree for possession The Court of first appeal agreed with the finding that the mortgage applied to the plot of which the mortgagees declared themselves to be, and in the absence of evidence by the plaintiff must be taken to be tenants The first appellate Court, however, held that the defendants by their act of accepting the mortgage of the same land had changed the nature of their possession, and that the plaintiff, when he claimed redemption, was entitled to get actual possession On appeal to this Court, our brother Banerji held, supporting the decision of the lower appellate Court, that it may be rightly inferred, and I take it to be the inference at which the lower appellate Court had arrived, that the defendants ceased to be the tenants of this plaintiff by taking a mortgage of the land of which they were tenants up to the date of the mortgage In my opinion the lower appellate Court, and also the learned Judge of the Court, held that as an inference of law arising from the fact of the defendants accepting a mortgage from their landlord, and they held so not upon any evidence external to that transaction As a proposition of law, we find ourselves unable to accept the ruling of the Judge of this Court and of the lower appellate Court In our opinion the effect of the mortgage was not to destroy the tenancy, but only to suspend the obligation of the tenant to pay rent to the landlord while the mortgage [491] subsisted We entirely agree with the ruling of our brother Burkitt in Second Appeal No 122 of 1898, upon which judgment was delivered on the 20th December, 1898,* a case which, we may remark, would properly find place in the Indian Law Reports, that no such extinction of tenancy or merger in effect took place on the grant to an occupancy tenant of a usufructuary mortgage by his landlord In our opinion the ruling in that case is absolutely sound law, and governs cases of tenancy of a less durable character than an occupancy right I would therefore decree this appeal, set aside the judgment of the Judge of this Court and also of the lower appellate Court, and restore the decree of the Munsiff, with this observation that the possession to which the plaintiff is entitled is a possession subject to the subsisting tenancy He will have the right to receive the rent, but will not enter into physical possession until such time as the tenancy has been determined according to law

24 A 487= 22 A W N 167

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* The judgment in this case was as follows —

BURKITT, J —In my opinion the decision of the Additional Judge in this case cannot be supported I entirely dissent from the novel and extraordinary doctrine laid down by the Additional Judge that, if an occupancy tenant lends money to his landlord and takes from his landlord a mortgage of an area of land which includes his own occupancy holding he thereupon ceases to be an occupancy tenant under some novel doctrine of merger, apparently invented for this case. If this doctrine

1902 JUNE 10. — APPELLATE CIVIL. — 24 A. 493= 22 A. W. N. 164.

there was a perfect partition into 13 mahals for each of which a new wajib-ul-arz was prepared containing the following observations on the subject of pre-emption :—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal." On the 12th of February 1895 the mortgagee sued for foreclosure, and on the 5th of March following obtained a decree in the terms of section 86 of the Transfer of Property Act, 1882. This decree became absolute on the 13th of February 1896, and possession was delivered through the Court on the 10th of May. On the 4th of July 1896 the present suit was filed. The plaintiffs, who were co-sharers in the new mahal, Ran Bahadur, alleged that they were entitled on a construction of both the wajib-ul-arzes above referred to, to pre-empt the property mortgaged in 1890 to Parmeshar Bharthi, which was situated in mahal Nihal Rai, the conditional sale having become absolute on the 13th of February 1896. The Court of first instance (Subordinate Judge of Ghazipur) gave the plaintiffs a decree; but on appeal by the defendant the District Judge [496] reversed that decree, holding, on an interpretation of the ruling in *Bechan Rai* v. *Nand Kishore Rai* (1), that the plaintiffs had no right of pre-emption. The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Majid* and Munshi *Gobind Prasad*, for the appellants.

Munshi *Haribans Sahai* and Babu *Sital Prasad Ghosh*, for the respondent.

STANLEY, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was a suit instituted by the plaintiffs to pre-empt certain villages. It appears that the defendant second party mortgaged the villages in dispute to the defendant first party on the 24th of July, 1890, by a deed of conditional sale. On the 12th of February, 1895, the defendant first party instituted a suit for foreclosure against the second party of defendants, and a preliminary decree was passed on the 25th of March, 1895. The order absolute for foreclosure was made on the 13th of February, 1896, and possession was obtained on the 10th of May, 1896. On the 4th of July, 1896, following, the present suit for pre-emption was instituted by the plaintiffs, who are co-sharers in the villages. They based their claim upon the terms of the wajib-ul-arz, to which we shall presently refer. The Court of first instance decreed the plaintiffs' claim; and thereupon an appeal was taken to the lower appellate Court, with the result that the lower appellate Court reversed the decree of the Court of first instance and dismissed the plaintiffs' suit. The grounds upon which the lower appellate Court dismissed the suit were, that the wajib-ul-arz of 1883 and that of 1894 expressly limited the right of pre-emption to the case of a sale, and did not contemplate its accrual in the case of a mortgage; that it was manifest, therefore, that "no right could possibly have accrued until the decree absolute had taken effect on the 13th of February, 1896. Even then, however, no right of pre-emption could arise, because the change of transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale." For this proposition the learned judge quotes as his authority the case of [498] *Bechan Rai* v. *Nand Kishore Rai* (2). The Wajib-ul-arz prepared at the settlement of 1883 contains the following provisions as to the

(1) (1892) I L R. 14 All. 341.
(2) (1892) I. L. R. 14 All. 341; S. C. Weekly Notes, 1892, p. 18.

defendants were not occupancy tenants when they entered into the mort gage they were at all events agricultural tenants who had certain rights including the right to retain possession of their holding until ousted in due course of law For the reasons set forth above, I concur in the order proposed 1902 JUNE 10 — APPELLATE CIVIL —

By THE COURT —The order of the Court is that the appeal is allowed with costs, the decision of this Court and of the lower appellate Court set aside with costs and that of the Court of first instance is restored We extend the time for payment of the mortgage money up to the 10th of September next 24 A 487= 22 A W N 157

Appeal decreed

24 A 493 (=22 A W N 164)

APPELLATE CIVIL

Before Sir John Stanley, Knight Chief Justice and Mr Justice Banerji

RAM BAHADUR RAI AND ANOTHER (*Plaintiffs*) v PARMESHAR BHARTHI (*Defendant*) * [10th June 1902]

Pre emption—Mortgage by conditional sale—Accrual of right of pre emption when sale

mahal consisting of as to pre-emption — sell it first to subordinate sharers if they refuse to take it then to sharers in the patti and if they also do not take it then to proprietors of the mahal and in case of refusal by all the sharers before mentioned he shall have power to transfer it to a stranger

While this Wajib ul arz was in force namely in 1890 certain property to which its provisions applied was mortgaged by a deed of conditional sale In 1894 after partition of the mahal a new wajib-ul arz was framed for the mahal in which the mortgaged property was situated which also contained a similar record of the custom of pre-emption in the following terms — Should a sharer sell his share he will sell it first to his subordinate sharers afterwards to a sharer in his mahal and in case of refusal by the sharer in the mahal a sharer in the old mahal

Held that the record as to the right of pre emption being in both cases the record of a custom and the provisions of the latter wajib ul-arz being capable of application to the circumstances of the case a right of pre emption [494] accrued to the share holders in one of the other mahals into which the original mahal had been divided upon the mortgage by conditional sale becoming an absolute sale in favour of a stranger

Alu Prasad v *Sulhan* (1) followed *Bechan Rai* v *Nand Kishore Rai* (2) and *Gaya Bharthi* v *Lakhnath Rai* (3) distinguished

THE suit out of which this appeal arose was a suit for pre emption brought under the following circumstances —On the 24th of July 1890 several co sharers in a mahal called Kheri Rai executed a mortgage by conditional sale in favour of one Parmeshar Bharthi At that time the subsisting wajib ul arz of the mahal was one framed at the settlement of 1883 1884 which contained the following provision as to the custom of pre emption — Should a sharer of any patti sell his share he will sell it first to subordinate sharers if they refuse to take it then to the sharers in the patti and if they also do not take it then to the proprietors of the mahal and in case of refusal by all the sharers before mentioned he shall have power to transfer it to a stranger In 1894

* Second Appeal No 339 of 1900 from a decree of R Greeven Esq District Judge of Ghazipur dated the 7th January 1900 reversing a decree of Maulvi Syed Zain ul Abdin Subordinate Judge of Ghazipur dated the 22nd February 1897

(1) (1881) I L R 3 All 610
(2) (1892) I L R 14 All 341
(3) (1897) I L R 20 All 103

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APPELLATE CIVIL.

24 A. 493= 22 A. W. N. 164.

which we have referred laid down no such proposition. The District Judge overlooks the fact, too, that in that case the claim was based upon contract, and not upon custom, as in the present case. All that was decided by the Court was, that a wajib-ul-arz, which was the creature of a contract entered into after the date of a mortgage, can in no way be allowed to prejudice the rights of the mortgagee, he being no party to the wajib-ul-arz, and that consequently, having had a right to convert his conditional sale, into an absolute sale, unfettered by any right of pre-emption before the wajib-ul-arz was agreed to, he was not precluded from exercising that right absolutely, regardless altogether of the provisions of the wajib-ul-arz subsequently entered into. Then it is said by the District Judge that the wajib-ul-arz in this case did not contemplate the accrual of the right of pre-emption in the case of a mortgage. [498] That is so; but when a conditional sale has been made absolute, it becomes an absolute sale of property, and upon so becoming absolute the right of pre-emption at once springs up under the provisions of the wajib-ul-arz. This was so decided in the Full Bench case in this Court of *Alu Prasad* v. *Sukhan* (1). In that case a party mortgaged by way of conditional sale a share of a village to a stranger. The mortgage was foreclosed. Whereupon the mortgagee sued the mortgagor for possession, and obtained a decree, in execution of which he obtained possession of the share in 1878. On the 1st of September, 1879, a co-sharer sued both the mortgagor and mortgagee to enforce his right of pre-emption in respect of the share, and founded his suit upon the following clause in the administration paper of the village, namely:—"When a share-holder desires to transfer his share, a near relative shall have the first right; next, the share-holders of other *pattis*; if all these refuse to take, the vendor shall have power to sale and mortgage, etc., to whomsoever he likes." The facts of this case seem to be on all fours with the case before us. It was there held by the members of the Court (Mr. Justice Pearson alone dissenting), that, having 'regard to the terms of the wajib-ul-arz, the co-sharer in the village was entitled to pre-empt' when the mortgage by conditional sale was foreclosed. This case seems to us to govern the present case. We have been referred, however, to a case as deciding the contrary, and that is the case of *Gaya Bharthi* v. *Lakhnath Rai* (2). In that case, it is sufficient to say that the judgment of the Court was based upon the language of the wajib-ul-arz. It was held that the wajib-ul-arz only contemplated a right of pre-emption in two cases, namely, when a co-sharer made a mortgage of his share; and, second, when the term of the mortgage was about to expire, and notice of foreclosure had been issued. It did not provide for pre-emption when the right to redeem had already been foreclosed, and it was on these special terms of the wajib-ul-arz that the Court held that, once the equity of redemption had been foreclosed, the co-sharer was late in seeking his remedy by pre-emption. For these reasons we are of opinion that the decision of the learned District Judge was wrong, and [499] that the judgment of the Court of first instance was correct. We therefore allow the appeal, set aside the decree of the District Judge, and restore that of the Court of first instance. The appellants will have their costs of this appeal, and also their costs in the lower appellate Court.

Appeal decreed.

(1) (1881) I. L. R. 3 All. 610. (2) (1897) I. L. R. 20 All. 103.

right of pre emption —" Should a sharer of any *patti* sell his share, he will sell it first to subordinate sharers, if they refuse to take it, then to the sharers in the *patti*, and if they also do not take it, then to the proprietors of the *mahal*, and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger ' In the wajib ul arz as framed on partition in 1894 substantially the same provision is contained in clause 13 as to the right of pre emption The words are as follows —" Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal It is to be observed that these provisions as to pre emption are founded, as appears by the wajib ul arz, on custom, and not on contract, and it is perfectly clear that the custom which prevailed in 1883 was not superseded when the partition was effected in 1894, but that that custom was carried on, and recognized by the sharers of the property in 1894 If there had been any real conflict in the nature of the custom as stated in the wajib ul arzes of these two years, different considerations might arise, or if it had been the case that the wajib ul arz which was framed on the partition in 1894 had been the outcome of a contract of the parties then entered into, also different considerations would arise But here the provisions as to pre emption are provisions which have arisen from custom, and which have been carried on from a time anterior to 1883 down to the present time Now the District Judge appears to us to have entirely misconceived and misinterpreted the case on which he relies namely, the case of *Bechan Rai* v *Nand Kishore Rai* (1) In that case a share holder in a village executed two deeds of conditional sale of his share Subsequently to the execution of the deeds and to the making of the contracts embodied in them, a wajib ul arz was prepared agreed to and sanctioned in the village After the making of the wajib ul arz a suit was brought by the mortgagee on foot of his mortgages, and the conditional sale made to him by the mortgages became an absolute sale [497] Thereupon a pre emption suit was brought by some of the co sharers in the village claiming by right of the wajib ul arz to pre empt the sale The plaintiff did not rely upon any custom of pre emption existing in the village at the time of the execution of the deeds of conditional sale He simply relied upon the agreement contained in the wajib ul arz, which was subsequent in date to the mortgages, and was not based on custom The learned Chief Justice Sir John Edge, in his judgment, says —' It appears to me that no subsequent village contract, to which the parties to the conditional sale deeds were not agreeing parties, could alter the rights of the conditional vendee under his deeds Those rights came into existence on the making of the deeds of conditional sale The change of the transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale The learned District Judge misconstruing this judgment says, in the course of his judgment, that ' no right of pre emption could arise because the change of transaction from one of mortgage to one of absoulte sale merely followed as the legal result of events contemplated by the contract of conditional sale, and whether the wajib ul arz evidences a custom or contract, it is unnecessary to decide, for in either case a mortgage is not contemplated as a transaction giving a right of pre emption ' The Court in the case to

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(1) (1892) I L R 14 All 341 S C, Weekly Notes 1892, p 18

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old building for a considerable time. But that fact cannot, in my opinion, override the rights of the appellants to occupy their house in comfort and safety. Mr. *Malaviya* does not attempt to found any argument upon the fact that the tree has been standing there for over 20 years, and indeed no such easement could be claimed.

The proposition put before me is, that if the general body of a muhalla entertain a feeling of reverence towards any tree, no individual owning a house in that muhalla can seek to lop off any of its branches which may overhang his property, even though they may prejudicially affect it. That is a proposition unsupported by authority and inconsistent with common sense. I set aside the judgments and decrees of the Courts below and decree this appeal with costs.

Appeal decreed.

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24 A. 501 (=22 A. W. N. 139).

[501] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SHEO KUMAR (*Defendant*) v. NARAIN DAS (*Plaintiff*).*
[14th June, 1902].

Act No. I of 1877 (Specific Relief Act), section 9—Civil Procedure Code, section 43—Summary suit for possession—Plaintiff restored to possession—Subsequent suit by plaintiff for mesne profits—Burden of proof.

One Lachmi Narain died possessed of certain immoveable property. He left him surviving a widow, Mukhta Kunwar. Narain Das obtained possession of some portion of the said immoveable property, as he alleged, under a lease from Mukhta Kunwar, and held possession, at any rate, for some months down to the 27th of November, 1897. After the death of Mukhta Kunwar, one Sheo Kumar, who claimed to be the adopted son of Mukhta Kunwar, by some means other than legal process, dispossessed Narain Das. Narain Das thereupon instituted a suit under section 9 of the Specific Relief Act, and, having obtained a decree in that suit, was restored to possession. He then instituted a suit against Sheo Kumar to recover mesne profits for the time during which he was out of possession. As to this suit it was *held* (1) that the suit was not liable to be defeated by reason of section 43 of the Code of Civil Procedure; and (2) that as to the other issues arising in the suit, the first was, whether the defendant was the true owner of the property the burden of proving which was on him; and secondly, if the defendant established his title, whether the plaintiff had such an interest in the property, under the lease set up by him or otherwise, as would entitle him to remain in possession as against the defendant.

[Fol. 28 I. C. 1=1915 M. W. N. 170=30 M. L. J. 326=2 L. W. 157; Ref. 1 Pat. L. J. 497; Fol. 11 I. C. 38 (Specific Relief Act, S. 9—suit for possession and for damages); Ref. 8 A. L. J. 910.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of an order of the District Judge of Cawnpore, remanding the case to the Subordinate Judge, under the provisions of section 562 of the Code of Civil Procedure, for the determination of the suit on the merits. The facts are shortly as follows:—One Lachmi Narain was the owner of the property which is now in dispute. He died leaving a widow

* First Appeal No. 9 of 1902 from an order of H. P. Dupernex, Esq., District Judge of Cawnpore, dated the 18th of November 1901.

24 A. 499 (=22 A W N 169)

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24 A 499= 22 A W N 169

Before Mr Justice Blair

BEHARI LAL AND OTHERS (*Plaintiffs*) v GHISA LAL AND OTHERS (*Defendants*)* [14th June, 1902]

Injunction—Maxim—Cujus est solum ejus est usque ad cœlum—Question whether common law rights of owner can be limited by religious prejudices of neighbours

Certain plaintiffs sued for an injunction restraining defendants from obstructing them in cutting certain branches of a pipal tree overhanging their property The pipal tree grew in the inclosure of a temple, and the resistance was based on the ground that the tree was an object of veneration to Hindus, and that the lopping of its branches would be offensive to the religious feelings of the Hindu community

Held, that the plaintiffs were entitled to the injunction prayed for, and that the fact that the plaintiffs action might cause annoyance to a large number of Hindus, was not a sufficient ground for cutting down the well recognized common law rights of an owner of property

[Ref 61 I C 132=6 Pat L J 11]

THE facts of this case sufficiently appear from the order of the Court

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the appellants

Pandit *Madan Mohan Malaviya*, for the respondents

BLAIR, J —This appeal impugns the propriety of a decision of the Subordinate Judge of Moradabad dismissing the plaintiffs' suit under the following circumstances The plaintiffs are the owners of a house adjacent to the site of a Hindu temple Near their house stands in the temple inclosure a pipal tree, the branches of which extend over their house, and which has, of course, been growing there for many years The plaintiffs, alleging that the branches of the tree afforded facilities for a thief to obtain entrance into their house, and endangered life and property, desired to cut those branches They were prevented [500] from so doing by the defendants The plaintiffs ask that an injunction may be issued against the defendants, enjoining them not to offer obstruction to the cutting of those branches which spread over the plaintiffs house Both the Munsif and the Subordinate Judge have found that the pipal tree is an object of veneration to pious Hindus, and has been growing there for over 20 years Both of them have dismissed the plaintiffs' suit The question is a serious one in this country, because, on the one hand, it is highly undesirable to insult or irritate the religious susceptibilities of the people, and on the other, one has to look for the existence of some principle of law by which the general feeling of one part of the population can be allowed to override the ordinary rights of property vested in another person Mr *Tej Bahadur*, for the appellants, contends that there is no such curtailment of individual right of property known to the law, and Mr *Malaviya*, for the respondents, is unable, out of the long array of Indian cases, to produce, a single authority in support of the judgments of the Courts below It is not for me to find facts, but to accept them implicitly as found by the Courts below The lopping of inconvenient boughs of such a tree as this may possibly be regarded as a sort of sacrilege by certain of the Hindu population But it appears that the tree has been lopped before And it is also found by the Subordinate Judge that the branches of this tree have been hanging over the

* Second Appeal No 374 of 1901 from a decree of Rai Mata Prasad, Subordinate Judge of Moradabad, dated the 31st January 1901, confirming a decree of Maulvi Muhammad Abdul Latif, Munsif of Moradabad, dated the 30th of November 1900

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as against the true owner. Therefore we think that the defence under section 43 of the Code of Civil Procedure fails.

As regards the defence set up under the provisions of section 107 of the Transfer of Property Act, it is impossible to determine the rights of the parties without knowing what were the nature and provisions of the lease which was granted by Mukhta Kunwar. Nor is it possible to determine whether or not the plaintiff is entitled to mesne profits unless it has first been ascertained whether or not the defendant is the true owner of the property. If he be not the true owner, then, even though the plaintiff had only a possessory title, it appears to us that he would be entitled to recover mesne profits against the defendant who had no title whatever. If, on the other hand, it turns out that the defendant is the true owner of the property, different considerations would arise. The plaintiff has already established his possessory title. Therefore it will lie upon the defendant to establish that he is the true owner of the property, and if he establish this, then the *onus* will be thrown on the plaintiff of showing that he has an interest in the property, under the lease which was granted to him or otherwise, which would entitle him to remain in possession as against the defendant.

[504] The order, therefore, of the District Judge in remanding the case is correct, but he has not directed the attention of the Court of first instance to all the issues which it is necessary to determine for the purpose of fully adjudicating upon the rights of the parties as indicated above. We therefore dismiss the appeal, and confirm the order of remand of the District Judge; but in doing so and in confirming the order of remand, we should direct the Court of first instance to have regard in the determination of the suit, to the matters which we have dealt with in our judgment. The cost of this appeal will abide the event.

Appeal dismissed.

24 All. 504 (=22 A. W. N. 166).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

RANJIT SINGH AND ANOTHER (*Plaintiffs*) *v.* NAUBAT AND OTHERS (*Defendants*).* [16th June, 1902.]

Act No. IX of 1872 (*Indian Contract Act*), *sections* 134 *and* 137—*Principal and surety —Creditor allowing remedy against principal debtor to become barred by limitation—Discharge of surety.*

"Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him" as these words are used in section 137 of the Indian Contract Act, 1872, indicate a forbearance for a more or less limited period to exercise a subsisting right. The section does not cover such forbearance as results in the remedy of the creditor against the principal debtor becoming barred by limitation.

Hence where a judgment-creditor allowed his judgment-debtor to enter into an agreement for the satisfaction of his decree by instalments, certain persons becoming sureties for the due payment of such instalments, and, the judgment-debtor having made default in payment of the instalments, delayed taking out execution of the decree until execution had become time-barred, it was *held* that the creditor had forfeited his remedy against the sureties

* Second Appeal No. 813 of 1899 from a decree of Munshi Sheo Sahai, Additional Subordinate Judge of Meerut, dated the 20th of July, 1899, reversing a decree of Babu Daya Nath, Munsif of Meerut, dated the 20th of March 1899.

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Mukhta Kunwar, and the plaintiff respondent Narain Das claims to hold the property in dispute under a lease which was granted by Mukhta Kunwar in her lifetime His name was recorded as lessee on the 17th of April, 1897, and he remained in possession until the 27th November, 1897 What the nature and the terms of the letting made by [502] Mukhta Kunwar to Narain Das have not been determined by either the Court of first instance or the lower appellate Court, and we are in ignorance as to these matters Mukhta Kunwar having died on the 16th of July 1897, the present defendant, Sheo Kumar, claiming to be the adopted son of Lachmi Narain, by some means other than by legal process, dispossessed the plaintiff of the property in question It is obvious that if the plaintiff was not entitled to possession under the lease made by Mukhta Kunwar, the defendant ought to have dispossessed him by regular process of law, and not in the illegal way in which he appears to have done so Narain Das thereupon instituted a suit for possession of the property under the provisions of section 9 of the Specific Relief Act, and he obtained a decree, on the 5th of February, 1899, and re entered into possession The present suit was instituted by him for recovery of mesne profits during the time he was out of possession, namely, from the 27th of November, 1897, to the 5th of February, 1899 The defence set up to the suit was amongst others, firstly, that the suit was barred by reason of the provisions of section 43 of the Code of Civil Procedure, and secondly, that the plaintiff was a lessee under a parol lease, which was for a term of more than one year, and had therefore no title to remain in possession, the lease being invalid, having regard to the provisions of section 107 of the Transfer of Property Act

The Court of first instance sustained both these defences and dismissed the suit, but upon appeal the lower appellate Court has held that the plaintiff, having got a decree under the Specific Relief Act, had at least a possessory title, and that the Court of first instance ought to have determined the suit on the merits, and accordingly remanded the case for trial upon the merits, suggesting the determination of two issues, namely an issue as to the amount due to the plaintiff during the period of dispossession, and, secondly, as regards the alleged adoption of the defendant Sheo Kumar and the respondent's consequent title to possession as against the appellant during the latter's dispossession

Now, on the first defence, the lower appellate Court held that section 43 of the Code of Civil Procedure did not bar the claim [503] for mesne profits, and we think that in this finding the Court was perfectly correct Section 43 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make *in respect of the cause of action* The cause of action under the Specific Relief Act is an entirely different cause of action from the cause of action set up in the present suit Under the Specific Relief Act the plaintiff would be entitled to recover possession in any event if he had been dispossessed otherwise than in due process of law, and therefore was entitled to a decree in the suit instituted under the Specific Relief Act, whether or not the defendants who had dispossessed him were the true owners In a suit, however, for mesne profits other considerations would arise, because, as it appears to us, in a suit to recover mesne profits for the time during which a party has been dispossessed, if it be found that he was only a trespasser, and that the person who dispossessed him was the true owner of the property, in such a case the Court could not award mesne profits

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pledged their property as security for the fulfilment of their obligation. On the 6th of November, 1886, the security was accepted by the Collector—we do not know under what powers—and he granted time and sanctioned the compromise. Six annual instalments were paid, namely, the instalments extending from the 6th of November, 1887, to the 6th November, 1892, by the judgment-debtor Harnam. Four instalments became due on the 6th of November, 1896, whereupon the plaintiffs took out execution against Harnam. On the 7th of February, 1898, the Munsif held that the execution proceedings against Harnam were barred by lapse of time. No appeal was taken from this order; and we must take it that, as against the original debtor, the claim of the plaintiffs is statute-barred. Thereupon on the 23rd of August, 1898, the plaintiffs instituted the present suit to recover the balance of the debt from the sureties, the present defendants.

The defence set up was that the plaintiffs, not having appealed against the order of the 7th of February, 1898, allowed the debt to become statute-barred against the principal debtor, and, in consequence, the sureties were discharged. The Court of first instance gave a decree for the amount claimed. On appeal the lower appellate Court reversed this decree and dismissed the suit, holding, in general terms, that, the plaintiff's remedy as against the principal being barred, no remedy against the sureties remained. The Court also held that the suit was barred by the provisions of section 257A of the Code of Civil Procedure; but having regard to the view which we [507] entertain upon the other question, it is unnecessary to discuss the effect of section 257A.

An appeal has been taken to this Court by the plaintiffs, and the case on their behalf has been ably presented to the Court by Mr. *Tej Bahadur.* We are unable, however, to follow him in the argument which he has presented. He relies with confidence on the decision of the Bombay High Court in the case of *Hajarimal* v. *Krishnarav* (1). The question turns upon the true construction of several sections of the Indian Contract Act, the first and most important of which is section 134. This section provides that "the surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, *or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.*" Section 137, which has been prominently brought to our notice, provides that "*mere* forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety." It is unnecessary for us to refer to some of the other sections which perhaps do throw some light on the question. It is contended on behalf of the appellant that in this case the forbearance of the plaintiffs to proceed with due diligence with their execution proceedings against the principal debtor, the result of which was to release him from the debt, was mere forbearance on the part of the creditor within the meaning of section 137, and therefore, in the absence of any guarantee to the contrary, did not discharge the surety. In section 134 it is provided in very clear terms that the surety is discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. It appears to us, reading together these two sections of the Act, that the meaning of "mere forbearance" in section 137 is such forbearance, the

(1) (1881) I. L. R. 5 Bom. 647.

also *Hazari Lal* v *Chuni Lal* (1) and *Radha* v *Kinlock* (2) followed. *Hajarimal* v *Krishnarav* (3) dissented from
[Ref 2 N L R 42 Diss 33 Mad 308]

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24 A 504=22 A W N 166

THE facts of this case are as follows —

On the 30th of March 1885 Ranjit Singh and others obtained a decree against one Harnam The decree was transferred to the Collector for execution on the 28th of May, 1886, the property which the decree holders sought to sell being ancestral [505] On the 30th August 1886 a compromise was entered into between the parties, whereby the plaintiffs agreed to give time to Harnam for payment of the debt upon the condition that Harnam should provide certain sureties to guarantee payment Upon the 30th of August 1886 a bond was executed by the sureties on behalf of Harnam which provided that if Harnam failed to pay the amount of the decree by annual instalments of Rs 100, with interest, the sureties would pay the amount of the decree, and by the bond the sureties pledged their property as security for the fulfilment of the obligation On the 6th of November 1886 the security was accepted by the Collector, and he granted time and sanctioned the compromise Under this agreement six annual instalments were paid, namely, the instalments extending from the 6th of November 1887 to the 6th of November 1892 Four instalments became due on the 6th of November 1896, whereupon the decree holders took out execution against Harnam On the 7th of February 1898, the Munsif held that the execution proceedings against Harnam were barred by lapse of time That order was not appealed from, and, as against the decree holders became final On the 23rd of August 1898 the decree holders brought the suit out of which this appeal has arisen to recover from the sureties the unpaid balance of the decretal debt The Court of first instance (Munsif of Meerut) gave the plaintiffs a decree On appeal the lower appellate Court (Additional Subordinate Judge of Meerut) reversed this decree and dismissed the suit, holding in general terms that, the plaintiff s remedy as against the principal being barred, no remedy against the sureties remained The plaintiffs thereupon appealed to the High Court

Pandit *Tej Bahadur Sapru* for the appellants

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the respondents

STANLEY, C J, and BANERJI, J —The suit out of which this second appeal has arisen was instituted by the plaintiffs to recover as against the defendants a sum of money alleged to be due on foot of a surety bond entered into by them on behalf of one Harnam, a judgment debtor of the plaintiffs The plaintiffs on the 30th of March, 1885, obtained a decree against [506] Harnam The decree was transferred to the Collector for execution on the 28th of May, 1886, the property to be sold being ancestral property On the 30th of August, 1886, a compromise was entered into between the parties, whereby the plaintiffs agreed to give time to Harnam for payment of the debt, upon the conditions that the defendants in the present suit should guarantee the payment of the debt This they agreed to do, and they executed on the 30th of August, 1886, a bond, which provided that if Harnam failed to pay the amount of the decree by annual instalments of Rs 100 with interest, the sureties would pay the amount of the decree, and by the bond they

(1) (1886) I L R 8 All 259
(2) (1889) I L R 11 All 310
(3) (1881) I L R 5 Bom 617

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forbearance" in favour of his debtors in the sense of section 137; that he had done an act inconsistent with the equities of the sureties, and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired. The learned Judges who decided that case, Oldfield and Tyrrell, JJ., in the course of their judgment, observe :—"It must be conceded that the legal consequence of the respondents' omission to execute the decree has been the discharge of his principal debtors. The decree is dead, and they are released from all responsibility under it. The sureties then would, under the rule of section 134 of the Indian Contract Act, stand discharged likewise by virtue of this omission of the creditor. But it was argued that (section 137 *ib.*) 'mere forbearance on the part of the creditor to enforce his remedy against the principal debtor does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.' This is doubtless true; but the action of the respondent, who omitted in this case to resort to the execution of his decree, and allowed it to become a dead letter by limitation, is, in our opinion, much more serious than 'mere forbearance' in favour of his debtors." In that case the case in I. L. R. 5 Bom. does not appear to have been brought to the [510] notice of the learned Judges. But in the more recent case of *Radha* v. *Kinlock* (1) the authority of the case in I. L. R. 5 Bom. was discussed by Sir John Edge, Chief Justice, and Mr. Justice Tyrrell, and it was held there that "the omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under section 134 of the Contract Act, even though the non-suing within such period arose from the creditor's forbearance; that section 137 of the Contract Act does not limit the effect of section 134; its object is to explain, and prevent misconception as to the meaning of section 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise the right which is still in existence." The learned Judges say, in reference to the Bombay case, "If the view adopted at Bombay be correct, that section (*i.e.*, section 137) applied to such a case as the present. The payment by the surety after the statutory period of limitation, so far as the debt was concerned, could not transfer to the surety any rights of the creditor against the principal debtor, for all those rights were barred at the time. Again, to take section 141, it shows that the intention of the framers of the Act was that the surety should have the benefit of every security which the principal debtor had at the time the contract of surety was entered into. We fail to see what advantage it would be to the surety to have the security which the creditor possessed against the principal debtor at the date when the contract of guarantee was entered into, if the creditor's right to sue upon the security had become barred by limitation before payment by the surety." Further on they say :—"In our opinion the liability of the surety determined as soon as the liability of the principal debtor by the omission of the creditor was discharged." We entirely concur in the view of the learned Judges who decided the last two cases to which we have referred, and we think that the decision of the lower appellate Court, which is expressed in very general terms, is, for the reasons which we have mentioned, a correct decision. We therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1889) I. L. R. 11 All. 310.

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24 A 604= 22 A W N 166

legal consequence of which is not to discharge the principal debtor, but merely forbearance to sue immediately the debt becomes due, or for a limited time thereafter, as indeed is exemplified by the illustration to the section, whereby a period of one year after the debt has become payable [608] is mentioned It does not mean forbearance for such length of time as by reason of the statute of limitation would be a bar to the claim against the principal debtor In the case to which we have referred in the Bombay High Court, it was decided by the Chief Justice, Sir M Westropp, and Mr Justice Birdwood, that, although the suit in that case was barred as against the principal debtor under the Limitation Act, yet the surety being an agriculturist, was still liable inasmuch as section 72 of the Dekhan Agriculturists' Relief Act, which extends the period of limitation in the case of suits against agriculturists, applies to all agriculturists, whether principals or sureties, in the districts affected by the Act In the judgment of the Court the meaning of the sections of the Indian Contract Act to which we have referred, relating to contracts of guarantee, were considered, and the learned Judges were of opinion that mere forbearance means a forbearance not resting upon, or in consequence of, such a promise to give time to, or not to sue the principal debtor as is the subject of section 135 They observe:—"The omission of the creditor to sue the principal debtor within three years from the date of the bond has undoubtedly [having regard to section 2 already mentioned, and to the Limitation Act of 1877] produced the legal consequence of the discharge of the principal debtor, and *prima facie,* if we were not to look beyond section 134, we should hold the surety to be discharged But this view is dispelled by section 137, which qualifies section 134 by enacting that 'mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety ' We are unable to agree in this view of the sections We think that the language of the two sections read together shows that mere forbearance is used in the restricted sense which we have already mentioned, and that it does not mean, and does not apply to a case of forbearance, the legal consequence of which is the discharge of the principal debtor This question has been decided in two cases in this High Court, the earlier of which is the case of *Hazari Lal* v *Chunni Lal* (1) In that case the facts are very similar to the facts of [609] the present case A decree holder in execution proceedings agreed to accept payment of the decretal amount by the judgment debtors in annual instalments He also agreed to accept a surety bond for the payment of the debt from certain other persons in the following terms —"In case of default in payment of the instalments, the whole decretal money, with costs and interest at 8 annas per cent, shall be executed after one month, and for the satisfaction of the decree holder, we the executants stand as sureties of the judgment debtors' The judgment debtors paid five instalments and then made default The decree holder omitted to apply for execution, and the decree became time barred He then sued the sureties to recover the amount of the decree It was held that the legal consequence of the omission to execute the decree being the discharge of the principal debtor, the sureties would, under section 134 of the Contract Act, stand discharged likewise, that the action of the decree-holder was much more serious than "mere

(1) (1886) I L R 8 All 259

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APPELLATE CRIMINAL.

24 A. 511= 22 A. W. N. 142.

Procedure. By the provisions of section 451, sub-section (1) of the Code, an European British subject, in a trial before the District Magistrate in a warrant case may, "before he enters on his defence under section 256, claim that the trial shall be by jury." It appears that, in the present case, at the outset of the proceedings, the accused was asked if he wished to be tried by a jury, and replied in the negative. A charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were ordered to be re-called for cross-examination. In his judgment the Magistrate observes :—"After the charge-sheet had been framed, an application for a jury was presented on his (the accused's) behalf. But it was then too late to accede to such a request." This application, it appears, was made by the accused's counsel on the 22nd of April, before the date fixed for the re-appearance of the witnesses for the prosecution. The language of section 256 shows that the application thus made was made before the accused entered on his defence. It was refused by the District Magistrate who dealt with the case himself. The sole question which I have to determine is whether the fact that the accused, before the trial had begun, [513] stated that he did not wish for a jury, prevented him altering his mind afterwards, and claiming a jury within the time allowed by section 451, sub-section (1). I am clearly of opinion that there was nothing to prevent the accused, when he had heard the evidence for the prosecution, altering his mind and availing himself of the privilege allowed him by law. His refusal to claim that privilege at the outset of the proceedings can in no way estop him from afterwards asserting his right, provided he does so before he has entered on his defence. After that it would be too late. It may well be that an accused, before he has heard the evidence for the prosecution, may think the case had better be disposed of by the Magistrate himself, and that after he has heard the evidence he may see that it would be for his benefit to have the evidence submitted to a jury. I therefore hold that the Magistrate's opinion that it was too late on the 22nd of April to accede to the accused's request is erroneous. That request ought to have been granted, and after it was made, the Magistrate had no power to dispose of the case himself.

For this reason I quash the conviction and sentence, and direct that the Magistrate take up the case from the stage it had reached when the request was made, that he grant that request, and thereafter deal with the case according to law. If the accused was on bail during the trial he ought to be admitted to the same bail. If not, he will be detained as an under-trial prisoner until the conclusion of the trial or until further orders. I note that at the conclusion of his judgment the learned District Magistrate says that he would have committed the case to the Court of Session if it had not been for the prisoner's youth, and the season of the year. If the accused or his counsel wishes the case to be committed, then, in my opinion, the District Magistrate would do well to accede to that wish.

24 A 511 (=22 A W N 142)

[511] APPELLATE CRIMINAL

Before Mr Justice Aikman

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APPELLATE CRIMINAL.

24 A 511= 22 A W N 142

EMPEROR v C J SULLIVAN * [18th June, 1902]

Criminal Procedure Code, section 451 (1)—European British subject—Right of European British subject to be tried by a jury—Such right claimable at any time before accused has entered upon his defence notwithstanding previous waiver

One Sullivan was sent for trial to the District Magistrate of Meerut the offence alleged against him being one under section 354 of the Indian Penal Code *i e*, a warrant case At the outset of the proceedings the accused was asked whether he wished to be tried by a jury, and replied in the negative A charge was framed against the accused and at his request certain witnesses who had been examined for the prosecution were ordered to be recalled for cross examination After the charge was framed, but before the accused had entered upon his defence, an application for a jury was presented on behalf of the accused. The Magistrate disallowed this application

[Ref

ONE C J Sullivan was sent for trial to the District Magistrate of Meerut, the offence alleged against him being one under section 354 of the Indian Penal Code, *i e*, a warrant case At the outset of the proceedings the Magistrate formally asked the accused whether he wished to be tried as an European British subject, and formally recorded the answer of the accused that he did not The trial was then proceeded with and a charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were recalled for cross examination About this stage of the trial, before a date had been fixed for the re appearance of the prosecution witnesses asked for by the accused, an application was presented on behalf of the accused asking that he might be tried by a jury The Magistrate rejected this application as having been made too late, and, continuing the trial, found the accused guilty and sentenced him accordingly Against this conviction and sentence the accused first applied in revision to the High Court, but, after the finding of the Court that by reason of section 439 (5) no application in revision could be entertained, the [512] present appeal was filed The sole contention argued (though the appeal was on the merits) was that the Magistrate was wrong in refusing the appellant's application for a jury

Mr *C Dillon*, for the appellant

The Government Pleader (Maulvi *Ghulam Mujtaba*), for the Crown

AIKMAN, J—This is an appeal on behalf of one C J Sullivan, who has been convicted by the District Magistrate of Meerut of an offence punishable under section 354 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment The appeal is on the merits. But a preliminary objection is also taken in the petition of appeal to the legality of the proceedings of the District Magistrate

Without entering into the merits of the case, I am of opinion that this appeal must be disposed of on the legal objection referred to The appellant is an European British subject The offence with which he was charged is a warrant case within the meaning of the Code of Criminal

* Criminal Appeal No 431 of 1902

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jeopardized, the mortgagees would be entitled to realize it with interest at 9 per cent. per annum. The lower appellate Court held that, as it was not through any act of the defendants' father that the present plaintiffs lost the pre-emption suit, the plaintiffs were not entitled to succeed in their claim upon the basis of the stipulation to which we have referred. We are, however, of opinion that the covenant in the mortgage-deed enures in favour of the pre-emptor, who has stepped into the shoes of the mortgagee. If he, as mortgagee, is damnified in any way, he would be entitled to avail himself of the covenant. The plaintiffs, in our opinion, are not entitled to take advantage of it.

It is next urged that as the defendants' father received the full amount of the mortgage, and as the plaintiffs have recovered from the pre-emptor only a portion of it, they are equitably entitled to the balance of the amount advanced by them. This might perhaps have been a valid contention had the full amount of the mortgage money been advanced by the plaintiffs; but the facts of this case show that they did not do so. The consideration for the mortgage consisted of a sum of Rs. 230 paid in cash, and Rs. 674 alleged to have been due by the mortgagor upon a bond executed by him in favour of the plaintiffs in 1887. A [516] part of the consideration for the bond of 1887 consisted of money which had been left in the hands of the plaintiffs, the obligees of that bond, for the discharge of a debt due to Shuhrat Singh upon a mortgage executed by Din Bandhu. It appears that Shuhrat Singh brought a suit to recover the amount due to him under the void mortgage, and in that suit it was pleaded that the present plaintiffs had, in compliance with the terms of the mortgage-deed of 1887, paid off the amount of Shuhrat Singh's mortgage. The Court found that plea to be untenable, and held that Shuhrat Singh's mortgage had not been discharged by the present plaintiffs. In the pre-emption suit brought by Shuhrat Singh, to which we have referred, he relied on the fact of the non-payment of the above amount in order to show that the consideration for the mortgage of 1892 had been falsely exaggerated in the mortgage-deed. The present plaintiffs in answer to that contention alleged that they had paid off the amount of Shuhrat Singh's mortgage. The Court repelled that contention and found against them. It is thus clear that the present plaintiffs and the defendants' father joined together in fraudulently representing that the consideration for the mortgage was Rs. 904, and not Rs. 525, the sum found by the Court in the pre-emption suit to be the actual amount of consideration. The plaintiffs and the defendants' father having thus joined together in perpetrating a fraud for the purpose of defeating the rights of pre-emptors, the plaintiffs cannot take advantage of that fraud and maintain the present claim against the defendants. Upon this ground also the plaintiffs' suit was bound to fail.

We therefore affirm the decree of the lower appellate Court, though not for the reasons upon which that decree is founded, and dismiss the appeal with costs.

Appeal dismissed.

25 A 514 (=22 A W N. 149)

[514] APPELLATE CIVIL

1902 JUNE 20.

APPELLATE CIVIL.

25 A 514= 22 A W N 149

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji

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BALBHADDAR NATH AND OTHERS (*Plaintiffs*) v SHEODIHAL AND OTHERS (*Defendants*) * [20th June, 1902]

Pre emption—Mortgage—Mortgage money fraudulently over-stated—Claim of pre emptor decreed at a lower figure—Suit by mortgagees against mortgagor to recover the difference

Din Bandhu mortgaged to Sheodihal and others certain property, and the mortgagor and the mortgagees for purposes of their own fraudulently agreed to over state the consideration for the mortgage One Shuhrat Singh then brought a pre emption suit against the parties to the mortgage, and obtained a decree, which allowed him to take over the rights of the mortgagees upon payment of a sum much less than the consideration stated in the bond which was found by the Court to have been largely fictitious The mortgagees, after the success of Shuhrat Singh s suit, sued the representatives of the mortgagor to recover from them the difference between the price paid by Shuhrat Singh and the consideration mentioned in the deed of mortgage They based their suit mainly upon a stipulation in the deed, to the effect that [illegible] in any way jeopardized, [illegible] interest at 9 per cent per [illegible] *Held* that from no point [illegible] stipulation in the bond above referred to enured to the benefit of the pre-emptor, and since the plaintiffs had joined with the defendants in misrepresenting the amount of the consideration for the mortgage, they could not be allowed to take advantage of their own wrong

THE facts of this case sufficiently appear from the judgment of the Court

Babu *Durga Charan Banerji*, for the appellants

Pandit *Sundar Lal*, for the respondents

STANLEY, C J, and BANERJI, J —This appeal has been preferred from the decree of the Additional Subordinate Judge of Gorakhpur, by which he has dismissed the suit brought by the plaintiffs appellants under the following circumstances :—Din Bandhu Pande, the father of the defendants respondents, executed a mortgage in favour of the plaintiffs on the 18th March, 1892, the amount of consideration set forth in the mortgage deed being Rs 904 One Shuhrat Singh, a co sharer [515] in the village in which the mortgaged property was situate, brought a suit for pre emption in respect of the mortgage He alleged that the actual amount of consideration for the mortgage was Rs 525, and not Rs 904 as specified in the mortgage deed The Court found in favour of the then plaintiff, and made a decree for pre emption conditional upon the payment of Rs 525 That amount has been received by the plaintiffs, and they now bring the present suit to recover from the defendants Rs 379, the difference between the amount received by them and the amount of consideration mentioned in the mortgage deed The claim was decreed by the Court of first instance, but has been dismissed by the lower appellate Court The plaintiffs have preferred this appeal

The claim as laid in the plaint was founded upon a stipulation contained in the mortgage deed, executed by Din Bandhu, to the effect that if the mortgage money due to the mortgagees was in any way

* Second Appeal No 730 of 1900 from a decree of Babu Ramdhan Rai, Officiating Additional Subordinate Judge of Gorakhpur, dated the 16th of April, 1900, reversing a decree of Babu Kalika Singh, Munsif of Bansi, dated the 29th July 1899

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APPELLATE CIVIL.

24 A. 517= 22 A. W. N. 50.

rent by suit under that Act. This provision clearly excludes the suit from the cognizance of a Court of Small Causes.

The first plea taken in the memorandum of appeal here is, that the assignee's only remedy was an application to the Revenue Court to execute the order of an Assistant Collector appraising the value of the standing crops. In my opinion this plea cannot be sustained. As has been shown above, the mode provided by the Rent Act for recovery of the amount awarded as the price of the standing crops is not by application to execute the award, but by a suit under the Act. It is true that the suit ought to have been brought in the Revenue Court. But no objection to the jurisdiction of the Munsif having been taken, either before the Munsif or in the lower appellate Court, such objection cannot now be entertained, and the appeal must be disposed of as if the suit had been instituted in the right Court (*vide* section 206 of Act No. XII of 1881). This disposes of the first plea.

The next plea is, that what the assignee acquired was an actionable claim, and that the defendants are entitled to be discharged by paying to the assignee the price and the incidental expenses of the sale of the claim with interest. This plea is based upon section 135 of the Transfer of Property Act No. IV of 1882. In my opinion this plea likewise fails, having regard to the provisions of cl. (*d*) of the above mentioned section, which provides that where the judgment of a competent Court [519] has been delivered affirming the claim, the provision as to the discharge of actionable claims does not apply. Here a competent Court, namely, the Court of the Assistant Collector, has delivered judgment affirming the claim. These are the only two grounds in the memorandum of appeal. I therefore dismiss the appeal with costs.

An objection has been taken by the plaintiff-respondent under the provisions of section 561 of the Code of Civil Procedure, to the set off which has been allowed by the lower appellate Court. That objection is clearly without force. The land-holders were entitled to set off against the price of crops, the amount of the rent payable by the plainiff's assignor—[*vide* cl. (*d*), section 42 of the Rent Act.] The result is that I dismiss both the appeal and the objection with costs,

Appeal dismissed.

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24 A. 519 (=22 A. W. N. 144).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Knox.

RAM ADHAR AND ANOTHER (*Judgment-Debtors*) *v.* NARAIN DAS (*Auction-Purchaser*).* [24th June 1902.]

Execution of decree—Objection by judgment-debtor that more had been delivered to the auction-purchaser than was included in the sale certificate—Objection disallowed—Appeal—Civil Procedure Code, section 244.

Certain landed property was put up for sale in execution of a decree. On the property stood a house. After the sale the auction purchaser obtained possession of the house. The judgment-debtors objected that the house should not have been delivered, inasmuch as no mention was made of it in the sale certificate. This objection was disallowed. *Held*, that the order disallowing the judgment-debtor's objection did not fall within section 244 of the Code of

* First Appeal No. 15 of 1902 from a decree of Munshi Shiva Sahai, Subordinate Judge of Cawnpore, dated the 16th of October 1901.

24 A 517 (=22 A W N 50)

[517] APPELLATE CIVIL

Before Mr Justice Aikman

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APPELLATE CIVIL

24 A 517= 22 A W. N 50

MATHURA DAS AND OTHERS (*Defendants*) v MURLIDHAR (*Plaintiff*) * [23rd June, 1902]

Act N [illegible] *— Land-holder and tenant* [illegible] *of right to receive price* [illegible] *—Jurisdiction—Civil and* [illegible] *section* 135

A zamindar ejected a tenant, and having done so, caused the value of the tenant's crops standing on the land to be assessed in the manner provided for by section 42 of the N W P Rent Act The tenant assigned his right to get the assessed value of the crops from the zamindar to a third person

Held on a suit by the assignee to recover the amount of the assessment— [illegible], and [illegible] t the [illegible] and [illegible] e was [illegible] n 135 [illegible]

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Sundar Lal*, Pandit *Baldeo Ram* and Babu *Devendra Nath Ohdedar*, for the appellants

Babu *Jogindra Nath Chaudhri* and Pandit *Madan Mohan Malaviya* (for whom Babu *Beni Madhub Ghosh*), for the respondent

AIKMAN, J —The suit out of which this appeal arises is one of a somewhat peculiar nature The defendants are the appellants here They are zamindars of a village Sultan Ali was a tenant of theirs They ejected him by proceedings under the Rent Act At the time of the ejectment there were standing crops on the tenant's holding The zamindars, wishing to acquire those crops, tendered their price to the tenant The parties not being able to agree as to the price, the zamindars applied to the Rent Court under cl (g) section 95 of Act No XII of 1881, to determine the value of the crops The Assistant Collector fixed the value at Rs 237 Sultan Ali assigned his rights to receive this sum to one Murlidhar, the plaintiff in this suit Murlidhar, the [518] assignee, brought a suit in the Court of the Munsif to recover from the zamindars the amount awarded as the value of the standing crops, together with interest The lower appellate Court has decreed the greater part of the claim, allowing a small set off on account of rent due to the defendants from the plaintiff's assignor The defendants come here in second appeal

A preliminary objection is taken to the hearing of the appeal based upon section 586 of the Code of Civil Procedure, namely, that the suit was one of a nature cognizable in a Court of Small Causes, and the value of the subject matter did not exceed Rs 500 In my opinion this preliminary objection must be overruled Section 42 (c) of Act No XII of 1881 provides that the amount of an award made by an Assistant Collector under cl (g), section 95, shall be recoverable as an arrear of

* Second Appeal No 422 of 1901, from a decree of Lala Shankar Lal, Additional Subordinate Judge of Meerut, dated the 31st January, 1901, modifying a decree of Maulvi Muhammad Abbas Ali, Munsif of Meerut, dated the 21st of February 1900

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310.

The plaintiff mortgaged to the defendant twelve villages, and stipulated in the mortgage deed that "until delivery of possession of the aforesaid villages I shall pay interest at the rate of 2 per cent. on the mortgage money," and that "until I pay up the Rs. 5,600 on account of principal with interest to the very last pie the mortgagee shall continue in possession and occupation of the villages." Possession of the villages was given to the mortgagee at the time of the execution of the mortgage, but a reduction in the number of villages in his possession was caused by a grant by the native Government in 1853, and settlements in 1858 and 1864 in favour of other persons. By a lease executed at the same time as the mortgage some of the villages were leased to the plaintiff who thus became the tenant of the mortgagee, and paid rent in lieu of interest. *Held* in a suit for redemption that the interest referred to in the mortgage deed was only interest until possession was given of the mortgaged property: the mortgagee after possession took the rents and profits instead of interest, and the plaintiff was entitled to redemption on payment of the principal sum of Rs. 5,600 only.

Held also that no difference to this result was caused by the reduction in the number of villages held by the mortgagee, which did not constitute a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property such as entitled the mortgagee to claim interest in lieu of the rents and profits of those villages of which he was so dispossessed. The settlements were final as to the ownership of the mortgaged property, and the mortgagee having brought no suit, as he might have when his security became diminished, must be taken to have acquiesced in his dispossession.

[Fol. 27 All. 318=1901 A. W. N. 273=1 A. L. J. 715; Ref. 31 All. 325=6 A. L. J. 247=2 Ind. Cas. 221; 6 Bom. L. R. 630; Dist. 11 C. W. N. 732=6 C. L. J. 74; Ref. 13 I. C. 156; 28 M. L. J. 184=2 L. W. 433=27 I. C. 989; 46 Cal. 448; 44 Mad. 801=40 M. L. J. 236=28 M. L. T. 234=61 I. C. 612; 23 I. C. 131.]

APPEAL from a decree (20th November, 1897) of the Court of the Judicial Commissioner of Oudh, which varied in favour of the respondent a decree (30th April, 1895) of the Subordinate Judge of Sultanpur, in a suit brought by the respondent.

The plaintiff, as representative of one Indarjit Singh, sued the defendant as representative of Raja Sarnam Singh, Taluqdar of Gaura Katari, to redeem a mortgage of the following five villages: (1) Hargaon, (2) Ahed, (3) Macharia, (4) Bahadurpur, (5) Poorab Pershad Badal.

[522] On 15th of June, 1851, Indarjit Singh borrowed Rs. 5,600 from Sarnam Singh, and as security mortgaged to him the above five villages together with seven others, *viz.* (6) Poorab Adhar, (7) Ajabgarh, (8) Rudgarh, (9) Kapasi, (10) Sheogarh or Sheopur, (11) Baghiapur, and (12) Poorab Kohli. The material clause in the mortgage deed is set out in their Lordship's judgment.

On the same date Raja Sarnam Singh executed a perpetual lease of the first-named five villages and of Poorab Adhar in favour of Indarjit Singh at a yearly rental of Rs. 2,801, from which amount Indarjit was to be allowed Rs. 800 per annum as *naskar* or subsistence allowance. The lease was to take effect from 1259 Fasli—the 11th of September, 1851.

On the 18th of September, 1853, one Hanuman Prasad obtained lease from the King of Oudh of the whole taluqa of Bhawan Shahpur, in which the above-named 12 villages were incorporated, and forcibly took possession of them, which he retained until the annexation of Oudh in 1856. At the first summary settlement the villages leased on the 15th of June, 1851, were settled with Indarjit Singh but the other six villages were settled with other persons. After the confiscation of Oudh in March 1858, the second summary settlement was made on the basis of proprie-

Civil Procedure, and was not otherwise appealable *Mammod* v *Locke* (1) and *Hira Lal Chatterji* v *Gourmoni Debi* (2) referred to

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IN this case one Ram Shankar, holding a decree against Ram Adhar and another, caused certain land belonging to the judgment debtors to be sold by auction in execution of his decree Upon this land there stood a building described as a "dera,' and this building was sold with the land, and the auction purchaser, Narain Das, was put in possession The judgment debtors filed [520] an objection in the executing Court, alleging that the building was in fact a dwelling house and could not be, and was not, sold with the land, and ought not to have been made over to the auction purchaser The Court of first instance (Subordinate Judge of Cawnpore) dismissed the application of the judgment debtors, on the ground mainly that the objection was not one which could be entertained under section 244 of the Code of Civil Procedure, especially after the sale had been completed, and that the building was not in fact, as the judgment debtors asserted, a dwelling house

The judgment debtors thereupon appealed to the High Court

Babu *Satya Chandra Mukerji*, for the appellants

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dave*), for the respondent

STANLEY, C J, and KNOX, J —A preliminary objection is taken to the hearing of this appeal, on the ground that no appeal lies The facts, so far as they are necessary for the objection are as follows —Certain property had been put for sale in execution of a decree—that property was landed property Upon the property stood a house After sale the auction-purchaser obtained possession of the house The judgment-debtors then objected that the house should not have been delivered over, on the ground that no mention of it was made in the sale certificate The Court below came to the conclusion that as possession had been delivered, be the order a proper or improper one, it could not interfere The respondent takes a preliminary objection to the effect that the order of the Court below is not an order under section 244, inasmuch as it is not an order made between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree The appellants' learned vakil was at first disposed to question this, but on his being referred to the case of *Mammod* v *Locke* (1) and the case of *Hira Lal Chatterji* v *Gourmoni Debi* (2), he was no longer prepared to sustain his appeal The result is that this appeal must be dismissed with costs

Appeal dismissed.

24 A 521 (=29 I A 148=7 C W N 97=4 Bom L R 845=8 Sar 310)

[521] PRIVY COUNCIL

PRESENT

Lord Davey, Sir Andrew Scoble, and Sir Arthur Wilson

PARTAB BAHADUR SINGH, MINOR, BY HIS NEXT FRIEND JAGMOHAN SINGH (*Defendant*) v GAJADHAR BAKHSH SINGH (*Plaintiff*)
[10th, 11th June and 22nd July, 1902]

[*On appeal from the Court of the Judicial Commissioner of Oudh*]

Mortgage—Suit for redemption—Stipulation for interest until principal paid off—Mortgagee in possession and in receipt of rents and profits—Reduction of mortgagee's security by acts beyond mortgagor's control—Acquiescence of mortgagee

(1) (1897) I L R 20 Mad 487 (2) (1886) I L R 13 Cal 326

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24 A. 521=29 I. A. 148=7 C.W.N. 97=4 Bom. L. R. 845=8 Sar. 310.

had any title to the remaining six villages; that those six villages were not lost in consequence of any negligence for which the mortgagee could be responsible; that the loss could be considered in a suit for redemption, and that the value of the six villages was at least Rs. 14,160. He was of opinion that the mortgagee was not put into possession of these six villages and of Poorab Adhar on the execution of the mortgage deed. He held that there was no proof of any payments in the years 1259 Fasli and 1260 Fasli, and *that the mortgagee could not charge* Rs. 105 per annum from 1864 to 1868. He decided that the mortgagee not having been put into possession of the entire property mortgaged, he was entitled to charge as interest or damages 2 per cent. per mensem on the principal, giving the mortgagor credit for payments made in excess of the Government revenue and cesses; and as there were no such payments, he decreed redemption on payment of Rs. 5,600 principal, Rs. 57,792 interest up to the 13th of June, 1894, and the costs of the suit.

From this decree the plaintiff appealed to the Court of the Judicial Commissioners of Oudh. That Court decided that the title of Indarjit Singh was limited to the five villages in suit; that the loss of the remaining villages was not due to any neglect on the part of the mortgagee, and that he was, therefore, not responsible to the mortgagor. The Judicial Commissioners reversed the finding of the Subordinate Judge in this respect, and held it proved that on the execution of the mortgage deed Raja Sarnam Singh was placed in possession of all the twelve villages as mortgagee. On the construction of the mortgage they were of opinion that the mortgagor covenanted to pay interest at 2 per cent. per mensem until possession of the mortgaged villages was delivered to the mortgagee, after which interest ceased, the mortgagee being then entitled to the rents and profits of the property in lieu of interest, and that redemption was to be effected on payment of the principal sum of Rs. 5,600 together with such interest as might have accrued until delivery of possession.

[525] As to this, and as to the legal effect of the mortgagee being deprived of the rents and profits in lieu of interest in consequence of the failure of the mortgagor to secure his possession, the Judicial Commissioners said:—

"Both the parties ad... determined under the p... their respective rights and liabilities should be ... Act IV of 1882.

"It appears to me ... successfully contest tl... payment of the princip... provisions o... the mort... 5,600). ... defendant cannot ... operty in suit on

"Had possession o... mortgagee, interest wo... terms of the mortgage, ... tended by the defendant, ... property of which the ... the only ground upon wh... dant in his written sta... ortgaged property was ... ge the mortgagor ... of delivery of posses... operty). He did not ... t being that ... and profits. ... ; and the mor... her with such ... to me ... m ... been ... rtgag ... of ... 57,7... U... at ... given to the ... under the ... suit, as con... mortgaged ... observe was ... the defen... the entire ... contract ... up ... mort

tary right, and at this settlement a decree for the five villages in suit was passed in favour of Indarjit Singh Poorab Adhar was settled with other persons, and the remaining six villages included in the mortgage were decreed to Babu Sitla Bhawan taluqdar of Bhawan Shahpur Raja Sarnam Singh had petitioned for settlement of the twelve villages by virtue of the mortgage of the 15th of June, 1851, but his claim was rejected At the regular settlement in 1864 he sued again for a recognition of his rights, and on the 30th of June judgment was delivered as follows —

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"I decree proprietary right of the following—Macharia, Bahadurpur, Hargaon, Poorab Pershad, and Ahed—in favour of Indarjit Singh, and direct that Raja Surnam Singh s name be entered, as in possession under bond, dated the 15th of June, 1851, while Indarjit Singh is entitled to hold lease of the villages in question according to the terms of the deed of agreement (the [523] lease of the 15th of June, 1851), which must be considered as binding on the parties I presume Indarjit Singh will be able to redeem any time within 30 years

From the 30th of June, 1864, the taluqdar was paid the rent, *viz*, Rs 2,001 per annum, reserved by the lease By order of the 26th of September, 1867, the lessee was directed to pay a further sum of Rs 165 as pay of chaukidars

Raja Sarnam Singh died in 1877 and Indarjit Singh in 1884

The suit out of which the present appeal arose was brought on the 25th of June, 1894, by the representative of Indarjit Singh to redeem the mortgage of the five villages In his plaint the plaintiff stated "that Raja Sarnam Singh, while holding possession as mortgagee of villages Ajabgarh, Rudgarh, Kapasi, Sheogarh, Baghiapur, and Poorab Kohli allowed Babu Jageshar Bakhsh Singh to take possession of the said villages and to include them in his taluqa, although he ought to have protected Babu Indarjit Singh's rights in the aforesaid villages, and continued his possession until redemption as provided in the mortgage deed Hence, having failed in his duties as mortgagee in possession Raja Sarnam Singh allowed Babu Indarjit Singh's rights in the said villages to be lost The plaintiff, therefore, claimed to set off the value of these villages against the mortgage money He also alleged that possession of the whole of the mortgaged property was delivered to the mortgagee on the 15th of June, 1851, and contended that on the true construction of the mortgage deed no interest was payable, even though the whole or a portion of the security had been lost

The defendant, who was the representative of Sarnam Singh in his written statement denied that Indarjit Singh ever had any title to the villages mortgaged other than those in suit He denied that possession of all the mortgaged villages was delivered to him in pursuance of the mortgage As he had been deprived of a great portion of the security, he claimed on redemption to charge interest at the rate of 2 per cent per month on the principal, and credit to the mortgagor all payments made by him in excess of the Government revenue and cesses He also claimed the sum of Rs 105 per annum, from the 30th of June, 1864, to the year 1868, payments made by him to the Government

[624] He also denied any responsibility for the loss of the six villages not covered by the lease

The Subordinate Judge decided that only the villages in suit, and Poorab Adhar were the property of Indarjit Singh, and that he had never

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not exhaustive as to the law; it expressly states that it is intended to amend part of the law. The appellant, therefore, should not suffer for failing to exercise his rights under section 68, which merely gives an additional remedy to the mortgagee. Moreover, in Oudh if there is no express law on any point, the case is to be decided according to equity and good conscience. The case of *Narain Singh* v. *Shimbhoo Singh* (1) was referred to. Redemption should only be decreed on payment by the respondent, for the time during which the appellant was not in possession of the entire mortgaged property, of interest at 2 per cent. per month on Rs. 5,600, calculated up to the time of redemption, or on payment of a sum equivalent to the profits of that portion, of the mortgaged property the possession of which was not secured to the mortgagee. The decree of the Judicial Commissioner is also erroneous in awarding possession of six villages, though possession of five only is claimed in the plaint.

Mr. *Herbert Cowell* for the respondent submitted that the right construction had been put on the mortgage-deed by the Judical Commissioner. The appellant was not entitled to put forward a contention which had never before been raised or suggested in the transaction until the respondent sued, and which, if successful, would give him interest for a long period at 24 per cent. There was no defect in the respondent's title, nor was it by any cause subject to his control that the appellant had been deprived of possession of some of the mortgaged villages. The proper remedy of the appellant was to have had the arrangement altered in 1864, if he was then dissatisfied with it. He ought to have exercised his option then, when he knew there was no chance of his recovering the portion of the property of which he had been dispossessed: he must in fact be considered to have done so. He then elected to wait, and by such action he confirmed rather than repudiated the mortgage. The decree appealed from is, it is submitted, correct in allowing the respondent to redeem [526] on payment of no more than the amount of the principal sum due on the mortgage.

Mr. *De Gruyther* replied:—

1902, July 22.—Their Lordships' judgment was delivered by SIR ANDREW SCOBLE:—

The father of the respondent, one Indarjit Singh, a zamindar of Oudh, in the year 1851, mortgaged twelve villages in which he had proprietary rights to Raja Sarnam Singh, the ancestor of the appellant, to secure an advanee of Rs. 5,600. The mortgage-deed is dated on the 15th of June, 1851, and the material clause is in these terms:—

"I do hereby mortgage the following villages to the said Raja Sarnam Singh at Rs. 2 per cent. interest, and promise and put down in writing that until delivery of possession of the aforesaid villages to the Raja Sahib mentioned above, I shall pay interest at the rate of Rs. 2 per cent. on the abovementioned mortgage money; that, until I pay up the sum of Rs. 5,600 on account of principal, with interest to the very last pie, Raja Sarnam Singh shall continue in possession and occupation (of the aforesaid villages), and that I shall put forward no excuse or objection."

It may here be noted that the learned Judicial Commissioner found that possession of the entire mortgaged property was delivered to the mortgagee on the execution of the mortgage, and that this finding was not disputed before their Lordships.

(1) (1876) I. L. R. 1 All. 325 (330, 332): L. R. 4 I. A. 15 (21).

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24 A. 521=2 I A. 148=7 6 W. N. 97= 4 Bom L. R 845=8 Sar. 310.

under sections 60 and 62 of Act IV of 1882, entitled to redemption on payment of

The mortgagee on being deprived of the possession of the whole or part of the mortgaged property had his remedies by suit against the mortgagor for the recovery either of the possession of the property, or of the mortgage-money, with perhaps damages (section 68 of Act IV of 1882) I can find no provision in Act IV of 1882 which authorizes him to charge against the mortgagor in the suit for redemption the rents and profits which he would have obtained, had his possession not been disturbed, or interest, as damages, on account of such loss of profits The mortgagee in the present case was well aware in 1864 that he could not possibly recover possession of the six villages which were settled at the second summary settlement with the Taluqdar of Bhawan Shahpur He brought no suit then, or at any time

In the result a decree was made for redemption of six villages on payment of Rs. 5,600 only, and each party was directed to pay his own costs in both Courts

From the decree of the Judicial Commissioners the defendant appealed to His Majesty in Council.

Mr. *De Gruyther*, for the appellant, contended that the respondent, the mortgagor, had failed to secure possession to the appellant of the whole of the villages mortgaged, and as he did not therefore get the benefit of the rents and profits as it was intended he should do, of those of which he was dispossessed, he was entitled to interest, which was expressly stipulated for in the mortgage deed, in lieu of the profits of such of the villages as he had been deprived of. An implied contract must be inferred that the mortgagee was to repay himself by taking the profits which is the case in usufructuary mortgages [see section 58, clause (*d*) of the Transfer of Property Act, IV of 1882]. The mortgagor having failed to keep the appellant in possession of a portion of the mortgaged property, should not have been allowed to redeem without payment of either interest or damages for breach of covenant. [LORD DAVEY: Ought not a suit to have been brought for the mortgage money and interest when, according to the appellant's case, it was found that possession of some of the villages could not be secured? If it was a condition that the mortgagor was to guarantee title and that failed, and the appellant did not then sue, is that not a waiver of his rights (if any) leading to the inference that he advanced the money for better or worse, and, if so, can he now claim what he has given up?] Assuming the property to have been totally lost, it is submitted that the mortgagor would have had to bear the loss, as there is in the contract an express stipulation to repay the money with interest. The appellant was not entitled to sue for damages in 1864; but now that a suit is brought against him to recover the property, it is submitted that he, having suffered loss from being deprived [527] of possession of part of the property, is not to continue to suffer loss by the mortgagor being allowed to recover the property on payment of only the principal money advanced. The Transfer of Property Act is

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parties relied on the mortgage-bond and lease as constituting the contract between them; and it is admitted that after the determination of their respective rights by the decrees of the Settlement Courts, the rent reserved by the lease and the charges allowed were paid by the respondent and his predecessor in title to the appellant and his predecessors in title.

Raja Sarnam Singh died on the 18th of May, 1877, and Indarjit Singh died on the 2nd of May, 1884. The appellant and respondent are their heirs respectively.

On the 25th of June, 1894, the respondent filed the present suit to redeem the mortgage, and the sole question now between the parties is as to the terms on which redemption should be decreed—the respondent contending that he is entitled to redeem on payment of the amount originally advanced, while the appellant claims in addition interest at the rate of 2 per cent. per month upon that amount for the period during which the mortgagee was not in possession of the entire mortgaged estate up to the date of redemption.

The Subordinate Judge of Sultanpur, before whom the suit came in the first instance, found in favour of the appellant on this point; but his decree was reversed on appeal by the Judicial Commissioners of Oudh who decreed the claim for the redemption of the mortgage of the villages in suit on payment of Rs. 5,600 only.

It appears to their Lordships that this decision is right. The only provision in the mortgage-bond as to interest is in these words:—"Until delivery of possession of the aforesaid villages to the Raja Sahib.........I shall pay interest at the rate of 2 per [531] cent. on the abovementioned mortgage-money," and the subsequent words "until I pay up the sum of Rs. 5,600 on account of principal, with interest to the very last pie," must be read to refer to interest as previously stipulated, namely, until possession was given of the mortgaged property. The mortgage was of the class known as usufructuary mortgages, which are not uncommon in India, and in which possession of the mortgaged property is delivered to the mortgagee who takes the rents and profits in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money [Act IV of 1882, section 58 (*d*)]. In this case the arrangement between the parties was completed by the execution of a lease, under which the mortgagor became the tenant of the mortgagee, and paid rent in lieu of interest. Under such a mortgage the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the bond, and the mortgagor is entitled to redeem on repayment of the mortgage-money.

But it was contended that, although possession of the twelve villages originally mortgaged was given at the time of the execution of the mortgage, the reduction of their number to six in 1853 by the grant to Hanuman Prasad, and to five by the settlements of 1858 and 1864, constituted a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property, which entitled the mortgagee to claim interest in lieu of the rents and profits of the property of which he was dispossessed. In the opinion of their Lordships, it is a sufficient answer to this argument to say that the mortgagee appears to have acquiesced in his dispossession by Hanuman Prasad (as to which he probably had no alternative), and that the decisions of the Settlement Courts in 1858 and 1864 were final as to the ownership of the mortgaged

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By an instrument of even date with the mortgage deed, Raja Sarnam Singh the mortgagee leased to the mortgagor, Indarjit Singh, six of the mortgaged villages at a consolidated rental of Rs 2 801 per annum, less Rs 800 per annum allowed to the lessee as *nankar* The lease was to take effect from the 11th of September, 1851

On the 18th of September, 1853, one Hanuman Prasad obtained a *kabuliat* from the King of Oudh of the taluqa of Bhawan Shahpur, in which the twelve mortgaged villages were included and forcibly dispossessed Raja Sarnam Singh the mortgagee and previous *kabuliat* holder The circumstances of this transaction are not very clear, but Charan Singh, one of the witnesses for the plaintiff, gives a characteristic explanation —

[529] "In *Nawabi* might was the right, and *kabuliats* were executed by anyone There was none to hear any grievances, and the *kabuliatdar* forcibly ejected the previous holder Whatever his title may have been, Hanuman Prasad remained in possession until the annexation of Oudh by the British Government in 1856

The procedure adopted by that Government for the purpose of ascertaining rights of property in land in the territories annexed is matter of history, and has frequently formed the subject of consideration by this Committee The first summary settlement was made with the persons actually in possession, and decided nothing as to ownership At the second summary settlement, which was made in 1858, on the basis of proprietary right, the name of Indarjit Singh was entered in respect of the five villages now in suit, while of the remaining seven villages of the twelve originally mortgaged, six were entered in the name of the Taluqdar of Bhawan Shahpur, and one (Poorab Adhar) in the names of Hubdar Singh and Sukram Singh, who claimed under a mortgage of earlier date than that to Sarnam Singh On the 11th of December, 1858, Sarnam Singh filed a petition in the Settlement Court, praying that the settlement of the whole twelve villages might be made with him but his application appears to have been made too late for it was ordered that "as the settlement of this village is over, and the applicant did not appear at the time the settlement was going on, and as it appears from the application and the statement of the applicant that this matter relates to a mortgage, hence it is ordered that if the applicant has any claim he must sue in the Civil Court

Sarnam Singh took no proceedings in the Civil Court, and no further action was taken until the regular settlement which was made in 1864, when both mortgagor and mortgagee claimed to be proprietors of the twelve mortgaged villages After inquiry the Assistant Settlement Officer, on the 3rd of June, 1864, decreed proprietary right of the five villages now in question in favour of Indarjit Singh, and directed that Raja Sarnam Singh s name be entered as in possession under the mortgage bond of the 15th of June, 1851, while Indarjit Singh was declared [530] entitled to hold lease of the five villages according to the terms of the agreement of the same date, 'which must be considered as binding on the parties" This decision was appealed against, but was eventually confirmed by the Superior Revenue Authorities with the result that the parties remained in the relation constituted by the mortgage bond and lease, with the exception that the mortgagee was left with five villages only, instead of twelve, as security for his advance

In 1866 and 1867 there was litigation between the mortgagor and mortgagee as to liability for certain charges upon the land, in which both

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

property As the learned Judicial Commissioner observes "the mortgagee was well aware in 1864 that he could not possibly recover possession of the villages which were settled at the second summary settlement He brought no suit then, or at any time subsequently, to recover his mortgage money, but appears to have remained satisfied for 31 years with the diminished security, and the possession of the [532] remaining villages" It may be added that he made no attempt to enhance the rent of the villages which were left to him, and that they constitute an ample security for the whole amount of his claim

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In the Judgment of the Judicial Commissioner it is inadvertently stated that the villages now in suit are six in number, but this is erroneous As already pointed out, at the Settlements of 1858 and 1864, Indarjit Singh was confirmed in the proprietorship of five only, and the decree must be varied accordingly Their Lordships will therefore humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of Oudh, so far as it relates to the five villages of Hargaon, Ahed, Macharia, Bahadurpur, and Poorab Pershad Badal, should be confirmed, and this appeal dismissed The appellant must pay the respondent s costs of this appeal

Appeal dismissed

Solicitors for the appellant—Messrs *T L Wilson & Co*
Solicitors for the respondent—Messrs *Barrow, Rogers, & Nevill*

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24 A 532 (=22 A W. N 112)

FULL BENCH

Before Sir John Stanley, Knight, Chief Justice, Mr Justice Banerji and Mr Justice Burkitt

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JAMNA BIBI (*Applicant*) v SHEIKH JHAU AND ANOTHER (*Opposite Parties*) * [15th May, 1902]

Civil Procedure Code, sections 2, 372, 588 (21)—Application to be brought on record of appeal as assignee f deceased appellant—Application rejected—No appeal from order rejecting application

Held that no appeal would lie from an order rejecting the application of a person who claimed to be brought on the record of an appeal as being the assignee of the deceased sole appellant *Lalit Mohan Roy* v *Shebock Chand Chowdhry* (1) followed *Moti Ram* v *Kundan Lal* (2) overruled *Indo Mati* v *Gaya Prasad* (3) explained and distinguished

[Ref 110 P R 1907=51 P W R 1907]

THE facts out of which this appeal arose were as follows :—

One Musammat Bholi Bibi brought a suit against Sheikh Jhau and Baijnath Prasad for a declaration that certain property [533] was not liable to be sold in execution of a decree obtained by Baijnath Prasad against Sheikh Jhau The Court of first instance dismissed the suit Musammat Bholi Bibi appealed Whilst the appeal was pending she, by means of a parol gift, assigned all her rights in the subject matter of the suit to one Musammat Jamna Bibi After this

* First Appeal No 124 from an order of W Tudball, Esq, District Judge of Gorakpur, dated the 17th August, 1901

(1) (1900) 4 C W N 403
(2) (1900) I L R 22 All 380
(3) (1896) I L R. 19 A. 142

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24 A 532= 22 A. W. N. 112.

party to the suit, but on behalf of a third person. Time has been granted twice. It cannot be granted now. It is ordered that the application be rejected." On appeal from this order to the High Court, Edge, C. J., and Blair, J., set aside the order, holding that it was a decree within the meaning of section 2 of the Code, and that an appeal lay from it. In the course of their judgment the learned Judges observed :—" It appears to us that the dismissal of her, (*i.e.*, Rani Indo Mati's) application was an adjudication on the representative right which she claimed, and as an order under section 372 dismissing an application is not an order specified in section 588, the order dismissing her application would be a decree, as that word is defined in section 2 of the Code of Civil Procedure, and in our opinion an appeal lay *the case coming within section 244 of the Code.*" It is to be observed in this case that a decree had already been obtained, and consequently the application of the appellant came within section 244, the question being one between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of the execution thereof. It appears to have escaped the notice of the Bench which decided the case of *Moti Ram* v. *Kundan Lal* (1) that the case of *Indo Mati* v. *Gaya Prasad* (2), was one coming within section 244 of the Code. The head-note to the case is misleading, as it contains no reference to the fact that a decree in the suit had already been passed, and that the case therefore fell under the provisions of section 244. It would appear from it that the Court decided that an appeal lay from an order dismissing an application under section 372 in all cases, but it did not [537] do so. Whether it properly treated the question as one coming within section 372 at all is open to doubt.

Now the order dismissing the application under section 372 now appealed against is, in our opinion, clearly not a decree within the meaning of section 2 of the Code of Civil Procedure; although it amounted to an adjudication upon the right claimed by the appellant to be made a party to the suit, it was in no sense an adjudication which decided the suit so far as regards the Court expressing it. The suit has not yet been decided. It may be, so far as we know, that some party who is in a position to establish his right as assignee may apply to the Court, and have his name added to the record and proceed with the disposal of the suit. The order clearly does not come within section 588 (sub-section 21), inasmuch as it was not an order disallowing an objection under section 372. But then it is contended that the application is in reality an application under section 365 of the Code which, in the case of the death of a sole plaintiff or sole surviving plaintiff, enables the legal representatives of the deceased, where the right to sue survives, to appeal to the Court to have his name entered on the record in place of the deceased plaintiff. This section is clearly, in our opinion, not applicable, inasmuch as the appellant here is not the legal representative of the deceased plaintiff, as she does not in law represent the estate of the deceased. Her claim is that of an assignee, and not that of a legal representative. This question recently came before a Bench of the High Court at Calcutta in the case to which we have referred of *Lalit Mohan Roy* v. *Shebock Chand Chowdhry* (3), in which the facts were in all respects similar to the facts of the present case, when it was held by a Bench consisting

(1) (1900) I. L. R. 22 All. 380.
(2) (1896) I. L. R. 19 All. 142.
(3) (1900) 4 C. W. N. 403.

alleging that she was the assignee of the shares in the property in dispute under a parol gift made to her by Bholi Bibi prior to her death The District Judge found that the alleged assignment was not proved, and refused the application Hence the present appeal

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FULL BENCH.

24 A 532= 22 A W N 112

The appeal came before a Bench of this Court, when a preliminary objection was taken by the learned vakil for the respondents to the hearing of the appeal, on the ground that the order of the District Judge being one under section 372 of the Code of Civil Procedure, and not being one disallowing an objection made under that section, no appeal lay There is a conflict in the rulings of a Bench of this High Court in the case of *Moti* [535] *Ram* v *Kundan Lal* (1), and of a Bench of the High Court at Calcutta in the case of *Lalit Mohan Roy* v *Shebock Chand Choudhry* (2) The Bench before whom the present appeal came considered that the decision in the former case was open to grave doubt, and thought it desirable to have the appeal referred to a larger Bench for determination Accordingly the appeal has come before us

In the case of *Moti Ram* v *Kundan Lal* (1), to which we have referred, the facts were as follows —A defendant, pending suit, made an assignment of his interest therein No application was made by the assignees or the assignor to have the assignees brought on the record, and the suit was decided *ex parte* unfavourably to the assignees Thereupon the assignees filed a memorandum of appeal, claiming to be entitled to file an appeal under the circumstances set forth in their memorandum Their application was supported by the assignor, who disclaimed all interest in the subject matter of the suit The District Judge treated the application for leave to appeal as if it were an application properly made under section 372 of the Code of Civil Procedure, but in his final order recorded that the applicants applied to be allowed to appeal under no section whatever, and because they had taken no steps to have their names entered apparently before the decree was passed, held that they had no *locus standi* then, and he accordingly rejected the application for leave to appeal On appeal the matter came before a Division Bench of this Court, which held that the District Judge was wrong in [illegible] section 372 clearly applied to such a ca[illegible] they adopted the decision in the case [illegible] being an authority upon the question, and held that an appeal did lie from an order rejecting an application made under section 372

In the case of *Indo Mati* v *Gaya Prasad* (3) the facts were shortly as follows —Gaya Prasad and another had obtained a decree for sale on a mortgage against one Chaudhri Raj Kunwar, who was the husband of Rani Indo Mati After the death [536] of her husband Rani Indo Mati applied to the Court, stating that the property to which the decree applied had devolved upon her under the will of one Rani Lachman Kuar, to whom it had been transferred on the 19th of September, 1895, and praying that she might be made a party to the execution proceedings, and that under section 87 of the Transfer of Property Act six months' time might be granted to her in which to make arrangements for satisfying [illegible] passed the fol[illegible]

(1) (1900) I [illegible]
(2) (1900) 4 C. W N 403

1902 JULY 4. — APPELLATE CIVIL. — 24 A. 538= 22 A. W. N. 155.

For the foregoing reasons we allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Subordinate Judge dismissing the plaintiff's claim with costs. The appellants will have their costs in all Courts.

Appeal decreed.

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24 A. 542 (=22 A. W. N. 160.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ALI AHMAD (*Judgment-debtor*) *v.* NAZIRAN BIBI (*Decree-holder*).* [5th July, 1902.]

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 86 *and* 87—*Application for order absolute under section* 87—*Execution of decree—Limitation—Act No. XV of* 1877 (*Indian Limitation Act*), *schedule ii, articles* 178 *and* 179.

An application for an order absolute under section 87 of the Transfer of Property Act, 1882, is an application in execution of the decree under section 86 of the Act, and is governed as to limitation by article 178 of the second schedule to the Indian Limitation Act, 1877, the time from which limitation begins to run being the date fixed by the decree under section 86 for payment of the mortgage money.

Kedar Nath v. *Lalji Sahai* (1), *Oudh Behari Lal* v. *Nageshar Lal* (2), *Chunni Lal* v. *Harnam Das* (3), *Parmeshri Lal* v. *Mohan Lal* (4), *Bhagwan Ramji Marwadi* v. *Ganu* (5), *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (6), *Cheddi* v. *Lalu* (7), *Ram Sarup* v. *Ghaurani* (8) and *Ranbir Singh* v. *Drigpal Singh* (9) referred to.

[Appl. 1 A. L. J. 15; Ref. 26 Mad. 780=13 M. L. J. 412; 6 O. C. 114; 27 All. 625= 1905 A. W. N. 136 = 2 A. L. J. 371; 33 Cal. 867 = 4 C. L. J. 141; 60 I. C. 23; 123; 30 I. C. 494; Fol. 13 A. L. J. 985.]

THE facts of this case are as follows :—

On the 27th of November, 1897, Naziran Bibi and Bismillah Bibi obtained a decree for foreclosure against Ali Ahmad conditioned on their paying off certain incumbrances. The time limited for redemption under this decree expired on the 27th May, 1898. On the 23rd of May 1901 Naziran Bibi applied to the Court for an order absolute for foreclosure in respect of her interest in the decree, alleging that the other decree-holder had [543] refused to take any steps towards the execution of the decree, and that she (Naziran Bibi) alone had paid off the incumbrances mentioned in the decree. This application was resisted on two grounds—first, that it was barred by limitation, and secondly, that Naziran Bibi alone was not competent to apply. The Court of first instance (Subordinate Judge of Ghazipur) overruled the plea of limitation, and, at the suggestion of the applicant's pleader made an order absolute for foreclosure in respect of Naziran Bibi's share alone. The judgment-debtor appealed, and the lower appellate Court (Officiating District Judge of Ghazipur), while agreeing with the Court of first instance on the question of limitation, set aside the order on other grounds and remanded the case under section 562 of the Code of Civil Procedure. From this order the

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* First Appeal No. 130 of 1901 from an order of Munshi Mata Prasad, Officiating District Judge of Ghazipur, dated the 16th of September, 1901.

(1) (1889) I. L. R. 12 All. 61.
(2) (1890) I. L. R. 13 All. 278.
(3) (1898) I. L. R. 20 All. 302.
(4) (1898) I. L. R. 20 All. 357.
(5) (1899) I. L. R. 23 Bom. 644.
(6) (1894) I. L. R. 17 All. 39.
(7) Weekly Notes, 1902, p. 60.
(8) (1899) I. L. R. 21 All. 453.
(9) (1893) I. L. R. 16 All. 23.

of Rampini and Wilkins, JJ, that an order disallowing an application of a person claiming under section 372 to be made a party defendant as assignee of the defendant was not a decree within the meaning of section 2 of the Code, and that no appeal lay against such an order We concur in this ruling It is difficult to understand why an appeal is not allowed in such a case when an appeal is expressly permitted when an order is passed disallowing objections under section 372 Great hardship may no doubt arise from the fact that there is no such appeal This is, however, not a [538] consideration which can weigh with us in interpreting the law For the foregoing reasons we allow the preliminary objection and dismiss the appeal with costs

1902 MAY 15

FULL BENCH

24 A 532=22 A W N 112

Appeal dismissed

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24 A 538 (=22 A W N 155)

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Banerji

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SHAM DAS AND ANOTHER (*Defendants*) v BATUL BIBI (*Plaintiff*) *
[4th July, 1902]

Mortgage—Usufructuary mortgage of zamindari and sir—Loss by mortgagor of proprietary rights—Mortgage to take effect against ex proprietary rights of mortgagor—Mortgagor not entitled to relinquish ex-proprietary rights to the zamindar—Act No XII of 1881 (*N W P Rent Act*) *section* 31

A zamindar having mortgaged by way of usufructuary mortgage his zamindari together with his *sir* land lost his zamindari rights and became an ex proprietary tenant of the *sir* *Held* that the usufructuary mortgage did not become ineffectual, but took effect as a mortgage of the ex proprietary rights *Moody* v *Matthews* (1) *Hughes* v *Howard* (2) *Trumper* v *Trumper* (3) *Khiali Ram* v *Nathu Lal* (4) and *Sukru* v *Tufazzul Husain Khan* (5) referred to

Held also that in such a case as above the mortgagor ex proprietary tenant could not to the prejudice of the mortgagee surrender to the zamindar his ex proprietary interest *Badri Prasad* v *Sheo Dhian* (6) referred to

[Ref 27 Mad 401 26 All 510=1904 A W N 101 36 All 248 25 I C 201 Dist 7 O C 265, 9 I C 553 33 I C 483]

THE facts of this case are fully stated in the judgment of the Court

Mr G W Dillon, for the appellants

Maulvi *Ghulam Mujtaba*, for the respondent

STANLEY, C J and BANERJI, J—One Rajab Ali was entitled to a share of zamindari property and *sir* lands appertaining to it On the 25th of January, 1890, he mortgaged it to the plaintiff, and in the years 1893 and 1895 he also granted usufructuary mortgages in favour of the defendants of the same property The defendants brought a suit for possession as mortgagees on foot of their earlier mortgage, and obtained a [539] decree on the 4th of January, 1894, and on the 2nd March, 1894, got possession of the *sir* lands The plaintiff brought a suit on foot of her mortgage impleading both Rajab Ali and the defendants and on the 24th of June 1895 obtained a decree for sale, which decree was made absolute on the 15th of February 1896 At the auction sale held in

* Second Appeal No 462 of 1900 from a decree of Syed Muhammad Ali District Judge of Jaunpur dated the 7th February 1900, reversing a decree of Babu Srish Chandar Bose Subordinate Judge of Jaunpur, dated the 29th September 1899

(1) (1801) 7 Ves 174
(2) (1858) 25 B 575
(3) (1873) L R 8 Ch 870
(4) (1893) I L R 15 All 219
(5) (1894) I L R 16 All 398
(6) (1896) I L R 18 All 354

1902 JULY 5.

APPELLATE CIVIL.

24 A. 542= 22 A. W. N. 160.

and the dictum of Parsons, A. C. J., and Ranade, J., in *Bhagwan Ramji Marwadi* v. *Ganu* (1) have been referred to. It is conceded that the only paragraph [545] of art. 179, which is, if at all, applicable to the present case, is the first, the other paragraphs having no application. Now, there can be no doubt that the decree or order referred to in that paragraph must be a decree or order which, on the date of it, is capable of execution, and that the *terminus a quo* under that paragraph cannot be a date on which the decree or order is not executable. This was held in *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (2) and in the recent case of *Chhedi* v. *Lalu* (3). A decree for foreclosure under section 86 of the Transfer of Property Act, which, in compliance with the provisions of that section, fixes a date for payment of the mortgage money, cannot be enforced before the expiry of that date. This is clear from the terms of section 87. Under that section the plaintiff may apply for an order absolute for foreclosure if payment is not made as directed by the decree under section 86. An application under section 87 cannot, therefore, be made on the date of the decree under section 86, and from the very nature of things limitation cannot run against the applicant from that date. Consequently the first paragraph in the third column of art. 179 cannot apply to an application under section 87. It is true that in the cases mentioned above art. 179 was referred to, but the real question was that of the applicability of the second schedule of the Limitation Act. In the two cases decided by this Court, the date fixed in the decree for the payment of the mortgage money had long expired before the date of the application under consideration. It was not, therefore, necessary to decide in those cases what was the *terminus a quo* for purposes of limitation. One of us was a party to the ruling in *Chunni Lal* v. *Harnam Das* (4) and is in a position to state that no question arose in that case as to the date from which limitation should be computed. In *Parmeshri Lal* v. *Mohan Lal* (5), the learned Judge, Burkitt, J., after holding that an application under section 87 of the Transfer of Property Act was an application in execution to which the provisions of art. 179 of sch. ii of the Limitation Act applied, observed as follows:—"It is admitted that a period of more than three years has elapsed between the date of the decree and the date of the application. [546] The application was therefore time-barred when made." The learned vakil for the appellant relies upon these observations as supporting his contention that limitation should be computed from the date of the decree. We have, however, the authority of our brother Burkitt for stating that he did not decide, and did not intend to decide, that the starting point for computing limitation is the date of the decree under section 86, as the question did not arise for consideration. In the Bombay case to which we have referred the point was not decided. For the reasons we have stated above, we are unable to hold that limitation runs, in a case like this, from the date of the decree.

As art. 179 of the second schedule of the Limitation Act does not govern the application of the respondent, we have to determine what other article is applicable. In our opinion the application in question is governed by art. 178, that being the article which prescribes the limitation for an application for which provision is not made in any other

(1) (1899) I. L. R. 23 Bom. 644.
(2) (1894) I. L. R. 17 All. 39.
(3) Weekly Notes, 1902, p. 60.
(4) (1898) I. L. R. 20 All. 302.
(5) (1898) I. L. R. 20 All. 357.

judgment debtor appealed to the High Court, again raising the plea that the application made by Naziran Bibi was time barred

1902 JULY 5

Mr *J Simeon*, for the appellant

Mr *Muhammad Raoof* and Munshi *Haribans Sahai*, for the respondent

APPELLATE CIVIL

BANERJI, J, (AIKMAN, J concurring) —The respondent, Musammat Naziran Bibi, and one Bismillah Bibi, obtained a decree for foreclosure against the appellant under section 86 of the Transfer of Property Act, 1882, on the 27th of November, 1897 For the payment of the mortgage money the decree allowed a period of six months, which expired on the 27th of May, 1898 On the 23rd of May, 1901, Musammat Naziran Bibi applied under section 87 of the Act for order absolute for fore closure That application was resisted on two grounds—first, that it was barred by limitation, and secondly, that Naziran Bibi alone was not competent to make it The plea of limitation has been overruled by both the Courts below With reference to the other plea, the lower appellate Court has reversed the order of the Court of first instance, and remanded the case to that Court under section 562 of the Code of Civil Procedure From this order of remand the present appeal has been brought

24 A 542= 22 A W N 160

The plea of limitation has been repeated before us, and it is urged that under art 179 of the second schedule of the Indian [544] Limitation Act, limitation should be computed from the date of the decree under section 86, and not from the date on which according to that decree, the mortgage money was payable

According to the rulings of this Court an application for an order under section 87 of the Transfer of Property Act is an application in exe cution In *Kedar Nath* v *Lalji Sahai* (1), it was held by a Full Bench that the order mentioned in that section is an order in execution of the substantive foreclosure decree It necessarily follows that an applica tion for such an order is an application in execution This view was upheld in the later Full Bench case of *Oudh Behari Lal* v *Nageshar Lal* (2) In that case it was held that an application for an order absolute for sale under section 89 is a proceeding in execution, and subject to the rules of procedure governing such matters The ruling in *Kedar Nath* v *Lalji Sahai* (1) was approved of and although, as stated above, the case was one to which section 89 applied, reference was made to section 87, and the same rule was held to apply to applications under both the sections Following the principle of these rulings and of the decision in *Chunni Lal* v *Harnam Das* (3), it was held in *Parmeshri Lal* v *Mohan Lal* (4), that an application for an order under section 87 of Act No IV of 1882, is an application in execution to which the provisions of the Limitation Act apply With this view we entirely concur

The next question which we have to consider is, what is the period of limitation governing an application under section 87, and what is the date from which limitation should be computed? It is contended on behalf of the appellant that the limitation applicable is that prescribed by art 179 of the second schedule, and that it should be computed under the first paragraph of the 3rd column of that article, from the date of the decree under section 86 In support of this contention the rulings in *Chunni Lal* v *Harnam Das* (3) and *Parmeshri Lal* v *Mohan Lal* (4),

(1) (1889) I L R 12 All 61
(2) (1890) I L R 13 All 278
(3) (1898) I L R 20 All 302
(4) (1898) I L R 20 All 357

1902 JULY 9. — APPELLATE CIVIL. — 24 A. 549= 22 A. W. N. 162.

by Parmanand on the 20th of April, 1891. The plaintiffs, who are the sons of Nathu Ram, thereupon brought the present suit. Their case is, that the sale made under the decree of the 27th of November, 1889, was illegal and void, and they claim proprietary possession of the property in dispute. They did not offer to redeem the mortgages of 22nd of March, 1881 and the 9th of May, 1881.

The main defence of the defendant was that the plaintiff was not competent to sue for possession of the property, and that of the property only 1½ shares were ancestral property, and that the remaining six shares were the self-acquired property of Nathu Ram. The Subordinate Judge held in favour of the plaintiff's contention that the sale was invalid for two reasons—first, that it was a sale of the equity of redemption and not of the mortgaged property; and secondly, that it was contrary to the provisions of section 99 of the Transfer of Property Act, and so was invalid. He held that the sale to the defendant passed [551] nothing to him, and that the plaintiffs could sue for possession of their shares. In the course of his judgment the learned Subordinate Judge says :—"I admit that the plaintiffs cannot sue for actual possession so long as the usufructuary possession subsists. The defendant as usufructuary mortgagee is entitled to continue in possession as such mortgagee until that mortgage is redeemed. The plaintiffs cannot, therefore, obtain a decree for actual possession; but there is no reason why they should not obtain a decree for proprietary possession subject to the defendant's mortgage." He held in accordance with the contention of the defendant that of the 7½ shares, only 1½ shares were ancestral property of the family, and such being the case, he gave the plaintiffs a decree for possession to the extent of three-fourths of 1½ shares.

From this decree there has been an appeal, and also a cross-appeal No. 8 of 1901. In the cross-appeal the plaintiffs claim, instead of the three-fourths of 1½ shares, the entire 7½ shares. The grounds of appeal in the present case are, first, that the sale was not void under section 99 of the Transfer of Property Act; secondly, that the sale was binding on the parties to the decree, and passed a good title to the purchaser; thirdly, that the sale was a sale of property, and even if it were a sale of the equity of redemption only, it was not void in law; and fourthly, that there was no proof that the appellant had notice of the existence of any interest of the plaintiff in the property, and that the sale in execution of the decree was not in contravention of section 85 of the Transfer of Property Act.

As regards the first ground of appeal, namely, that the sale was not in contravention of the provisions of section 99 of the Transfer of Property Act, it appears to us that the contention advanced on behalf of the appellant must prevail. Section 99 provides that a mortgagee who, in execution of a decree for the satisfaction of any claim, attaches the mortgaged property, shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67. In this case the appellant did institute a suit under the provisions of section 67 of the Transfer of Property Act for sale of the property mortgaged to him by the deed of the 9th of May, 1881, and obtained a decree in accordance with section 88 of the same Act. We, therefore, [552] think that there was no violation of the provisions of section 99 in the course which the appellant adopted. The cases which were relied upon by the learned vakil for the respondent in support of his

24 A 549 (=22 A W N 162)

1902 JULY 9 APPELL CIVIL 24 A 549 22 A W 162

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Banerji

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PARMANAND (*Defendant*) v DAULAT RAM AND OTHERS (*Plaintiffs*)* [9th July, 1902]

Act No IV of 1882 (*Transfer of Property Act*) *sections* 67, 85, 99—*Mortgage—Sale under a decree of equity of redemption—Rights of purchaser, the decree having become final*

On the 22nd of March, 1881 one Nathu Ram mortgaged certain property with possession On the 9th of May, 1881, the mortgagees leased the mort r the rent due from him ginal mortgagees died The he successor in title of the mortgagees instituted a suit against the mortgagor to recover the amount due to him for arre rs or rent by sale of the equity of redemption of the property On the 27th of November 1889 a decree for sale was passed and on the 31st of March 1890 an appeal against the decree for sale was rejected The property was accordingly sold by virtue of the decree for sale, and was purchased by the successor in title of the mortgagees on the 20th of April 1891 The sons of Nathu Ram thereupon brought a suit claiming proprietary possession of the property on the ground that the sale of the equity of redemption was illegal and void, and conveyed nothing to the purchaser

Held that the sale having been the outcome of a suit under section 67 of the Transfer of Property Act, 1882, did not offend against section 99 of the Act, and that although according to law as laid down by the High Court, the sale of an equity of redemption was not contemplated by the Transfer of Property Act yet, inasmuch as the sale has taken place under a decree which had become final it could not at that time be upset *Matadin Kasodhan* v *Kazim Husain* (1) and *Tara Chand* v *Imdad Husain* (2) referred to

[Dist 157 P L R 1906=2 P R 1907 Ref 36 All 516 12 A L J 855=24 I C 612]

THE facts of this case sufficiently appear from the judgment of the Court

[550] Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the appellant

Pandit *Baldeo Ram*, for the respondents

STANLEY, C J, and BANERJI, J —The plaintiffs, respondents, who are the sons of Nathu Ram, brought this suit for proprietary possession of 7½ shares out of 10 biswas in mauza Nagla Sada under the following circumstances —On the 22nd of March, 1881, Nathu Ram mortgaged with possession 7½ shares to the predecessors in title of Parmanand, the defendant appellant, to recover a sum of Rs 4,000 and interest thereon and on the 9th of May, 1881, the same parties granted a lease of the same property to Nathu Ram Nathu Ram, as security for the rent payable under the lease, mortgaged the property to the lessors The predecessors in title of the defendant appellant died, rent fell into arrears under the lease, and the defendant appellant instituted a suit against Nathu Ram to recover the amount due to him for arrears of rent by sale of the equity of redemption of the property On the 27th of November, 1889, a decree for sale was passed, and on the 31st of March, 1890, an appeal against the decree for sale was rejected The property was accordingly sold by virtue of the decree for sale, and was purchased

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* First Appeal No 267 of 1901 from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 30th of June 1900

(1) (1891) I L R 13 All 432 (2) (1896) I L R 18 All 325

1902 JULY 10.

APPELLATE CIVIL.

24 A. 553= 22 A. W. N. 170.

24 All. 553 (=22 A. W. N. 170.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

HINGU LAL (*Plaintiff*) *v.* BALDEO RAM AND OTHERS (*Defendants*).*
[10th July, 1902.]

Civil Procedure Code, sections 43 and 44—Cause of action—Misjoinder of causes of action—Omission to claim all the reliefs to which plaintiff is entitled on the cause of action.

One *R D* brought a suit against two persons *M* and *G*, claiming to recover certain cash and ornaments belonging to one Sahai, deceased. To that suit *B R* and *B*, who had previously brought a suit for certain immoveable property belonging to the same estate, applied to be, and were, added as defendants. After this *H L*, the son of *R D*, brought a suit claiming possession of a house which originally belonged to Sahai, and which was alleged to be then in the possession of *B R* and *B*.

Held that the provisions of section 43 of the Code of Civil Procedure did not apply to these facts so as to bar the suit brought by *H L*.

[Dist. 5 P. W. R. 1907=28 P. L. R. 1907 ; Ref : 7 A. L. J. 627.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor* and Pandit *Madan Mohan Malaviya* (for whom Pandit *Tej Bahadur Sapru*), for the appellant.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J. and BANERJI, J.—This is an appeal against the decree of the District Judge of Mirzapur, dismissing the suit of the plaintiff, appellant, on the ground that it is barred by the [554] provisions of section 43 of the Code of Civil Procedure. The property claimed is a house which originally belonged to one Sahai. After Sahai's death it was in the possession of his widow, Musammat Kabutra, who died in 1892. The defendants are the brother, and the sons of the brother of Musammat Kabutra, and they are alleged to be in possession of the house. The plaintiff claims to be entitled to the house as next heir of Sahai after the widow's death. The suit was resisted upon the ground, amongst others, that it offended against the provisions of the 43rd section of the Code. The Court of first instance overruled this plea and decreed the plaintiff's claim. The defendants appealed, and in their appeal they reiterated the plea based on the provisions of section 43. The lower appellate Court allowed the plea and dismissed the suit. The plaintiff appeals to this Court. It appears that the plaintiff's father Ram Das brought a suit against two persons, Mathura and Gopal, claiming to recover certain cash and ornaments alleged to have belonged to Sahai. The defendants, Baldeo Ram and Bawan, appear to have brought a suit for certain immoveable property before the institution of Ram Das' suit, and they applied to the Court, under section 32 of the Code of Civil Procedure, to be added as defendants to the suit brought by Ram Das. Their application was granted, and they were made defendants. The learned Judge of the lower appellate Court has held that the plaintiff's father Ram Das was bound to amend his plaint in the

* Second Appeal No. 1034 of 1900, from a decree of Nawab Muhammad Ishaq Khan, District Judge of Mirzapur, dated the 2nd of November, 1900, reversing a decree of Munshi Anant Prasad, Subordinate judge of Mirzapur, dated the 27th of August, 1900.

contention are all cases in which money decrees only had been obtained, and not decrees as in the present case under section 67 of the Transfer of Property Act.

1902 JULY 9

APPELLATE CIVIL

24 A 549= 22 A W N. 162

The next ground of appeal with which we shall deal is, that the sale was a sale of the property, and that even if it were a sale of the equity of redemption only, it was not void in law According to the ruling of a majority of a Full Bench of this Court by which we are bound, whatever may be our opinion as to the correctness of it, an equity of redemption cannot be sold This was the case of *Matadin Kasodhan* v *Kazim Husain* (1) In view of this decision it appears to us that the sale which was held in this case was not a valid sale However, the Court in the case before us entertained the suit for sale of the equity of redemption, passed a decree for sale of the equity of redemption, and sold the equity of redemption There was no appeal against the decree and the decree for sale must now be treated as valid and binding on the parties to the suit This was so decided in the case of *Tara Chand* v. *Imdad Husain* (2) The sale was, therefore, binding on Nathu Ram, the father of the plaintiffs respondents Can the sons now impeach it? There is no suggestion that the debt in respect of which the mortgage was granted was tainted with immorality Nathu Ram himself could have sold the property, including the interests of his sons in it to the appellant, and the plaintiffs respondents, could not have impeached the transaction The Court has only done what Nathu Ram himself could have done, and under such circumstances it appears to us that it would be most inequitable now to allow the plaintiffs respondents, to impugn the transaction In disposing of this ground of appeal we have dealt with the second as well as the third ground of appeal

It only remains to consider the last ground of appeal which has been discussed before us, *viz*, the allegation that the sale of the property was not in contravention of the provisions of section 85 of the Transfer of Property Act This question was not [553] determined by the lower Court, but it appears that the defendant appellant was not proved to have had any [illegible] the interest of the plaintiffs respon[illegible] ntrary, the evidence, so far as it goes, [illegible] made by or on behalf of the appellant [illegible] interested parties, and that he was unable to ascertain that there was any one interested in the property at the time of suit other than Nathu Ram For these reasons we are of opinion that the appellant has established his case, and we accordingly allow the appeal, set aside the decree of the Court below, and dismiss the plaintiffs' suit with costs in both Courts

Appeal decreed

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(1) (1891) I L R 13 All 432 (2) (1896) I L R 18 All 325

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(I. L. R. ALL. VOL. XXV)

suit brought by him, and to add a prayer for recovery of possession of the house now in suit as soon as Baldeo Ram and Bawan were made parties to it, and that his omission to do so precludes the plaintiff from bringing the present suit We are unable to agree with this view As regards Ganeshi, defendant, who was not a party to the former suit, section 43 certainly has no application As regards the other defendants also, we think that that section cannot operate as a bar The learned Judge says, that when Baldeo Ram and Bawan were added as defendants to Ram Das' suit, Ram Das was bound under the provisions of section 33 of the Code of Civil Procedure, to amend his plaint, and "to bring the whole of his claim against all the four defendants for an adjudication before the Court" The learned Judge overlooks the fact that the plaintiff in that [556] suit had no claim in respect of the house against the original defendants Section 33 does not certainly contemplate that upon the addition of defendants to a suit a cause of action different from that upon which the suit was founded, which may have accrued to the plaintiff against the added defendants, should be added to the claim All that section 33 requires is, that when a defendant is added the plaint should be amended in such manner as may be necessary, and an amended copy of the summons served on the defendants The amendment there referred to is such an amendment as is necessitated by the addition of a defendant, and not such an amendment as would add to or alter the nature of the suit as originally brought Further, the learned Judge seems to have lost sight of the provisions of section 44 of the Code of Civil Procedure, which forbids the joinder with a suit for the recovery of immoveable property, or to obtain a declaration of title to such property of any claim other than the claims specified in the section Now the suit brought by Ram Das was a suit to recover moveable property, and he could not have added to such a suit a claim for possession of immoveable property without violating the provisions of section 44 We think that the learned Judge was clearly wrong in dismissing the suit We therefore allow the appeal, set aside the decree of the Court below, and remand the case under section 562 of the Code of Civil Procedure to that Court for trial on the merits The appellant will have the costs of this appeal Other costs will follow the event

Appeal decreed and cause remanded.

25 A 1 (=29 I A. 203=6 C W N. 849=4 Bom. L. R 832=8 Sar 340)

PRIVY COUNCIL

PRESENT

Lord Davey, Sir Ford North, Sir Andrew Scoble and Sir Arthur Wilson

1902
JUNE 13
& 17
JULY 9

PRIVY
COUNCIL.

25 A. 1=29
I A 203=
6 C. W N
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RAMPAL SINGH (*Plaintiff*) *v* BALBHADDAR SINGH (*Defendant*)
[13th and 17th June and 9th July, 1902]

[*On Appeal from the Court of the Judicial Commissioner of Oudh*]

Leas ... rts *Act* ... *ian* ... *of* ... 872 ... *ct*), *section* 3

A lease granting land to the defendant "as a zamindari village" was held not to make him a mere tenant subject to ejectment, but to create a perpetual under proprietary right in the subject of the lease

The relief sought by the plaint in a suit in the Civil Court was possession of the village with mesne profits, and, alternatively, a declaration that the defendant had no right under the lease beyond that of a mere lessee, and was liable to ejectment and also other relief *Held* that (the Civil Court having, with regard to the provisions of the Oudh Rent Act, 1886, no jurisdiction to decree possession of the village or to make such a declaration as

The rule of law that notice to the agent is notice to the principal (which has been embodied in section 229 of the Contract Act (IX of 1872) and section 3 of the Transfer of Property Act (IV of 1882) is applicable for the purpose of limitation The cause of action in the above suit was therefore held to have arisen when the plaintiff's mukhtar had knowledge that the defendant claimed a proprietary interest under the lease, his possession becoming adverse from that time, and the suit, not having been instituted within six years from that date, was barred by lapse of time

... ind that ... *Held* ... that the ... reverse ... applied a

[Ref 1 C L J 73, 21 C L J 45=25 I C 236 24 I C 331, Dist 7 O C 372]

APPEAL from a judgment and decree (6th May, 1899) of the second Additional Judicial Commissioner of Oudh, reversing on second appeal a decree (26th October, 1898) of the District Judge of Rae Bareli, which latter decree had affirmed a decree (27th September, 1897) of the Subordinate Judge of Partabgarh in favour of the appellant

1883, and asked for time to get instructions from Rampal Singh On 30th June, 1883, Jamna Prasad stated that he had "received permission from the Raja the settlement about the jama remains to be made with the *thekadar* (lessee) who should be summoned' Sheoambar and Jamna Prasad were ordered to appear and produce the lease on 14th July, but they did not then appear, and an order was made that [4] "the case should be kept with the other cases of perpetual leases Sheoambar died in 1890 and his son, Balbhaddar Singh, the present respondent, obtained possession of the village, and in 1891 Rampal Singh took proceedings in the Revenue Court to recover possession of the village from him and caused a notice of ejectment to be served on him under section 53 of the Oudh Rent Act (XXII of 1886) In those proceedings Rampal Singh was examined and the lease under which Sheoambar Singh had previously claimed the village was produced and shown to him, and he admitted having granted it His evidence is set out in their Lordships' judgment As a result the Revenue Court ordered the notice of ejectment to be cancelled, leaving the other questions to be determined in a Civil suit

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Thereupon this suit was brought by Rampal Singh to set aside the lease which was dated 23rd May, 1865, and was in the following terms —

"Executed by Sri Maharaj Kumar Raja Sahib Raja Rampal Singh, Bahadur Jeo, Taluqdar of Pargana Rampur Kaithoula Sarkar Manikpur Further I have made over mauza Bijlipur Bangadwa as a zamindari village to Sheoambar Singh Jeo (together with) *sayar* (cesses), *mal* (rents), *Jhils* (lakes), *jhankars* (bushes &c), tanks wells, *indaras* (big wells) and tamarinds of the village, the jama of it is Rs 553 (five hundred and fifty three rupees) of the current Queen's coin Having arrived at this item in respect of the pargana, I have given a lease He may take possession of the village cause to plough and sow, settle and cause to settle, keep the tenants satisfied It must be carried out according to the writing There will be no variation

"Dated Friday, Jeth Sudi 13th, 1921 Sambat or Rabi 1271 Fasli

This document bore the seals of Rampal Singh and Hanwant Singh, and the following endorsement by Hanwant Singh —

"Patta correct, jama to vary according to pargana custom. He may obtain Rs 200 *nankar*"

The suit was instituted on 4th June, 1894, and the plaint stated that, after his execution of the deed of gift of 2nd April, 1859, Raja Hanwant Singh was not competent to execute the lease, that, if otherwise valid, the lease did not confer on Sheoambar Singh an estate of inheritance that the plaintiff first came to know of its existence on 24th June 1891, when he was examined before the Deputy Collector in the suit in the Revenue Court, and that the cause of action arose on that date [5] The plaint prayed for possession of the village with mesne profits, or, in the alternative, for a declaration that the defendant had no other right in the village than that of a lessee, and that he was liable to ejectment

The defendant filed a written statement in which he pleaded that the lease was binding on Rampal Singh because the deed of gift of 2nd April, 1859, was never acted upon, was inoperative in consequence of the subsequent grant of a *sanad* of the whole estate in the name of Raja Hanwant Singh and the passing of Act I of 1869, and because all previous titles were superseded by the decree of 7th September, 1871, which expressly provided for the validity of all leases heretofore granted by Raja Hanwant Singh, that it was also binding on the plaintiff because

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paragraph 8 of the compromise that Raja Hanwant Singh made another grant in perpetuity for the support of a temple and other grants for the lives of certain ladies.

"The above circumstances show that Raja Hanwant Singh considered that his powers of transfer were not limited by the ostensible tenure of the estate. In my opinion Raja Hanwant Singh dealt with the estate as absolute owner while in possession, and his legal advisers in drafting the compromise advisedly stipulated that Raja Rampal Singh should ratify and confirm any grants made in pursuance of those dealings which were in excess of Raja Hanwant Singh's apparent title. Paragraph 8 of the compromise confirms grants heretofore made. Had Raja Hanwant Singh clearly the full right to make these grants, the covenant would have been superfluous. Applying the Hindu Law to the case, I hold that the grant conveyed an estate of inheritance. Even if the Hindu Law is not strictly applicable to the case under clause (*b*), section 3, Act XVIII of 1876, and if justice, equity, and good conscience do not require the application of that law under clause (*g*) of that section, I am of opinion that under the general law the plaintiff cannot succeed. Construing the words of the grant according to their ordinary and primary meaning, the grantor gave and constituted the village of Bijlipur Bangadwa as the zamindari property of Sheoambar Singh.

"The word 'zamindari' is well understood to convey an estate of inheritance, and that is the interpretation that should be placed on the word in this instrument. There is nothing in the context or surrounding circumstances to negative this construction. The grant of a deduction of Rs. 200 *nankar* strongly confirms it. I hold that on a proper construction of the grant of 3rd May, 1865, Raja Hanwant Singh granted an estate of inheritance and that Raja Rampal Singh covenanted in 1871 to ratify and confirm that grant."

The Judicial Commissioner further held that the Civil Court had no jurisdiction to make a declaration of a tenant's liability to be ejected by notice, which under section 56 of the Oudh Rent Act (XXII of 1886) was within the exclusive jurisdiction [9] of the Revenue Courts. In the result he reversed the decisions of the two lower Courts and dismissed the suit with costs.

The amount in dispute in the suit and the appeal was under Rs. 10,000, and an application by the plaintiff for leave to appeal to His Majesty in Council on the ground that the appeal involved questions of law of public importance was refused by the Judicial Commissioner.

The plaintiff subsequently applied to His Majesty in Council for special leave to appeal from the judgment of the Judicial Commissioner on the following grounds:—(i) that the case involved questions of law of considerable importance, and particularly a question of "constructive knowledge" of the plaintiff in consequence of the mutation proceedings in 1883: and (ii) that the Judicial Commissioner had in second appeal subverted findings of fact arrived at by the Court of first appeal which he had no jurisdiction to do.

The "findings of fact" were (*a*) that exhibit B1 was genuine, and (*b*) that the plaintiff had in 1883 notice of the lease in suit.

Special leave was granted to the plaintiff as prayed.

Mr. *DeGruyther* for the respondent took a preliminary objection to the hearing of the appeal that if the circumstances of the case had been properly stated to the Council, special leave would not have been granted. He pointed out that the questions of law decided by the Judicial Commissioner, *viz.*, (*a*) that the plaintiff was bound by the lease in suit in consequence of the compromise and decree of 1871, and (*b*) that the lease by its terms, without reference to any extraneous matter, conveyed an estate of inheritance, were not questions of public importance, but only affected the parties to the suit, and that they disposed of the whole suit, and made it unnecessary to decide any other question. As to the allegation in the grounds for special leave that the Judicial Commissioner

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"In the absence of the evidence of the agent, the Courts below have found it not proved that the Raja had personal knowledge of the defendant's claim The Courts have not dealt with the knowledge of plaintiff's agent in that case

of the defendant, merely because the plaintiff found it more convenient for himself
to carry o
and section
obtained b
transacted
have the same legal consequences as if it had been given to, or obtained by, the principal It has been held in England that a purchaser who contracts through an agent who knows of the fraud, cannot be a *bona fide* purchaser. *Vane* v *Vane* (1)"

"I hold that the defendant in 1883, in a litigation pending between the plaintiff and himself, denied the right now claimed by the plaintiff and asserted an adverse title in himself I hold that plaintiff had constructive knowledge of that fact, and that the right to sue accrued to him in 1883 Accordingly a suit for a declaration of the plaintiff's right is barred under article 120, schedule ii of the Limitation Act"

As to the power of Hanwant Singh to grant the lease, and the effect of the compromise, he observed—

"The matter was settled by a judicious family arrangement, and whatever defects there may have been in Raja Hanwant Singh's power to lease, gift or transfer

As to exhibit B1, and the construction of the lease, the Court observed—

"I see no reason to doubt the genuineness of Exhibit B1, a letter written in 1857, in which Raja Hanwant Singh writes to Sheoambar Singh, his sister's son, saying that the whole pargana is against him and calling on him to assist amicably compromising claims and promising to secure firmly to him an estate in Bijlipur Bangadwa In my opinion a presumption may properly be drawn in favour of the genuineness of this document . . . . 'In cases governed by Hindu Law a gift of lands made by an instrument, not containing express words of inheritance, is presumed to carry an estate of inheritance

" The instrument to be construed in the

lists referred to in Act I of 1869 Under these circumstances it appears to be extremely doubtful whether Raja Rampal Singh could have established or defended in a suit his title to those villages under the deed of gift of 1859 It appears from

(1) (1873) L R 8 Ch App. 383

aside the lease, and not a suit for ejectment From the proceedings of 1883, in which Jamna Prasad acted as agent of the appellant, the Judicial Commissioner has rightly [13] inferred as a matter of law that the appellant then had notice of the respondent's title, being bound by the admission of Jamna Prasad The suit should have been brought within six years from that time, and not having been instituted until 1894, it is barred The suit cannot be a suit for ejectment because a Civil Court has no jurisdiction to determine the liability of a person to be ejected under the Oudh Rent Act that jurisdiction belongs exclusively to the Revenue Court

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Mr *Arathoon* replied—

1902, *July* 9 —The judgment of their Lordships was delivered by LORD DAVEY —

In this case special leave was granted by Her late Majesty to appeal from a decree of the Judicial Commissioner of Oudh, dated the 6th May, 1899, overruling the previous decree of the District Judge on first appeal, which confirmed the original decree of the Subordinate Judge A preliminary objection was made by counsel for the respondent that leave to appeal had been granted under a misconception, and that the appeal ought not to be heard on its merits Their Lordships found it impossible to appreciate the weight or validity of the objection until they were in possession of the facts of the case, and they accordingly allowed the appeal to proceed, reserving to the respondent the benefit of his objection if it proved to be well founded

The property which is the subject of this litigation is a village called indifferently Bijhpur Bangadwa and Bangarwa comprised in the Taluqdari estate of Rampur Kaithoula Prior to and in the year 1869 Raja Hanwant Singh was taluqdar of this estate, and his name was also entered in Lists 1 and 2 in the Appendices to the Oudh Estates Act, 1869, in respect thereof The Raja had two sons, the elder of whom died some time before the year 1859, leaving an only son, Rampal Singh, who is the present appellant The old Raja purported in the year 1859 to divest himself of his taluq in favour of his grandson, and afterwards took proceedings to resume or set aside his grant, which resulted in a compromise It is unnecessary, however, for their Lordships to follow the details of the complicated story of the relations between the old Raja and his grandson It is sufficient for the present purpose to say that [14] on the death of his grandfather on the 29th June, 1881, the appellant became the undisputed proprietor of the taluq

On the 9th December, 1882, Sheoambar Singh, who was sister's son of the old Raja, commenced [illegible] for mutation of names in respec[illegible] cation he claimed to be entitled [illegible] of the entire village for a perpetual lease And in his affirmation in support of his application he stated that the appellant gave him zamindari of the entire village in 1271 Fasli (corresponding with the Christian year 1865) under a perpetual lease on payment of a rent of Rs 553, and that from that year or from before that time he had been in possession of the village

It is stated that the appellant was at that time in England, but one Jamna Prasad, his mukhtar, appeared for him and obtained an adjournment of the case in order to enable him to communicate with the

had exceeded his jurisdiction in reversing on second appeal questions of fact decided by the Court below, he had not done so The Court of first appeal had not decided that exhibit B1 was not genuine, and the Judicial Commissioner decided in favour of its genuineness as a presumption of law [see section 90 of the Evidence [10] Act, I of 1872] The question of notice, too, was a question of law to be inferred from the admitted proceedings in 1883 moreover, the finding was not material or neces sary for the determination of the suit It is submitted, therefore, that the appeal should not be heard, but that the order granting special leave should be discharged

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Mr *C W Arathoon* for the appellant referred to the observation of the Judicial Commissioners in refusing to grant a certificate of appeal to the Privy Council where they said, "Facts and circumstances which have induced their Lordships to grant special leave to appeal may exist in a case, but nevertheless the case may be one which should not be certified as a fit one for appeal, and that "the only point of law which could be said to be of public importance was the point whether the knowledge of the plaintiff s agent is the knowledge of the plaintiff for the purpose of the Limitation Act '

Their Lordships without prejudice to the objection of the respon dent, if sustained, allowed the appeal to proceed

Mr *Arathoon* contended that the lease relied upon by the respon dent purported to be granted by the appellant, but was actually given by Hanwant Singh, whose authority to grant such a lease was not proved If executed by Hanwant Singh in his own behalf, he having only a life interest in the village leased, it could not have conveyed any larger interest to the lessee As to the construction of the lease, the Judicial Commissioner was wrong in deciding that an estate of inheritance was created or was intended to be created by it there is nothing to show that such was the case and the mere use of the word "zamindari does not make it a perpetual lease The letter (Exhibit B1) relied on in sup port of the lease was found to be not genuine by the District Judge That finding was, as one of fact, final on second appeal, and the Judicial Commissioner had no power to interfere with it or to accept Exhibit B1 as genuine In the plaint Sheoambar Singh is called a ziladar' of Hanwant Singh s The word *nankar* does not imply any pro prietary interest of the lessee in the subject of the lease Sykes Taluqdari Law, p 166 There is nothing to show that the Raja was a "zamindar within the meaning of the Government [11] letters with Act I of 1869, and this should be proved before those letters can be relied upon (Sykes' Taluqdari Law, p 290) On the construc tion of leases under the Oudh Settlement Acts the cases of *Lekhraj Roy* v *Kunhya Singh* (1), *Tulshi Pershad Singh* v *Ramnarain Singh* (2), and *Rohan Singh* v *Surat Singh* (3), and Sykes Taluqdari Law, p 107 were referred to There is no proof that Jamna Prasad was aware that the claim of Sheoambar Singh in 1883 was to a perpetual lease, the admission, as recorded, shows rather that he understood the claim to be in the character of a *thekadar* (lessee), and not of an under proprietor [see section 108 of the Oudh Rent Act (XXII of 1886)] where *thekadar* is defined] Even if Jamna Prasad knew the claim was to an under

(1) (1877) L R 4 I A 223 (227) I L R 3 Cal 210 (213)
(2) (1885) L R 12 I A 205 I L R 11 Cal 318
(3) (1884) L R 12 I A 52 I L R 12 Cal 117

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become binding upon him or his estate, or by a decision that according to its true construction it had no operation beyond the life of the old Raja or alternatively of Shoeambar Singh And their Lordships think that the suit can only be maintained (if at all) as one for those objects, notwithstanding that for obvious reasons it is in the pla nt made to look as much like a suit for recovery of land as possible, and an order for ejectment in the Revenue Court might be consequential on a decree in the plaintiff s favour No doubt the ultimate object of the appellant was recovery of possession ; but that relief could not be given in this suit It is different, therefore, from a case in which the substantial relief sought is recovery of land and the setting aside an instrument is merely ancillary or incidental to that relief In the present case the cancellation of the instrument or a declaration of its invalidity as against the appellant was the substantial relief sought and the only relief which the Court had jurisdiction to give

The suit is, therefore, in the opinion of their Lordships one which would come within section 39 or section 42 of the Specific Relief Act And the relevant article in the schedule to the Limitation Act would be either 91 "to cancel or set aside an instrument not otherwise provided for" for which the period is three years only from the date when the facts became known to the plaintiff, or (as the Judicial Commissioner thought) the general article 120, which gives six years from the date when the right to sue accrued In the present case the right to sue accrued *primâ facie* on the death of Raja Hanwant Singh on 29th June, 1881 The appellant, however, says that time did not begin to run against him until Sheoambar's or the respondent's possession became adverse, or until he knew the facts which entitled him to sue, and he fixes that date at the 24th June, 1891, the date of his appearance before the Revenue Officer in the proceedings of that year, when (he says) he first became aware of the instrument of 23rd May, 1865

The Judicial Commissioner has, however, held that the appellant had notice through his mukhtar that Sheoambar claimed a perpetual proprietary tenure in the village under an instrument purporting to be the appellant's deed in the proceedings for [17] mutation of names in the year 1883 And this is the principal point on which the appellant in his petition for special leave to appeal relied as an excess of jurisdiction by the Commissioner The Courts of first instance and of first appeal both held that the appellant came to know of the existence of the instrument of the 23rd May, 1865, only on the 24th June, 1891, and it is contended that such finding was one of fact which the Commissioner on second appeal had no jurisdiction to reverse Their Lordships, however, think that the learned Commissioner in holding that the appellant had notice through his mukhtar did not reverse any finding of fact by the Courts below, but merely applied a well known and universal rule of law to the facts before him By section 229 of the Indian Contract Act it is enacted that any notice given to, or information obtained by, an agent in the course of his business transacted by him for the principal shall as between the principal and third parties, have the same legal consequence as if it had been given to, or obtained by, the principal And the same is repeated in section 3 of the Transfer of Property Act, 1882 It may be that these enactments are not directly applicable to the matter now in dispute, but they are only declaratory of a general principle of law That principle

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appellant. On a subsequent day he stated that he had received permission from the appellant, and at his suggestion an order was made that Shooambar Singh be summoned with the lease concerned for the 14th July, and Jamna Prasad was also ordered to present himself. Neither party, however, attended on the day fixed, and the case was ordered to be kept with other cases of perpetual leases for future decision.

On the 29th June, 1891, the appellant commenced proceedings in the Revenue Department against the present respondent (the son of Sheoambar Singh, who had died in the interval), to recover possession of the village in suit. The respondent thereupon produced a document bearing a native date corresponding with the 23rd May, 1865, and purporting to be sealed with the seals of Raja Hanwant Singh and of the appellant, and to be signed by the old Raja. On being shown the document the appellant stated as follows :—

"*Answer.*—I see the lease. It bears the signature of Raja Hanwant Singh. It bears his and my seals as well. This lease was executed by Raja Hanwant Singh on my behalf, which I have now come to know. This village was given to me by Raja Hanwant Singh along with the estate. Subsequently [15] Raja Hanwant Singh executed this deed in favour of Sheoambar Singh, the father of Balbhaddar Singh, to do which he (Hanwant Singh) had no power, and he affixed my seal also to the deed. At the time of its execution I was a minor. This deed being produced, I have no hope of success in a Revenue Court."

The respondent's objection was thereupon maintained and the appellant's claim for ejectment cancelled.

The respondent does not now contend that the document of the 23rd May, 1865, was the deed of the appellant, and it has been assumed by both sides that his seal was affixed to it by his grandfather during his minority ; but he relies on it as Hanwant Singh's deed, which he says has been confirmed in his favour by the appellant as part of the compromise. The construction of the document, however, has been the subject of much argument. Their Lordships agree with the opinion of the Judicial Commissioner that the document created a prepetual under-proprietary right in the village and with the reasons he has given for his opinion. In the circumstances of the present case it is unnecessary for them to say more.

On the 4th June, 1894, the plaintiff commenced the present action in the Court of the Subordinate Judge of Partabgarh. The relief sought by the plaint was (1) possession of the village ; (2) mesne profits ; (3) (alternatively) a declaration that the defendant had no right in the disputed village beyond that of a lessee having no right (which sounds a little tautological) and that he was liable to be ejected by an ordinary notice of ejectment ; (4) further relief. The respondent by his written statement relied (amongst other defences) on limitation.

It is admitted by counsel on both sides that having regard to the provisions of the Oudh Rent Act of 1886, the Civil Court had no jurisdiction either to decree possession of the village or to make a declaration in the form prayed by the plaint. Their Lordships think that in substance the object of the suit was to get rid of the blot or cloud on the appellant's title occasioned by the respondent's claim under the instrument of 23rd May, 1865, either by cancellation of the instrument or by a declaration that it was not the appellant's deed, and had not by any act [16] of his

25 A 19 (=22 A W N 182)

1902 JULY 2

APPELLATE CIVIL

APPELLATE CIVIL

25 A 19= 22 A W N 182.

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Banerji.

MAHADEO PRASAD (*Plaintiff*) v TAKIA BIBI AND OTHERS (*Defendants*) * [2nd July, 1902]

Civil and Revenue Courts—Jurisdiction—Act No XIX of 1873 (*N W P Land Revenue Act*), *section* 241 (*f*)—*Partition—Suit by person not a party to the partition proceedings to obtain in a Civil Court a declaration that a partition carried out in a Revenue Court was fraudulent and injurious to his interest*

If by a fraud practised upon outside parties, such as mortgagees, or by fraud practised upon the Revenue Court itself a collusive and fraudulent partition is carried through in that Court, the person who is damnified by such fraudulent proceedings is not without a remedy in the Civil Court The Civil Court has no jurisdiction whatever to set aside a partition effected in the Revenue . . . .

distinguished

[Ref 51 I C 125=17 A L J 797=41 All 626]

IN this case the plaintiff brought his suit in the Court of a Subordinate Judge to obtain a declaration that certain partition proceedings, which had been carried out in a Court of Revenue under the arbitration sections contained in the North Western Provinces Land Revenue Act, 1873, were fraudulent and void as against him Eight persons, the co sharers, parties to the partition, were made defendants to the suit The plaintiff alleged that under two deeds, dated the 19th of September, 1889 and the 20th of March, 1890 respectively, the ancestor of the defendants Nos 1 to 6 had mortgaged to the ancestor of the plaintiff a 5 anna 4 pie share in the mauza in question [20] On the 22nd of April, 1897, the plaintiff obtained a decree for sale on this mortgage After the plaintiff had obtained his decree for sale, namely, on the 26th of May 1897, the defendants Nos 7 and 8 applied for partition of the property, and a partition was carried out by means of arbitration The plaintiff alleged that this partition was altogether fraudulent, that property of little value was allotted to defendants Nos 1 and 6, whilst the valuable portion of the property was allotted to defendants Nos 7 and 8, this being done with the object of prejudicing and defeating the plaintiff's claim as mortgagee The partition proceedings were carried out in the Court of Revenue, and confirmed on the 15th of October, 1898 On the 21st of March, 1899 the plaintiff purchased the share of the defendants Nos 1 to 6 in the property, at a sale held in execution of his decree against them, the property being sold as an undivided share of the zamindari and not as a divided share The present suit was instituted on the 8th of November, 1899 The main defence of the defendants was that, having regard to section 241 (*f*) of the Land Revenue Act, 1873, the suit was not cognizable by a Civil Court

* Second Appeal No 827 of 1900, from a decree of J H Cumming, Esq, District Judge of Azamgarh, dated the 26th of June, 1900, confirming a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 5th of April, 1900

(1) (1873-4) L R 1 I A 106
(2) (1869) 4 E. and I A. 82
(3) (1749) 1 Vesey (Senior), 283
(4) (1901) I L R 23 All 231

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is in an especial sense applicable to legal proceedings which are usually conducted through an agent, and it would be impossible to conduct such business, and it would lead to grave inconvenience and injustice if it were required to prove afterwards that the client had personal knowledge of the contents of the pleadings or of some document in suit or of the general nature of the claim made against him. It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or (in other words) the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings. Now what did the appellant's mukhtar know from the written statements in the proceedings? He knew that Sheoambar Singh claimed a perpetual proprietary tenure in the village under an instrument purporting to be executed by the appellant himself in the year 1271 Fasli. It is true that the instrument itself was not [18] produced, but its production was ordered and might have been enforced by the appellant's mukhtar if he had been so minded. He did not do so, perhaps, because he was too well acquainted with the contents of the document, and he took no further steps in the matter. In a Court of Law the appellant must be held to have received in 1883 all the information which the proceedings of that year conveyed, and Sheoambar's possession became adverse to the appellant from that date.

Their Lordships are therefore of opinion that the Judicial Commissioner took a correct view, and that the suit is barred by limitation, whether it comes under article 91 or article 120, and it is immaterial to consider whether time began to run against the appellant from Hanwant Singh's death or from the proceedings of 1883.

The only other point on which the appellant relied as an excess of jurisdiction in the Judicial Commissioner was an expression of opinion in his judgment that there was no reason to doubt the genuineness of a certain letter said to have been written in 1857 by Raja Hanwant Singh to Sheoambar Singh, which had been admitted in evidence, but which both Courts below had treated as a forgery. This point, however, turns out to be absolutely immaterial. No reliance was or could be placed on the letter by the respondent's counsel, and it is a matter for surprise that anybody should have thought it worth while to forge such a letter, or that anybody should have conceived it to be relevant evidence on any issue in the case.

Undoubtedly if their Lordships had found that leave to appeal had been obtained by misrepresentation or concealment of material facts, they would have dismissed the appeal at once without considering the merits. But they acquit the appellant of any intention of that kind. They must, however, add that if it had been possible when the leave was applied for to appreciate the points in the case as well as they are now in a position to do, they doubt whether any leave to appeal would have been given.

Their Lordships will humbly advise His Majesty that the appeal be dismissed and the appellant will pay the costs of it.

Appeal dismissed.

[19] Solicitors for the appellant—Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent—Messrs. *Watkins and Lempriere.*

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to impeach the partition proceedings was himself a party to those proceedings This is important to bear in mind In the case now before the Court the plaintiff, who is a mortgagee, was not a party to the proceedings in the Revenue Court, as a matter of fact, he made an application to the Revenue Court to be added as a party to the proceedings, but his application was ultimately rejected In the case of *Muhammad Sadiq* v *Laute Ram* (1) the Chief Justice, Sir Arthur Strachey, stated the law on the subject as follows He observed —"The enactment in clause (*f*) is not merely that a Civil Court is not to alter the distribution of the land made on partition, but that it is not to 'exercise any jurisdiction over the matter' of such distribution of the land That would, I think, exclude a suit in a Civil Court which sought a declaration impugning the distribution which by partition the Revenue authorities had effected The object of such a declaration could only be to obtain in some manner an alteration in the distribution that had been made If such a declaration were binding upon the Revenue Court so as to compel the Revenue Court to alter the distribution, it would clearly be an exercise of jurisdiction in the matter of the distribution If the declaration were not binding on the Revenue Court it would be a mere *brutum fulmen* ' Now it is to be observed that in the case with which the learned Chief Justice was dealing there was no allegation of fraud It was also a question between the parties to the partition, and undoubtedly under the Partition Act such questions could have been raised and determined by the Revenue Court, and we take it that the learned Chief Justice in laying down the law as he has done, did so without reference to cases in which partition proceedings have been carried through in the Revenue Court fraudulently and collusively and to the detriment of mortgagees, as is alleged to be the case in the present suit We are disposed to think that if by a fraud practised upon outside parties, such as mortgagees, or by fraud practised upon the Revenue Court itself, a [23] collusive and fraudulent partition is carried through in that Court, the person who is dammified by such fraudulent proceedings is not without a remedy in the Civil Court It is true, no doubt, that the Civil Court has no jurisdiction whatever to set aside a partition effected in the Revenue Court, but it is not without jurisdiction to investigate a question of fraud, and if fraud be established, to make a declaration that proceedings carried out in any Court were fraudulent proceedings, and to give relief accordingly In the well known case of *Byjnath Lall* v *Ramoodeen Chowdry* (2) their Lordships of the Privy Council guardedly abstained from expressing the opinion that there would not be redress for a fraud such as we have referred to, on the contrary, we gather from their judgment that a person who has been prejudiced and injured by malpractices such as have been alleged here will not be without remedy in the Civil Court In that case it was decided that a mortgage of an undivided share in land may be enforced against such lands as under a *batwara* or revenue partition may have been allotted in lieu of such share, and also that lands allotted in severalty by the *batwara* to the co sharers of the mortgagor will not be subject to the mortgage That was a case in which there was no allegation of fraud whatever In delivering the judgment of their Lordships, Sir Montague E Smith observes —" It was argued that, as the mortgagee could not be a party to the *batwara* proceedings, so upon general principles of jurisprudence

(1) (1901) I L R 23 All 291 (2) (1873-4) L R 1 I A 106

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The Court of first instance (Subordinate Judge of Azamgarh) accepted this defence and dismissed the suit, and an appeal by the plaintiff was dismissed on the same ground by the District Judge.

The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

Mr. *Abdul Raoof* and Maulvi *Ghulam Mujtaba*, for the respondents Nos. 7 and 8.

STANLEY, C. J. (BANERJI, J., concurring).—The plaintiff's suit was brought for a declaration that certain partition proceedings, which were carried out in the Revenue Court by means of the arbitration clauses of the Revenue Act, were fraudulent and void as against him, he being a mortgagee of certain shares in the property which was so partitioned. Under two deeds, dated the 19th of September, 1889 and the 20th of March, 1890, the ancestor of the defendants Nos. 1 to 6 executed a simple mortgage in favour of the plaintiff's ancestor of a 5 anna 4 [21] pie share in mauza Pardhanpur. On the 22nd of April, 1897, the plaintiff obtained a decree for sale on foot of his mortgage. The defendants Nos. 7 and 8 are co-owners of the property along with the defendants Nos. 1 to 6. After the plaintiff had obtained his decree for sale, namely, on the 26th of May, 1897, the defendants Nos. 7 and 8 applied for partition of their property and a partition was carried out by means of arbitration. It is alleged in the plaintiff's claim, seeking to have the partition proceedings declared fraudulent and void as against him, that the partition was altogether fraudulent; that property of little value was allotted to the defendants Nos. 1 to 6, whilst the valuable portion of the property was allotted to defendants Nos. 7 and 8, and this with a view to prejudice and defeat the plaintiff's claim as mortgagee. The partition proceedings were carried out in the Revenue Court, and confirmed on the 15th of October, 1898. On the 21st of March, 1899, the plaintiff purchased the share of the defendants Nos. 1 to 6 in the property at a sale held in execution of his decree against them, the property being sold as an undivided share of the zamindari, and not as a divided share. The present suit was instituted on the 8th November 1899, and the main defence which has been relied on by the defendants is, that under section 241 (*f*) of Act No. XIX of 1873, the claim is not cognizable by the Civil Courts. This contention has found favour with both the lower Courts, and the claim of the plaintiff was accordingly dismissed. Hence the present appeal.

Much reliance in argument has been placed by the respondent's counsel upon the case of *Muhammad Sadiq* v. *Laute Ram*, (1) recently decided in this Court. In that case it was decided by a Full Bench of this Court that if a party to a partition which is being conducted by the Revenue authorities under the Land Revenue Act of 1873, desires to raise any question of title affecting the partition, he must do so according to the procedure laid down in sections 112 to 115 of that Act, and that if a question of title affecting the partition, which might have been raised under these sections during the partition proceedings, is not so raised and the partition is [22] completed, section 241 (*f*) of the Act debars *the parties to the partition* from raising subsequently in a Civil Court any such question of title. It is to be noticed in the first place that in that case the party who sought to raise the question of title, and

(1) (1901) I. L. R. 23 All. 291.

Now the lower Courts in this case have not entertained the question of fraud which was raised in this suit They have confined themselves to a decision of the case upon the preliminary point that the suit was not cognizable by the Civil Court In this we are unable to agree with them for the reasons which we have stated We think that if the plaintiff is able to substantiate a case of fraud, such as he alleges, it is open to the Civil Courts to declare that the proceedings in the Revenue Court were fraudulent We also think that if this issue be found in favour of the plaintiff the decision of the Court need not necessarily be a mere *brutum fulmen* and end with the finding of fraud If it be found that the plaintiff has been damnified by the proceedings in the Revenue Courts, we are of opinion that the Civil Court will be able to redress the wrong It would be premature for us to say what the nature of the redress may be It will be for the Court to ascertain first that fraud has been committed If it finds that fraud has been committed, it will be necessary to consider whether the plaintiff has been thereby damnified, and if it is found that the plaintiff has been damnified, it will then be for the Court to consider in what way under the circumstances, and having regard to all the facts, it can best give redress to the plaintiff

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For these reasons we allow the appeal, set aside the decrees of the lower Courts, and remand the case to the Court of first instance with directions to readmit the suit under its original number in the register and proceed to determine it on the merits, bearing in mind the observations which we have laid down above The costs here and hitherto will abide the event

Appeal decreed and cause remanded

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25 A 26 (= 22 A W N 178)

[26] APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Aikman

GANGA DAYAL AND ANOTHER (*Plaintiffs*) v BACHCHU LAL AND ANOTHER (*Defendants*)* [4th July 1902]

Act No IX of 1872 (*Indian Contract Act*) *section* 74—*Act No. VI of* 1899 (*Indian Contract Act Amendment Act*) *section* 4—*Bond—Interest—Penalty*

Held that a stipulation in a bond for payment of compound interest on failure to pay simple interest on the same amount is not a penalty within the meaning of section 74 of the Indian Contract Act 1872, as amended by Act No VI of 1899

[Fol 25 All 159 58 P R 1901 Ref 1 N L R 9]

THIS was a suit for money alleged to be due on a registered mortgage bond, dated the 2nd of March 1891, with interest on the same The [illegible] f Rs 10 only had been ider a stipulation in the paid annually, compound irst instance (Subordinate claim in full On appeal Shahjahanpur) held that

[illegible] G D Steel Esq, District Judge of Shahjahanpur, dated the 4th September, 1900, modifying a decree of Babu Nihal Chandra Subordinate Judge of Shahjahanpur, dated the 22nd of March 1900

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he could not be held to be bound by them; that consequently he was at liberty to enforce his rights against an undivided share in every parcel specified in the mortgage deed, to whichsoever of the co-sharers such parcel might have been allotted, but that he could not claim more. The objection that, in such a case, he must either forfeit part of his security or pursue his remedy against those with whom he had no privity of contract, was met by the suggestion that the co-sharers thus injuriously affected would, upon the principle of implied warranty, such as exists in this country on a title acquired by partition or exchange, have a remedy over against the mortgagor, even if the consequence of that were the re-opening of the partition. And [24] it was further argued that if the contention of the appellant concerning a partition by *batwara* were correct, it must be equally true of a partition by private arrangement; and that in either case an unequal partition might be effected by collusion between the mortgagor and his co-sharers with the object of defrauding the mortgagee. Upon this it is to be observed that fraud would be a substantive ground for relief, and that if the fraud supposed were effected by private arrangement, the mortgagee would have a clear remedy against all who were parties to it in the Civil Court. In the more improbable case of such a fraud being effected by means of *batwara* proceedings, his remedy might be more difficult by reason of the finality of the partition and the incapacity of the Civil Court to entertain a suit to disturb it. But without entering into these nice questions, which do not directly arise on this appeal, their Lordships deem it sufficient to observe that the finality of such a partition cannot be greater than that of the purchase of an estate at a sale for arrears of the public revenue; and that even in this latter case, Courts of Justice have found the means of relieving the person injuriously affected by fraud." In this decision of their Lordships there is a clear indication that if a fraud has been practised, the person or persons injured by it will be able to obtain redress in the Civil Courts, notwithstanding the diffiulties which may be thrown in their way by reason of the finality of the partition proceedings carried out in the Revenue Court. That an Act of Parliament will not stand in the way of relief being given in a case of the kind is laid down by Lord Westbury in the well known case of *McCormick* v. *Grogan* (1). I only quote this case for the statement made by Lord Westbury in his judgment, which is as follows:—"The Court of Equity has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud." In the earlier [25] case of *Barnesly* v. *Powel* (2) it was laid down to the effect that though the Court of Chancery could not set aside the judgment of a Common Law Court obtained against conscience, it would consider the person who had obtained the judgment fraudulently as a trustee, and would decree him to reconvey any property that he might have become possessed of under the judgment on the ground of laying hold of his conscience so as to make him do what was necessary to restore matters as before.

(1) (1873-4) 4 E and I. A. 82; at p. 88.
(2) (1749) 1 Vesey (Senior), 283; at p. 285.

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of them, Nakchhedi died, and thereupon his widow, on behalf of her minor children, applied that they should be made parties to the appeal as his legal representatives That application appears to have been rejected on the ground that it had not been made within the prescribed period of limitation The learned Judge held that, as regards the appellant Nakchhedi, the appeal had abated He also held the appeal of the other appellants to have abated on the ground that "where a joint decree is the subject [28] of appeal on the part of unsuccessful defendants, the death of one of the appellants causes the appeal of the others to abate," and in support of this view referred to the case of *Kamlapat* v *Baldeo* (1) He accordingly dismissed the appeal

From this decree of dismissal the present appeal has been preferred In our judgment the appeal must prevail The decision of the case turns upon the question whether the right to appeal survived to the surviving appellants If it did, the appeal of those appellants did not abate by reason of the death of one of the appellants This is clear from the provisions of sections 361 and 362 of the Code of Civil Procedure read with section 582 of the same Code Section 544 provides that where there are more plaintiffs or more defendants than one in a suit and the decree appealed against has proceeded on a ground common to all of them, any one of such plaintiffs or defendants may appeal against the whole decree, and thereupon the appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants as the case may be, including those who have not appealed In this case the Court of first instance proceeded, as we have already said, upon a ground common to all the defendants, and therefore any of those defendants might under the above section have appealed against the whole decree, and upon his appeal the Court was competent to reverse or modify the decree in favour of all the defendants, the fact that six of them preferred the appeal jointly did not, in our opinion, make any difference If each of the surviving appellants could have appealed separately, all of them were competent to continue the appeal notwithstanding the death of one of the persons who had joined them in making the appeal The appellant, if he had so chosen, might have preferred an appeal separately, and if he had done so, the abatement of his appeal could not have affected an appeal preferred by other defendants From the fact that several plaintiffs or defendants, each of whom might have preferred an appeal separately if he had chosen to do so, joined together in filing one appeal, it does not follow that upon the death of any one of them the right to appeal does not survive to the other appellants Section 363 read with section 582 does not apply to [29] such a case We are therefore of opinion that upon the abatement of the appeal of Nakchhedi, appellant, the appeal of the other appellants before the Court below did not abate This view is supported by the ruling of the Bombay High Court in *Chandarsang* v *Khimabhai* (2) There a suit for possession of land brought against five defendants was decreed by the first Court The defendants appealed Before, however, the appeal could be heard, one of the appellants, namely, the fourth defendant, Harisang Kanubhai, died, and the application to have the name of his heir entered as appellant was rejected as time-barred The District Judge dismissed the appeal for want of parties The High Court reversed his decision, and held that "the mere fact of the death

(1) (1900) I L R 22 All 222 (2) (1897) I L R 22 Bom 718

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illustration (*d*) added to section 74 of the Indian Contract Act by Act No. VI of 1899 made the stipulation in the bond for the payment of compound interest in default to amount to the imposition of a penalty, and therefore allowed the plaintiffs simple interest only. The plaintiffs appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Lalit Mohan Banerji*), for the appellants.

Munshi *Gobind Prasad*, for the respondents.

BLAIR and AIKMAN, JJ.—We are of opinion that this appeal must be allowed. There is no rule of law which compels us to say that a stipulation for payment of compound interest on failure to pay simple interest on the same amount is a penalty within the meaning of section 74 of the Contract Act as amended by Act No. VI of 1899. The illustration relied on by the learned Judge of the Court below is inapplicable to the present case. We allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

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25 A. 27 (=22 A. W. N. 171.)

[27] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM SEWAK AND OTHERS (*Defendants*) *v.* LAMBAR PANDE AND OTHERS (*Plaintiffs*).* [4th July, 1902.]

Civil Procedure Code, sections 361, 362, 363, 544, *and* 582—*Appeal—Parties—Death of one of several appellants—Survival of right of appeal—Abatement of appeal.*

Where several plaintiffs or defendants jointly appeal against a decree to which section 544 of the Code of Civil Procedure applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned : it cannot have the effect of causing the appeal as a whole to abate. *Chandarsang* v. *Khimabhai* (1) referred to. *Ghamandi Lal* v. *Amir Begam* (2) distinguished. *Kamlapat* v. *Baldeo* (3) overruled.

[Fol. 10 I. C. 27 (Abatement of appeal) 5 I. C. 325 ; Ref. 5 C. L. J. 393.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard* and Munshi *Gokul Prasad*, for the appellants.

Mr. *Abdul Majid*, for the respondents.

STANLEY, C. J. and BANERJI, J.—The suit in which this appeal has arisen was brought by the respondents for the partition of certain immoveable property which belonged jointly to the parties. The Court of first instance decreed the claim, and in doing so, admittedly proceeded upon a ground common to all the defendants. From this decree only six of the defendants, namely, those who were described in the plaint as defendants first party, appealed. During the pendency of the appeal one

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* Second Appeal No. 466 of 1900, from a decree of R. Greeven, Esq., District Judge of Ghazipur, dated the 1st of March, 1900, confirming a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated 29th of November, 1897.

(1) (1897) I. L. R 22 Bom. 718. (3) (1900) I. L. R. 22 All. 222.
(2) (1894) I. L. R. 16 All. 211.

one for partition does not, we think, make section 544 any the less applicable, moreover, the Court always has the power to direct that persons interested [31] in the result of the appeal who have not been made parties to the appeal be added as respondents 1902 JULY 4

APPELLATE CIVIL

For the above reasons we are of opinion that the Court below was wrong in holding that the appeal to it had abated We accordingly allow the appeal, set aside the decree of the lower appellate Court, and remand the case to that Court under the provisions of section 562 of the Code of Civil Procedure for trial according to law Costs here and hitherto will follow the event 25 A 27=22 A W N 171

Appeal decreed and cause remanded

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25 A 31 (=22 A W N 173)

REVISIONAL CRIMINAL

Before Mr Justice Blair and Mr Justice Aikman

EMPEROR v MAHABIR SINGH AND OTHERS * [10th July, 1902]

Act No XLV of 1860 (*Indian Penal Code*), *section* 423—"*Dishonestly*"—"*Fraudulently*" —*False statement of price in a sale deed with the view of defeating claims of pre emptors*

Held that the making of a false statement in a sale deed of immoveable property as to the consideration for the sale, such statement being made for the purpose of preventing any person who might have a right of pre emption in respect of property sold from coming forward to assert his right of pre emption, is an offence which falls within the definition contained in section 423 of the Indian Penal Code

[Ref 37 Mad 47]

THE facts of this case, so far as they are material for the purposes of the present report, are as follows —One Sheobhik brought a charge of cheating against Mahabir The complainant alleged that by two sale deeds in favour of Mahabir, registered on the 9th of October, 1900, he had sold certain property to Mahabir for the sum of Rs 1,900, of which price Rs 1,000 were to pay off prior mortgages on the property Of the balance Sheobhik admitted the receipt of Rs 184 in cash but said that he had not received the balance Rs 716 Before the Registrar, Sheobhik had admitted payment in full Mahabir in his defence said that he had paid Rs 286 in cash as well as the Rs 184, and he proved a mortgage for Rs 50 which he had redeemed The remaining Rs 400, he said, was owed him by Sheobhik for grain and cash lent during the last ten years This Sheobhik [32] entirely denied Mahabir was thereupon called on to produce his account books He did so; but on inspection they were found to be obvious fabrications, and Mahabir was in consequence charged with cheating Upon this Mahabir made a statement to the Court, in which, while admitting the fabrication of the account, he said that the real consideration money was Rs 1,500, but that in order to forestall the co parceners' right of pre emption, he had induced Sheobhik to consent to the consideration being entered as Rs 1,900 On this admission the prosecution of Mahabir under section 423 of the Indian Penal Code was ordered His prosecution was also ordered under other sections of the Code in respect of the fabricated accounts

* Criminal Revision No 337 of 1902

1902 JULY 4. — APPELLATE CIVIL. — 25 A. 27= 22 A. W. N. 171.

of one of the appellants cannot affect the right of the other appellants to proceed with the appeal if they chose to do so," and that "the proper course for the lower appellate Court was to order that the appeal had abated so far as Harisang Kanubhai was concerned, and to have proceeded with the hearing of the appeal so far as the remaining appellants were concerned." This decision appears to be in conflict with the ruling of this Court in *Kamlapat* v. *Baldco* (1). That was a suit instituted against two joint decree-holders under section 283 of the Code of Civil Procedure for a declaration that certain property which had been attached by them, belonged to the plaintiffs, and was not liable to be taken in execution of the decree. The suit was dismissed by the Court of first instance, but decreed by the lower appellate Court. The decree-holders preferred a second appeal to this Court, but during the pendency of the appeal one of them died, and no steps were taken to bring his legal representatives on the record within the prescribed period. It was held by the single Judge who heard the case that the appeal abated. With all deference we are unable to agree with our learned colleague. He seems to have failed to give effect to the provision of section 544 of the Code of Civil Procedure. The Court below having proceeded against both the defendants upon a ground common to them, any one of them might under that section have appealed against the whole decree, and thereupon the appellate Court [30] would have been competent to make a decree which would have enured to the benefit of both the defendants. The decision in *Ghamandi Lal* v. *Amir Begam* (2), on which our learned brother relied, was, in our judgment, not in point. In that case the original defendant in the Court of first instance had appealed against the decree of that Court, and after his appeal had been admitted on the register, he died leaving three heirs. Only one of them was brought on the record as the legal representative of the deceased. It was held that the words "the legal representative" in section 365 must, where there are more legal representatives than one, be read in the plural, and that as all the representatives of the deceased appellant had not been brought on the record the appeal abated. Section 544 was referred to, and it was, we think rightly, held that each of the legal representatives was not entitled under that section to bring a separate appeal without making the other representatives parties to the appeal, and that consequently that section did not apply. The case referred to is not, therefore, an authority for holding that under circumstances similar to those of the present case the appeal would wholly abate. It was contended on behalf of the respondents that even if, on the application of the principle of section 544, the surviving appellants in the Court below could proceed with the appeal, they were bound to make the representatives of the deceased appellant parties to the appeal as respondents, and that in consequence of this omission the appeal was rightly dismissed for want of a proper array of parties. It is said that the obligation to implead the legal representative was the greater in this case, inasmuch as the suit was one for partition. We are unable to hold that where an appeal can be brought by one of the defeated plaintiffs or defendants in accordance with the provisions of section 544, the other parties who might have appealed, but had not joined in doing so, are necessary parties to the appeal. We have not been referred to any authority which supports the contention of the learned counsel. The fact that the suit was

(1) (1900) I. L. R. 22 All. 222. (2) (1894) I. L. R. 16 All. 211.

1902 JULY 21

APPELLATE CIVIL

25 A 35= 22 A. W. N 175

the 2½ biswas, which had been purchased by them in 1873, to Chunni Lal and Zauki Lal, and these last named parties instituted a suit for sale on foot of their mortgage, and obtained a decree for such sale, and at the sale held in execution of the decree the plaintiffs, on the 20th of February, 1897, purchased the 2½ biswas which had belonged to Lal Khan and Man Khan In execution of his decree in 1895, Ram Lal sold 1 biswa 19 biswansis, but the sum realized being insufficient to satisfy his claim, he applied for the sale of the remaining 1 biswa The application was granted, and 1 biswa was advertised for sale Thereupon the plaintiffs instituted the present suit for the purpose of obtaining a declaration that the 1 biswa sought to be sold by Ram Lal was not liable to be sold in execution of his decree Both the lower Courts decreed the plaintiff's claim on the ground that the decree obtained by Munni Lal in 1888 not having been executed, the right of Munni Lal and of his mortgagee, the appellant Ram Lal, became time barred

It has been contended before us by the learned vakil for the appellant, who seeks to set aside the decrees of the lower Courts, that, having regard to the fact that a decree for possession was passed against Lal Khan and Man Khan, the predecessors in title of the respondents, in respect of the 1 biswa in dispute, the respondents could not set up the plea of adverse possession, and [37] that it was not material in considering this question that that decree was never followed up by execution The learned vakil further contended that inasmuch as Munni Lal had obtained this decree, and had mortgaged in 1889 his interest to Ram Lal, Ram Lal was entitled to the benefit of article 147 of the Indian Limitation Act, and could maintain a suit for foreclosure or sale of the mortgaged property within a period of 60 years from the time when the mortgage debt became due We are unable to agree in this contention It appears to us that the possession of Lal Khan and Man Khan, which commenced from the year 1873, continued adverse to Munni Lal and his successors in title notwithstanding the unexecuted decree of the 6th June 1888 No proceedings in execution having been taken under it, this decree in fact became a dead letter, and did not give a new starting point of limitation to Munni Lal or to his successors in title This was so decided in the case of *Amir un nissa Begum* v *Umar Khan* (1) In that case a party obtained a decree for possession of land in 1859, but failed to take any proceedings in execution, and the defendant continued in possession The plaintiff s interests in the decree were purchased by a third party in 1869, and the purchaser forcibly dispossessed the defendant, who had been 12 years in possession of the property The defendant then brought a suit against the purchaser to recover possession, and it was held that the execution of the decree of 1859 being barred, the defendant—the plaintiff in that suit—having been 12 years in possession, was entitled to recover possession from the plaintiff in the original suit Markby, J , in delivering the judgment of the Court, observed —"But as under section 20, Act XIV of 1859, that decree cannot now be executed, and has in fact become absolutely null, and as the plaintiff did, notwithstanding the decree, remain in possession, wholly undisturbed, and further as there is no suggestion that the title of the defendant was in any way whatever acknowledged by the plaintiff, the allegation being that the defendant actually obtained possession under the decree, which allegation is found to be false, I think the plain

(1) (1872) 8 B L R 540

1902
JULY 21.

APPELLATE CIVIL.

25 A. 35= 2 A. W. N. 175.

25 A. 35 (=22 A. W. N. 175.)

[35] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Blair.

RAM LAL (*Defendant*) *v.* MASUM ALI KHAN AND ANOTHER (*Plaintiffs*).*
[21st July, 1902.]

Mortgage by decree-holder out of possession—Decree for possession barred by limitation—Title of mortgagee—Adverse possession—Limitation—Act No. XV of 1877 (*Indian Limitation Act*), *schedule ii, article* 147.

M holding a decree for possession of immoveable property against *L K* and *M K*, but not having obtained possession, mortgaged the property to which he was entitled under his decree to *R L*. *R L* sued on his mortgage, but without impleading *L K* and *M K*, who were in possession adversely to *M*, and got a decree for sale. *M* meanwhile allowed his decree for possession to become barred by limitation. *L K* and *M K* mortgaged the property in question to *C L* and *Z L*, and in execution of a decree on their mortgage, the property was sold by auction and purchased by *A* and *S*.

Held that the consequence of *M* not having executed his decree for possession was that *L K* and *M K* gained a good title by adverse possession as against *R L*, who therefore was not in a position to bring to sale the property, which had passed to the auction purchasers. *Amir-un-nissa Begum* v. *Umar Khan* (1) and *Sheoumber Sahoo* v. *Bhowuneedeen Kulwar* (2), referred to.

[Ref. 36 All. 567; 35 Mad. 231; Fol. 9 I. C. 990.]

THE facts of this case are fully stated in the Judgment of the Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Lalit Mohan Banerji*), for the appellant.

Messrs. *Abdul Majid* and *Muhammad Raoof*, for the respondents.

STANLEY, C. J. and BLAIR, J.—It is necessary in this appeal to state shortly the facts which have led up to the present litigation. One Allahyar Khan was the owner of a 4 biswa 9 biswansi share of a village called Mirzapur Basant. He mortgaged it to one Salamat Rai prior to 1873. In 1873 Lal Khan and Man Khan purchased a $2\frac{1}{2}$ biswa share of the property from the mortgagor, Allahyar Khan. Salamat Rai then, in the year 1876, sued in respect of his mortgage for a sale of the property, and obtained a decree, and in execution of that decree the property was sold, and was purchased by Munni Lal at the auction [36] sale. Munni Lal got actual possession of only 1 biswa and 19 biswansis, and formal possession of the residue of the property purchased. On the 19th of January, 1888, Munni Lal sued Lal Khan and Man Khan for possession of the $2\frac{1}{2}$ biswas which they had purchased in 1873 from Allahyar Khan. A decree was passed on the 16th June, 1888, for possession of 1 biswa of the property, and in respect of the remaining $1\frac{1}{2}$ biswas claimed the suit was dismissed. In the following year, namely, on the 30th of January, 1889, Munni Lal mortgaged to Ram Lal, the defendant appellant, 2 biswas and 19 biswansis of the property. Ram Lal instituted a suit on foot of his mortgage for a sale of the mortgaged property in 1895, and obtained a decree for sale. He did not in that suit implead either Lal Khan or Man Khan. In the same year, but after the date of Ram Lal's decree, Lal Khan and Man Khan mortgaged

* Second Appeal No. 1130 of 1900, from a decree of Babu Sheo Prasad, Officiating Subordinate Judge of Shahjahanpur, dated the 4th of August, 1900, confirming a decree of Babu Deoki Nandan Lal Sahai, Munsif of Budaun West, dated the 26th March, 1900.

(1) (1872) 8 B. L. R. 540.
(2) (1870) 2 N.-W. P. H. C. Rep. 223.

The principal pleas put forward by the defendants were (i) that the defendants other than Ajudhia Prasad were not partners of the plaintiffs, and that the transaction was one into which Ajudhia Prasad entered on his own account, (ii) that the transaction in respect of which the loss was said to have been incurred was of a wagering nature, and the plaintiffs were therefore not entitled to recover, and (iii) that the plaintiffs went beyond the scope of the partnership business in entering into the transactions in respect of which losses were alleged to have been incurred

1902 JULY 28.

APPELLATE CIVIL.

25 A 38= 22 A W N. 178

The Court of first instance (Subordinate Judge of Jhansi) found that the partnership alleged had been entered into, the managing members of either firm acting for his firm in the matter It found that the contracts in question were not wagering contracts nor outside the scope of the partnership business, and that the plaintiffs had suffered loss which the defendants were bound to recoup to the extent of one-half The plaintiffs, claim was accordingly decreed with some slight deduction as a matter of account

From this decree the defendants appealed to the High Court

Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal*, and Pandit *Moti Lal Nehru*, for the appellants

Babu *Durga Charan Banerji*, for the respondents

BANERJI and AIKMAN, JJ —The plaintiffs are the owners of the firm styled Gursahai Mal Badri Das the defendants of a firm called Kunji Lal Sikhar Chand The plaintiffs state that the two firms entered into a partnership on the 14th of [40] July, 1893, for the purchase and sale of silver, and that those purchases and sales were to be made for cash and by way of *badni*, which we understand to be transactions of a speculative nature for the sale of silver not in the hands of the seller at the time of the contract of sale It is further alleged that the partnership continued till the 22nd of June, 1894, and resulted in a loss of Rs 18,190 8 6, that the defendants' share in the partnership transaction was one half, and that the defendants are consequently liable for a half of the said amount together with interest which they had agreed to pay The plaintiffs accordingly brought the present claim to recover from the defendants Rs 11,836 15 9 on account of principal and interest Various pleas were put forward in answer to the claim but the only pleas with which we are concerned in the present appeal are three, (i) that the defendants, other than Ajudhia Prasad, were not the partners of the plaintiffs, and that the transaction was one into which Ajudhia Prasad entered on his own account, (ii) that the transaction in respect of which the loss is said to have been incurred was of a wagering nature and the plaintiffs are consequently not entitled to recover, and (iii) that the plaintiffs went beyond the scope of the partnership business in entering into the transactions in respect of which losses are alleged to have been incurred The Court below granted a decree to the plaintiffs for the bulk of their claim The defendants have preferred this appeal, and in the argument before us they have raised the pleas set forth above

As regards the first point the learned Subordinate Judge has found that the defendants are members of a joint Hindu family, and that the evidence adduced by the plaintiffs satisfactorily proves that the alleged contract was entered by the plaintiffs firm and the firm of the defendants It was for the appellants to show that this finding of the learned

the 2½ biswas, which had been purchased by them in 1873, to Chunni Lal and Zauki Lal, and these last named parties instituted a suit for sale on foot of their mortgage, and obtained a decree for such sale, and at the sale held in execution of the decree the plaintiffs, on the 20th of February 1897, purchased the 2½ biswas which had belonged to Lal Khan and Man Khan In execution of his decree in 1895, Ram Lal sold 1 biswa 19 biswansis, but the sum realized being insufficient to satisfy his claim, he applied for the sale of the remaining 1 biswa The application was granted, and 1 biswa was advertised for sale Thereupon the plaintiffs instituted the present suit for the purpose of obtaining a declaration that the 1 biswa sought to be sold by Ram Lal was not liable to be sold in execution of his decree Both the lower Courts decreed the plaintiff's claim on the ground that the decree obtained by Munni Lal in 1888 not having been executed, the right of Munni Lal and of his mortgagee, the appellant Ram Lal, became time barred

It has been contended before us by the learned vakil for the appellant, who seeks to set aside the decrees of the lower Courts, that, having regard to the fact that a decree for possession was passed against Lal Khan and Man Khan, the predecessors in title of the respondents, in respect of the 1 biswa in dispute, the respondents could not set up the plea of adverse possession, and [37] that it was not material in considering this question that that decree was never followed up by execution The learned vakil further contended that inasmuch as Munni Lal had obtained this decree, and had mortgaged in 1889 his interest to Ram Lal, Ram Lal was entitled to the benefit of article 147 of the Indian Limitation Act, and could maintain a suit for foreclosure or sale of the mortgaged property within a period of 60 years from the time when the mortgage debt became due We are unable to agree in this contention It appears to us that the possession of Lal Khan and Man Khan, which commenced from the year 1873, continued adverse to Munni Lal and his successors in title notwithstanding the unexecuted decree of the 6th June 1888 No proceedings in execution having been taken under it, this decree in fact became a dead letter, and did not give a new starting point of limitation to Munni Lal or to his successors in title This was so decided in the case of *Amir-un nissa Begum* v *Umar Khan* (1) In that case a party obtained a decree for possession of land in 1859, but failed to take any proceedings in execution, and the defendant continued in possession The plaintiff's interests in the decree were purchased by a third party in 1869, and the purchaser forcibly dispossessed the defendant, who had been 12 years in possession of the property The defendant then brought a suit against the purchaser to recover possession, and it was held that the execution of the decree of 1859 being barred, the defendant—the plaintiff in that suit—having been 12 years in possession, was entitled to recover possession from the plaintiff in the original suit Markby, J, in delivering the judgment of the Court, observed —" But as under section 20, Act XIV of 1859, that decree cannot now be executed, and has in fact become absolutely null, and as the plaintiff did, notwithstanding the decree, remain in possession, wholly undisturbed, and further as there is no suggestion that the title of the defendant was in any way whatever acknowledged by the plaintiff, the allegation being that the defendant actually obtained possession under the decree, which allegation is found to be false, I think the plain

(1) (1872) 8 B. L. R. 540

25 A 42 (=22 A W. N. 183)

1902 JULY 23

APPELLATE CIVIL

25 A 42=22 A W. N 183

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Blair

SHAIDA HUSAIN (*Plaintiff*) v HUB HUSAIN AND OTHERS (*Defendants*) *
[23rd July, 1902]

Civil Procedure Code, section 108—Decree ex parte—*Decree set aside as against one only of the joint judgment-debtors—Fresh decree ultimately passed at variance with the decree standing against the other judgment debtor—Application for order absolute for sale under section 89 of Act No IV of 1882—Practice*

of the mort r in default, was *ex parte*, of the decree against the

decree

[Ref 6 C L J 226, 29 All 623]

[43] IN this case the plaintiff, Shaida Husain held a mortgage over certain property belonging to Hub Husain Subsequent to the date of this mortgage Mahbub Husain, the son and Matlub un nissa, the wife of Hub Husain purchased part of the mortgaged property from Hub Husain The plaintiff brought a suit upon his mortgage against all three persons, and obtained a decree for sale against them under section 88 of the Transfer of Property Act, the amount ascertained to be due on the mortgage being Rs 2,270 As against Mahbub Husain this decree was *ex parte* He accordingly made an application under section 108 of the Code of Civil Procedure to get the decree set aside as against him, and in this application he was successful and the decree was set aside as against him When the suit was subsequently reheard as between the plaintiff and Mahbub Husain the latter succeeded in proving that the sum actually due on the mortgage was only Rs 1,556 15 0 and not Rs 2,270 After both these decrees had become final two applications by the decree holder asking for a decree absolute under section 89 of the Transfer of Property Act were heard by the Subordinate Judge and were dismissed The plaintiff decree holder appealed, and the lower appellate Court (District Judge of Shahjahanpur) holding that the result of Mahbub Husain s application under section 108 of the Code of Civil Procedure, had been the setting aside of the decree as against all the defendants, made an order for sale for realization of the smaller amount only namely, Rs 1,556 15 0 with costs

From this order the plaintiff appealed to the High Court

Maulvi *Muhammad Ishaq*, for the appellant

Munshi *Gobind Prasad* and Babu *J N Mukerji*, for the respondents

* Second Appeal No 1136 of 1900 from a decree of C D Steel Esq, District Judge of Shahjahanpur, dated the 7th of June, 1900 reversing a decree of Babu Nihal Chander, Subordinate Judge of Shahjahanpur, dated the 22nd of July, 1899.

1902 JULY 28.

APPELLATE CIVIL.

25 A. 38= 22 A. W. N. 178.

Subordinate Judge was incorrect. They have not laid before us any evidence which would justify our coming to a different conclusion from that at which the lower Court has arrived. The only pieces of evidence to which reference was made in the argument are the statement of a witness, Panna Lal, and an agreement of reference to arbitration, dated the 21st of July, 1894. We are unable [41] to hold that the evidence of Panna Lal is of such a character that we should be justified in discarding on the basis of it the whole of the evidence adduced on the other side and the finding of the Court below. It is true that the agreement referred to was entered into by Lalman, plaintiff, on the one side, and Ajudhia Prasad, defendant, on the other. It is also true that in that agreement no reference is made to the partnership firms. But these circumstances, in our opinion, do not necessarily lead to the conclusion that the partnership with the plaintiffs was entered into by Ajudhia Prasad alone. The agreement of reference to arbitration appears to have been executed by the managing members of each firm.

As regards the second point, it appears from the report of the Commissioners appointed by the Court below, that out of the amount of losses alleged by the plaintiffs, the sum of Rs. 2,223-7-3 represents loss on actual sales and purchases of silver. As to this the defendants cannot dispute the plaintiffs' claim. As regards the balance, it is alleged by the defendants that the transactions which resulted in loss were wagering contracts. If the transactions were of the nature of wagering contracts, the defendants would not be liable for the loss which resulted from them. We are of opinion that the Court below has rightly held that the burden of proving that the transactions in question were of a wagering nature was on the defendants. Now in order to make this out, what had the defendants to prove? Every *badni* transaction is not necessarily a transaction of a wagering nature any more than any other speculative transaction into which parties may enter. It was held in *Tod* v. *Lakhmidas Purshotamdas* (1) that a contract is not a wagering contract unless it be the intention of both the contracting parties at the time of entering into the contract under no circumstances to call for or give delivery from or to each other. This view was affirmed in later cases by that Court and by the Madras High Court, and we see no reason to hold a contrary opinion. It was therefore the duty of the defendants in this case to establish that the contracts which resulted in loss, were contracts in which the intention of the parties thereto, at the time when they entered into them, was [42] that under no circumstances was the one party to call for and the other to give delivery of the silver to which the contracts related. The defendants have, in our opinion, failed to discharge the *onus* which lay on them, and on this point we fully agree with the finding of the Court below.

As to the third plea—that *badni* transactions were not within the scope of the business of the partnership between the parties—the learned Subordinate Judge finds against the defendants. He says that the evidence proves that the partnership related both to cash and *badni*. We have not been referred to any evidence from which we may conclude that this finding of the Court below is not justified. The result is that this appeal must fail, and we dismiss it with costs.

Appeal dismissed.

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(1) (1892) I. L. R. 16 Bom. 441.

his security We were asked in the course of the argument to allow an amendment of the plaint by omitting in the prayer where they occur the words which have been translated "mortgaged," but which mean "mortgagee's rights" Under the circumstances we thought it to be just and equitable to do so, and we have allowed the amendment asked for We think that the decisions of the lower Courts upon the main question will work substantial justice, and that with the amendment which we have allowed, the plaintiff is undoubtedly entitled to maintain his suit, and to the decrees which have boee granted to him Accordingly we dismiss the appeal with costs

1902 JULY 25 — APPELLATE CIVIL — 25 A 46= 22 A W N 176

Appeal dismissed

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25 A 48 (=22 A W N 179)

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Aikman

BANKE BEHARI LAL, (*Plaintiff*) v POKHE RAM AND ANOTHER (*Defendants*) * [26th July, 1902]

Civil Procedure Code, section 17—"Cause of action"—Jurisdiction—Suit for a declaration that a compromise and a decree founded thereon are null and void as against the plaintiff, and for an injunction restraining execution

Held that the term "cause of action" as used in section 17 of the Code of Civil Procedure does not necessarily mean the whole of the cause of action, but a suit to which section 17 applies may be instituted where some material portion of the cause of action arises *Murti* v *Bhola Ram* (1), *Read* v [49] *Brown* (2), *Llewhellin* v *Chunni Lal* (3), *Bishunath* v *Ilahi Bakhsh* (4), *Gopi Krishna Gossami* v *Nilkomul Banerjee* (5), *Hills* v *Clark* (6), *Laljee Lall* v *Hardey Narain* (7), *Jackson* v *Spittall* (8), *Vaughan* v *Weldon* (9) and *Haramoni Dassi* v *Hari Chowdhry* (10) referred to

The plaintiff came into Court, alleging that he was the adopted son of one Balmakund having been adopted to him by Balmakund's widow, and that the defendants, who were trustees of the will of Balmakund, had entered into a collusive suit, which they had fraudulently compromised, with the result

injunction might be issued restraining execution of the decree *Held* that, although the decree was passed in Calcutta, yet inasmuch as the property aff

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*First Appeal No 162 of 1900, from an order of Munshi Shiva Sahai, Subordinate Judge of Cawnpore, dated the 15th of June 1900

(1) (1893) I L R 16 All 165
(2) (1889) L R 22 Q B D 128
(3) (1882) I L R 4 All. 423
(4) (1883) I L R 5 All 277
(5) (1874) 13 B L R 461
(6) (1874) 14 B L R 367
(7) (1882) I L R 9 Cal 1105
(8) (1870) L R 5 C P. 512
(9) (1874) L R 10 C P 47
(10) (1895) I L R 22 Cal 833 at p. 840.
(11) (1899) I L R 26 Cal 891.
(12) (1874) 13 B L R 91
(13) (1879) 4 C L R 366

1902 JULY 25. — APPELLATE CIVIL. — 25 A. 46= 22 A. W. N. 176.

purchased the equity of redemption of his mortgagor in the share which was mortgaged to him, and he, on the 12th of August, 1890, mortgaged the property to the ancestor of the defendants appellants. The defendants appellants brought a suit on foot of their mortgage to recover the amount due thereunder, and obtained a decree, and in execution of that decree at an auction sale purchased the property, and are now in possession of it. This purchase was made on the 22nd of September, 1896. The present suit was [47] instituted by the plaintiff on the 8th of July, 1899, against the legal representatives of the mortgagor and others for recovery of the money due to him on foot of his mortgage by a sale of the mortgaged property. The main defence to the suit was that, having regard to the rulings of this Court in the case of *Matadin Kasodhan* v. *Kazim Husain* (1), and in the case of *Ganga Prasad* v. *Chunni Lal* (2), the plaintiff was not entitled to sell the interest of his mortgagor in the property of which that mortgagor was only a mortgagee. Both the Courts below overruled this plea and decreed the claim.

There is no doubt, having regard to the decisions to which we have referred, and by which we are bound, whatever our own views may be upon the propriety of the decisions, that a mortgagee's rights cannot be ordered to be sold under sections 88 and 89 of the Transfer of Property Act. It is to be observed, however, here that the plaintiff's mortgagor, Jhandu Singh, purchased the equity of redemption in the property which had been mortgaged to him, and so became the absolute owner of it subject to the plaintiff's charge. This being so, unless the form of the prayer in the plaint is an obstacle to the maintenance of this suit, it appears to us clear that the plaintiff's mortgage became a charge upon the additional interest in the property which Jhandu Singh acquired, that is, the equity of redemption which Jhandu Singh purchased, and that the suit is maintainable. In other words, the purchase of the equity of redemption by the sub-mortgagor enured for the benefit of the sub-mortgagee. In the case of *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (3), their Lordships of the Privy Council (at page 210) observe upon the question of accretion to the interest of a mortgagor as follows :—" It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognised by English law to this extent, *viz.*, that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security ;" and this rule, in another portion of the judgment their Lordships observe, applies to [48] India as well as in England as " being agreeable to general equity and good conscience." In a case reported in the third volume of the Calcutta Weekly Notes, 323, Tottenham, J., on the same subject, observes :—"The enlargement of, or the removal of incumbrances from, the estate of a mortgagor effected by himself will generally enure to the benefit of the mortgagee by increasing the value of his security." It appears to us, therefore, that if the plaintiff in this suit had in his claim specifically asked for a sale of the mortgaged property, and not for a sale of the mortgagee's rights in the property, the defence set up could not have been sustained, inasmuch as the acquisition of the equity of redemption by his mortgagee enured to his benefit, and so increased the value of

(1) (1891) I. L. R. 13 All. 432.
(2) (1895) I. L. R. 18 All. 113.
(3) (1879) I. L. R. 5 Cal. 198.

principal cause of action Those acts were done in the district of Cawnpore, where the property also is situated A material part of the plaintiff s cause of action therefore, arose in that district In this respect the present case is similar to that of *Hadjee Ismail* v *Hadjee Mohomed* (1) That was a suit brought in Calcutta for the cancelment, on the ground of fraud, of a release executed in Calcutta in regard to property, part of which was situated in Bombay It was held that a part of the cause of action arose in Bombay, and that the whole cause of action did not arise in Calcutta Sir Richard Couch, C J, in delivering the judgment of the Court, said —"The fraudulent representations which led to the execution of the release may have been made, and the release may have been executed here, but the cause of action in this case consists of more than that It includes the effect of the release upon the plaintiff s share of the property If there had been no property, the execution of the release would not have injured the plaintiff in any way In order to constitute a cause of action, there must be an injury to him from the operation of the release Then where did the release take effect? Where was it operative? The property was in Bombay and that part of the cause of action arose there In such a case as the present I think the cause of action in respect of the immoveable property arose in the place where the release took effect Applying the same reasoning to the present case, the cause of action arose in the Cawnpore district where it was sought to enforce the decree As I have said above, if execution of the decree was never applied for, the mere passing of it would not have materially injured the plaintiff It is the injury to him arising from the enforcement of the decree which constitutes his cause of action, and as that was done in the Cawnpore district, a substantial portion of his cause of action arose in that district, and the Court below had jurisdiction [55] to entertain the suit In my opinion that Court has erred in ordering the plaint to be returned I would allow the appeal, set aside the order of the Court below, and remand the case to that Court, with directions to receive back the plaint, re admit the suit under its original number in the register, and dispose of it according to law I would direct the costs hitherto incurred to follow the event I may add that I do not agree with the learned Subordinate Judge in his opinion that section 20 of the Code of Civil Procedure is inapplicable to a case like the present

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APPELLATE CIVIL

25 A 48= 22 A W N 179

Appeal decreed and cause remanded

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25 A 55 (=22 A W N 181)

APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Aikman.

BINDRABAN BEHARI (*Defendant*) v JAMUNA KUNWAR (*Plaintiff*) AND GANGA KUNWAR (*Defendant*)* [30th July, 1902]

Act No. XV of 1877 (Indian Limitation Act), Schedule ii, Article 120—Limitation—Suit against representative of deceased pleader to recover money received by the pleader in his professional capacity on behalf of a client

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* Second Appeal No 1236 of 1900, from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 10th of July, 1900 reversing a decree of Babu Jagat Narayan, Munsif of Koil dated the 19th of December 1899

(1) (1874) 13 B. L. R. 91

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of explanation III by Act No. VII of 1888, so far from introducing any change in the section as interpreted in the rulings to which I have referred, indicates that the words "cause of action" in this section are not so limited as to mean the whole cause of action, but include any material part of it. This view is supported by the observations of Macpherson and Banerjee, JJ., in *Haramoni Dassi* v. *Hari Churn Chowdhry* (1) to the effect that "the expression 'cause of action' has been used in section 17 in a restricted as well as in some respects in an elastic sense, so as to include the facts constituting the infringement of the right, but not necessarily all those constituting the right itself." Any other conclusion would, it seems to me, cause immense hardship. In cases in which all the defendants do not reside within the jurisdiction, if the whole cause of action of the plaintiff has not arisen within the [53] jurisdiction of a single Court but a part of the cause of action has arisen within the jurisdiction of one Court and another part within the jurisdiction of another Court, the plaintiff would be without remedy were we to hold that the expression "cause of action" in section 17 means the whole cause of action. This certainly could not have been intended by the legislature. If therefore in this case a material part of the plaintiff's cause of action arose within the district of Cawnpore, the Court below had, in my judgment, jurisdiction to entertain the suit.

I am of opinion that, if the allegations contained in the plaint are true, a material part of the plaintiff's cause of action did arise within the local limits of the lower Court's jurisdiction. If it be true that the agreement of the 25th of November, 1895, the compromise made in regard to it, and the decree passed on the basis of the compromise were fraudulent and collusive, it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud, "and it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of Judicature in the realm." This was held in the recent case of *Nistarini Dassi* v. *Nundo Lall Bose* (2), and I have no hesitation in expressing my entire concurrence with the view of the law therein laid down. If the allegation of fraud and collusion made by the plaintiff be established, the Court below would be competent, if it otherwise had jurisdiction over the suit, to declare that the compromise and the decree in question are void and ineffectual as against the plaintiff. The plaintiff does not ask the Court to set aside the decree of the Calcutta High Court, and therefore the ruling in *Bibee Soloman* v. *Abdool Aziz* (3), on which the learned counsel for the respondent relies, has no application. In so far as the said decree and the compromise on which it was founded are alleged to have infringed the plaintiff's right, the cause of action arose in Calcutta, where the decree was made and the compromise was admittedly entered into. The mere fact, however, of the passing of the decree did not materially affect the plaintiff until it was put into execution [54] and the amount awarded by the decree was sought to be realized from the estate of Balmakund, of which the plaintiff claims to be the owner. The execution of the decree and the application for the realization of the amount of it are the acts of the defendant which infringe the rights of the plaintiff, and afford him his

(1) (1895) I. L. R. 22 Cal. 833 at p. 840.
(2) (1899) I. L. R. 26 Cal. 891. at p. 908.
(3) (1879) 4 C. L. R. 366.

his father's decease Even if the right of suit were held to accrue on the date of receipt of the money by the father, the suit would still be within the period of six years allowed by Article 120 We, therefore, find the suit was within time, and dismissed the appeal with costs

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Appeal dismissed

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25 A 57 (= 22 A. W N 190)

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Aikman

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MATHURA PRASAD AND OTHERS (*Defendants*) v RAMCHANDRA RAO (*Plaintiff*) * [30th July, 1902]

Hindu law—Joint Hindu family—Money decree against father—Liability of sons who were not parties to decree—Suit for declaration of son s liability

The plaintiff in a suit upon a bond executed by one Sarju Prasad, obtained ... e so ... ment- ... pro- ... the ... was

Held that the suit would lie, and that it was no bar thereto that the plaintiff had omitted to make the sons parties to his original suit *Muhammad Askari* v *Radhe Ram Singh* (1) *Dharam Singh* v *Angan Lal* (2) and *Nitayi Behari Saha Paramanick* v *Hari Govinda Saha* (3) followed *Nuthoo Lall Chowdhry* v *Shoukee Lall* (4) referred to

THE facts of this case sufficiently appear from the judgment of the Court

Munshi *Gulzari Lal* (for whom Munshi *Kalindi Prasad*), for the appellants

Pandit *Moti Lal Nehru* and Maulvi *Ghulam Mujtaba*, for the respondent

STANLEY, C J and AIKMAN, J —On the 23rd December, 1897, the plaintiff respondent got a simple money decree against one Sarju Prasad on a bond executed by Sarju Prasad on the 2nd June, 1894 In execution of that decree he attached certain property On the objection of the appellants, who are alleged [58] by the plaintiff to be members of a joint Hindu family, of which Sarju Prasad was the head and manager, the property was released from attachment The plaintiff thereupon brought the suit out of which this appeal arises, for a declaration that the defendants appellants, as members of a joint family, are liable to pay the amount due under the decree of the 23rd December, 1897, and that the property specified in the plaint is liable to attachment and sale in execution of the decree

The defendants pleaded that Sarju Prasad was not the head or manager of the family, that he had been separate from them for twenty years, and that the debt had not been incurred for their benefit

It may be mentioned that there is nothing in the bond to show that it was executed by Sarju Prasad as manager of a joint Hindu family, and

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* First Appeal No 139 of 1901 from an order of H E. L. P Dupernex, Esq District Judge of Cawnpore, dated the 31st of August, 1901

(1) (1900) I L R 22 All 307
(2) (1899) I L. R 21 All 301
(3) (1899) I L. R 26 Cal 677
(4) (1872) 10 B. L. R 200

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Held that a suit to recover from the son of a deceased pleader, as representative of his father, money which had been received by the pleader in his professional capacity on behalf of a client, was governed as regards limitation by Article 120 of the second schedule to the Indian Limitation Act, 1877.

[Ref. 31 All. 429=6 A. L. J. 667=2 Ind. Cas. 118.]

25 A. 55= 22 A. W. N. 191.

THE plaintiff in this case had been a client of the defendant's father, who was a pleader. The defendant's father had been employed by the plaintiff to obtain for her a certificate for collection of debts, and, in connection with that matter, a sum of Rs. 800 in cash had been deposited on her behalf by one Ram Chandra, her brother and general attorney, as part of the security given by the plaintiff. Subsequently, a security of immoveable property was given, and the Rs. 800 were withdrawn by the plaintiff's pleader. The pleader died without making over the money to the plaintiff. Within three years from his death, the plaintiff instituted the present suit to recover the money withdrawn as above described from the son of the deceased pleader. She also named as a defendant the representative of Ram Chandra, who, however, did not appear. The Court [56] of first instance (Munsif of Koil) dismissed the claim, holding that the money did not belong to the plaintiff. The plaintiff appealed, and the lower appellate Court (Additional Subordinate Judge of Aligarh) allowed the appeal and decreed the claim. From this decree, the defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chandra Mukerji*), for the appellant.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the respondent.

BLAIR, J.—(AIKMAN, J., concurring).—The only point raised in this case is whether the suit has been brought within the period of limitation applicable to the case. The defendant is sued as the representative of his father, who was a pleader, and who in that capacity was employed by the plaintiff to obtain for her a certificate for collection of debts. In that case the sum of Rs. 800 was deposited in cash as part of the security. After such deposit a security of immoveable property was given, and the amount withdrawn by the pleader. That amount was never paid over by him to the plaintiff. He died some time within two years of the withdrawal by him of the money, and within three years of the date of his death the present suit was filed. The lower appellate Court gave the plaintiff a decree, against which the present appeal is filed. As stated above, the sole plea raised is that of limitation. Mr. *Satya Chandra* urged upon us that Article 62 of Schedule ii of Act No. XV of 1877 was applicable, and that under the three years' rule the suit was out of time, reckoning from the date on which the money was received by the deceased pleader. The defendant, however, is not the deceased pleader, but his representative, and the money was not received by him until after the pleader's death. The period, therefore, of limitation dates from the death of the pleader. In this view of the case the suit is within time. Article 89, which is suggested as the article applica- [illegible] to this case, [illegible] clearly no application, because the suit is not against [illegible] agent, [illegible] [illegible]inst the legal representative of the agent. It has [illegible] Chief Court, in a case undistinguishable from [illegible] [illegible]r such circumstances Article 120 applies, and [illegible] is the time when the right to sue accrues. [illegible] the present defendant could not have [illegible]ved the money from his father on

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APPELLATE CIVIL.

25 A. 59= 22 A. W. N. 192.

the minor or his property had benefited by the money advanced on the security of the mortgage. The position is altered when the minor is a defendant and not a plaintiff." The facts of that case were exceptional. An unqualified person had mortgaged the estate of the minor, and apparently contemporaneously with the mortgage the mortgagee had granted a lease to the minor, who thereupon entered into occupation. The suit before the Court was a suit for the rent reserved by that lease. The case was, therefore, obviously distinguishable from the one we have before us. The Judges declined to decide, on the ground that such decision was unnecessary, the question whether the plaintiff could have obtained restitution or compensation in another suit differently framed. We do not, therefore, find ourselves constrained by that authority. On the other hand, we find in *Sinaya Pillai* v. *Munisami Ayyan* (1), a decision upon facts which appears to us to be on all fours with those of this case. We are not inclined to take exception to the ruling of that Court in so far as it applies to defendants the principle of equity applied to plaintiffs that he who seeks equity must do equity. We therefore are of opinion that the Court below decided wrongly in dismissing this suit upon a preliminary point. The case will go back through the District Judge to the Court of first instance under section 562 of the Code of Civil Procedure, there to be dealt with under the provisions of that section, and decided on the merits. It will be for that Court to consider seriously the question as to the degree to which the estate of the minor, if bound at all, was bound by the mortgage transaction which is the subject of this suit. The original loan secured by this mortgage was Rs. 200 only. We find that, apparently through [62] the *laches* of the natural guardian in not paying the simple interest at 12 per cent. reserved under the mortgage, the interest, which on default became compound interest, with six-monthly rests, now amounts to the disproportionate sum of Rs. 945-3-0. If the Court finds that the whole or any part of the principal was borrowed for the benefit of the minor, then to that extent, on equitable considerations, the minor's estate ought to be held liable before he is equitably entitled to be relieved of the mortgage. The appeal is so far allowed. Costs here and hitherto will be costs in the cause.

Appeal decreed and cause remanded.

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25 A. 62 (=22 A. W. N. 185).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SUNDAR LAL (*Plaintiff*) *v.* FAKIR CHAND (*Defendant*).*
[1st August, 1902.]

Benamidar—Realization by benamidar of money due on a bond in his name—Payment of such money to bona fide *transferee—Rights of beneficiary—Limitation—Act No. XV of* 1877 *(Indian Limitation Act) Schedule ii Article* 62.

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* Second Appeal No. 1223 of 1900, from a decree of C. L. M. Eales, Esq., District Judge of Bareilly, dated the 28th of June 1900, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 6th February 1900.

(1) (1899) I. L. R. 22 Mad. 289.

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the decree does not purport to have been passed against him in that capacity.

The Court of first instance, without entering into the merits of the case, dismissed the suit as not maintainable, sustaining a preliminary objection to the effect that the plaintiff ought to have made the defendants parties to his original suit if he wished to bind them.

On appeal the learned District Judge held that the suit was maintainable, and remanded the case under the provisions of section 562 of the Code of Civil Procedure for determination on the merits.

The present appeal has been instituted against this order of remand.

The question we have to decide is, whether or not this second suit by the plaintiff is maintainable.

A large number of authorities was cited in argument, which we think it unnecessary to go into in detail. Some of these, for instance, *Nuthoo Lall Chowdhry* v. *Shoukee Lall* (1) are in favour of the appellants' contention. Others, *e.g.*, *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha* (2), are as clearly in favour of the view taken by the lower appellate Court. In this last case Hill, J., at page 684, speaks of "the principle, which indeed has often been recognised before, that a [59] decree-holder may sue to have it declared that the interests of third persons may be made liable for the satisfaction of a decree made in a suit to which they were not parties, although the decree was one in execution of which ordinarily the rights and interests of the judgment-debtor alone could be disposed of." This last-mentioned case is in accordance with the decisions of this Court—*vide Muhammad Askari* v. *Radhe Ram Singh* (3) and *Dharam Singh* v. *Angan Lal* (4). In this conflict of authority we think we ought to abide by the decisions of our own Court.

The result is that we dismiss this appeal with costs.

Appeal dismissed.

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25 A. 59 (=22 A. W. N. 192.)

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

TEJPAL (*Plaintiff*) *v.* GANGA AND OTHERS (*Defendants*).*
[30th July, 1902.]

Act No. VIII of 1890 (*Guardians and Wards Act, sections* 29 *and* 30—*Guardian and minor—Mortgage by guardian of minor's property—Previous permission of the Court of Wards not obtained—Effect of mortgage.*

A mortgage, purporting to bind the estate of a minor, was executed on behalf of the minor by his mother, who was not only the natural guardian of the minor, but a certificated guardian under the provisions of the Guardians and Wards Act, 1890. The guardian, however, had not obtained the permission required by section 29 of the above-mentioned Act.

Held that the mortgage was not void, but if the minor had in fact benefited by the money borrowed, to that extent the minor's estate ought to be held

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* Second Appeal No 1241 of 1900 from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 12th of June 1900, confirming a decree of Munshi Rajnath Prasad, Subordinate Judge of Agra, dated the 31st of March, 1900.

(1) (1872) 10 B. L. R. 200.
(2) (1899) I. L. R. 26 Cal. 677.
(3) (1900) I. L. R. 22 All. 307
(4) (1899) I. L. R. 21 All. 301.

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APPELLATE CIVIL.

25 A. 67= 22 A. W. N. 199.

25 A. 67 (=22 A. W. N. 199.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

FAKIR CHAND (*Plaintiff*) v. DAYA RAM AND OTHERS (*Defendants*).*
[2nd August, 1902.]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule ii, articles* 64, 120—*Limitation—Suit against heirs of deceased debtor—Hindu law—Joint Hindu family.*

The plaintiff, on the 29th of August, 1898, sued to recover a sum alleged to be due on an account stated between himself and one Kashi Nath, since deceased, on the 15th of November, 1893. The contesting defendants were two sons of Kashi Nath and were sued as members of a joint Hindu family and as partners in the business carried on by Kashi Nath, and his third son, who did not defend the suit. It was found, however, that these defendants had separated from their father and brother before the date of the account sued upon, and that they were not partners in the business.

Held that the suit was governed as regards limitation by art. 64 of the second schedule to the Indian Limitation Act, 1877; that limitation, which had begun to run in favour of the deceased from the date of the account stated, continued running in favour of the heirs, and that in the absence of any valid agreement or part payment, such as would have the effect of extending the period of limitation, the suit was barred. *Narsingh Misra* v. *Lalji Misra* (1) distinguished. *Dagdusa Tilakchand* v. *Shamad* (2) referred to.

[Ref. 60 I. O. 219.]

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Meerut in so far as it dismissed the plaintiff's claim as against the defendants Ram Prasad and Kanhaya Lal. The defendants are the three sons of one Kashi Nath, who died in the year 1894. From the evidence it appears that Kashi Nath and his sons, prior to the year 1877, formed a joint Hindu family. In that year Kashi Nath divided the joint family property between himself and his sons, and from that time forward he and his sons [68] Kanhaya Lal and Ram Prasad, if not all his three sons, lived separate. Kashi Nath carried on a business at Meerut and other places under the style of Kashi Nath and Son, and after his death this business was carried on by Daya Ram. The defendants, Ram Prasad and Kanhaya Lal had no connection whatever with it. From time to time, beginning with the year 1885, the plaintiff made advances to this firm, and also to the defendant Daya Ram on his personal account. A settlement of accounts was made on the 15th of November, 1893, when a sum of upwards of Rs. 19,000 was found to be due to the plaintiff, partly on account of the advances made to the firm of Kashi Nath and Son, and partly on account of the personal debt of Daya Ram. Daya Ram sold a kothi to the plaintiff for the sum of Rs. 9,500, which was set off *pro tanto* against his debt. He also made some further payments, which left a sum of Rs. 4,600 due. In respect of this sum a verbal agreement was entered into between the plaintiff and Kashi Nath

* First Appeal No. 15 of 1900, from a decree of A. Rahman, Esq., Subordinate Judge of Meerut, dated the 8th day of November, 1899.

(1) (1901) I. L. R. 23 All. 206. (2) (1884) I. L. R. 8 Bom. 542.

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APPELLATE CIVIL

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[illegible] name money to [illegible] ver the money so [illegible] and not collusive to a third party who had no knowledge of the beneficiaries' interest therein [illegible] interested in the bond that [illegible] me barred by limitation, the [illegible] who had taken *bona fide* in ignorance of the plaintiff s interest. *Thomson v Clydesdale Bank, Limited,* (1) referred to

[Fol. 32 Cal 527=1 C L. J 167, 30 Mad. 298=17 M L. J 224=2 M L T 332, Ref. 81 P W R. 1903, Dist. 37 P. R 1909=38 P L. R 1909=50 P W R 1909=9 Ind. Cas. 732]

THE facts of this case are fully stated in the judgment of the Court

Pandit *Moti Lal Nehru*, for the appellant.

Mr *D. N Banerji* (for whom Babu *Jogindro Nath Chaudhri*), for the respondent

STANLEY, C J and BANERJI, J —The circumstances out of which this appeal has arisen are the following One Lalji Mal executed a bond in favour of Mahesh Das, defendant No 1, to secure a sum of Rs 17,000 It is alleged, and has been found, [63] that Mahesh Das was a mere *benamidar* in this transaction, and that the persons for whose benefit the bond was given were three in number, namely, the Plaintiff Sundar Lal, Musammat Rup Dei, and Harnam Das The shares in which they were respectively entitled to the amount of the bond were as follows —Sundar Lal, Rs 1,000, Musammat Rup Dei, Rs 10,000, and Harnam Das Rs 6 000 Mahesh Das brought a suit on the bond and obtained a decree, and on foot of that decree he realized sums amounting in the aggregate to over Rs 20 000 Harnam Das, one of the beneficiaries, died, leaving Mahesh Das, Fakir Chand and others as his heirs Fakir Chand, after the death of Harnam Das, as manager and head of the family, brought a suit against Mahesh Das for recovery of the amounts received by him on foot of the bond, claiming that Harnam Das was beneficially entitled to all the moneys secured by it A compromise decree was granted in that suit, whereby Mahesh Das agreed to hand over to Fakir Chand all the moneys that he had received on foot of the bond It was arranged that the bond-debt should be treated as assets of Harnam Das, and in consideration of Mahesh Das relinquishing in favour of Fakir Chand his interest in certain immoveable and other property of Harnam Das, Fakir Chand allowed Mahesh Das to retain out of the moneys recovered on foot of the bond a sum amounting to about Rs 15,000 as representing his share of the assets of Harnam Das Now it is not alleged in the present suit, and certainly has not been proved, that Fakir Chand had any knowledge that the plaintiff had any interest in this bond throughout the proceedings he claimed that the bond debt belonged to Harnam Das, and in this suit he denied that the plaintiff had any interest in it After the date of the decree which was obtained by him, Fakir Chand recovered a further sum of Rs 3 000 from the judgment debtor Lalji Mal This was on the 18th July, 1899 The present suit was brought by the plaintiff on the 22nd of September, 1899, for recovery of his share in the moneys so realized on foot of Lalji Mal s bond The Subordinate Judge held that the plaintiff had established his title as beneficial owner in respect of Rs 1,000 of the money secured by the bond, but he found that [64]

(1) L R 1893, A C 282

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exercised it after a careful consideration of the facts, and not arbitrarily. Where a Court has exercised its discretion in a sound and reasonable way, the appellate Court has no power to interfere under the provisions of section 584 of the Code of Civil Procedure. Consequently the appeal fails, and is dismissed with costs.

Appeal dismissed.

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25 A. 73 (=22 A. W. N. 187).

[73] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

IHTISHAM ALI (*Plaintiff*) *v.* SHAM SUNDAR AND OTHERS (*Defendants*).*
[2nd April and 4th August, 1902.]

Act No. XXIII of 1871 (*Pensions Act*), *sections* 4 *and* 6—*Pension—Right to receive land revenue granted by Government as a reward—Mortgage of right—Suit for foreclosure—Certificate of Collector not forthcoming—Procedure.*

Section 4 of the Pensions Act, 1871, applies to a heritable right to receive land revenue granted by Government as a reward for services rendered.

Where therefore such a right to receive land revenue was included along with other property in a mortgage, upon which a suit for foreclosure was brought, it was *held* that as regards the right to receive land revenue the suit would not lie in the absence of the certificate required by section 6 of the Pensions Act, and, time having been granted for the production of the necessary certificate, which was not produced, the dismissal of the suit *quoad hoc* was sustained. *Jijaji Pratabji Raje* v. *Balkrishna Mahadeo* (1) followed.

THIS was a suit for foreclosure of a mortgage executed by the two principal defendants on the 20th of June, 1893. The mortgage included, amongst other items, (3) a 5 anna 4 pie zamindari and muafi share in mauza Terhi, and (4) a 5 anna 4 pie zamindari and muafi share in mauza Kansebhari. The "muafi" in these two villages consisted of a perpetual right to receive a certain share in the revenue derivable therefrom, which had been granted by one of the Moghal emperors to an ancestor of the defendants in recognition of services rendered by him. In his plaint the plaintiff stated that in respect of this property the plaintiff had applied to the Collector for a certificate, in view of the provisions of Act No. XXIII of 1871, but that the Board of Revenue had expressed its opinion that n[illegible] certificate was necessary. As regards this property the princi[illegible] raised was that no certificate such as is required by sectio[illegible] [illegible]ons Act, 1871, was forthcoming, and that the suit [illegible] [illegible]h [illegible]t it. The [illegible] of first instance (Subordinate [illegible] plaintiff [illegible] for foreclosure of the mort[illegible] of the [illegible] [illegible]ts in Terhi and Kansebhari. [illegible]iff ap[illegible] High Court, urging that [illegible] Reve[illegible] necessity of a certificate [illegible]t [illegible] [illegible]sons no certificate was [illegible]

[illegible] ant.

[illegible] Anant Ram, Subordinate

and Daya Ram for the payment of it with interest by annual instalments of a thousand rupees each Kashi Nath died on the 30th of September, 1894, leaving a considerable amount of the plaintiff's debt unpaid Upon his death the defendant Daya Ram continued to carry on the business of the firm of Kashi Nath and Son, and made some further payments to the plaintiff on foot of his debt, but having failed, when called upon, to pay the balance which remained owing, the present suit was instituted In the plaint the plaintiff alleges that Kashi Nath divided his property among his sons and himself, but that up to his death, he and his son Daya Ram were joint owners of the firm of Kashi Nath and Son, and that after the death of Kashi Nath, Daya Ram carried on the business as before on behalf of all the defendants, and that all the defendants are the owners of the property of Kashi Nath as members of a joint Hindu family, and are therefore liable to pay the plaintiff's debt Daya Ram did not defend the suit, and as against him a decree *ex parte* was passed for the amount claimed The other defendants, Ram Prasad and Kanhaya Lal, filed a written statement, and in it alleged that they had not any connection with the firm of Kashi Nath and Son, and [69] had not inherited anything from Kashi Nath, and so were not liable for the debt They also set up the plea of the statute of limitation as a bar to the suit The learned Subordinate Judge held that the defendants, Ram Prasad and Kanhaya Lal, were not partners in the firm of Kashi Nath and Son, and that there was no satisfactory evidence that after the death of Kashi Nath they became partners with Daya Ram in the shop He also held that claim of the plaintiff as against them as heirs of Kashi Nath was barred by limitation, inasmuch as the suit was not brought until the 29th of August, 1898, more than three years after the death of Kashi Nath

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The plaintiff has appealed from this decree on several grounds, but the only ground which has been pressed in argument before us is, that the suit was not barred by limitation It is not disputed that Kanhaya Lal and Ram Prasad were separate from their father, and consequently, as has been admitted, no pious duty rested upon them as sons to pay their father's liabilities It is suggested, however—but of this there has been no proof—that after the death of Kashi Nath they took possession of a portion of his assets as his heirs, and consequently are liable to the extent of such assets The contention of the appellant is, that the article of the Indian Limitation Act, which is applicable to the case, is article 120, which allows a period of six years from the time when the right to sue accrued in a suit for which no period of limitation is provided elsewhere in the schedule to the Act, and reliance for this contention is placed upon a ruling of this Court in the case of *Narsingh Misra* v *Lalji Misra* (1) To this matter we shall refer later on in our judgment

The contention on behalf of the respondents is that article 64 of the Indian Limitation Act governs the case, and that the suit not having been brought within three years from the settlement of the account in 1893 the claim is statute barred It is to be observed that the agreement which was entered into simultaneously with the settlement of accounts in 1893 was not committed to writing It was merely a verbal agreement In order to extend the period of limitation for a suit [70] on an account stated by a simultaneous agreement, the simultaneous agreement

(1) (1901) I L R. 23 All 206

1902
AUG. 4.

REVISIONAL CRIMINAL.

25 A. 75= 22 A. W. N. 196.

25 A. 75 (=22 A. W. N. 196.)

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

EMPEROR *v.* DURGACHARAN GIR.* [4th August, 1902.]

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 193, 511—*Fabricating false evidence—Attempt to commit forgery.*

One Durga Charan Gir had an ejectment case against Ram Ghulam, which was decided against him. After this, on the 23rd of November, 1901, Durga Charan took his servant Daulat to the town of Padrauna, and there purchased an 8 anna stamp paper in the name of Ram Ghulam. Daulat personated Ram Ghulam, and told the stamp vendor that he was Ram Ghulam, so that the stamp vendor put down the name of Ram Ghulam on the stamp paper as the purchaser of it. The stamp paper was subsequently found in the possession of Durga Charan, who had locked it up in a chest in his house. *Held* upon the above facts that Durga Charan was properly convicted of the offence of abetting the fabrication of false evidence, though his acts did not amount to an attempt to commit forgery. *Queen-Empress* v. *Mula* (1), followed.

[76] THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *C. C. Dillon*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BANERJI, J.—The applicant, Durga Charan Gir, has been convicted of having abetted the fabrication of false evidence. It is contended that the facts found do not constitute the offence of which the applicant has been convicted. The facts are these :—Durga Charan Gir had an ejectment case against Ram Ghulam *Gond*, which was decided against him. After this, on the 23rd of November, 1901, he took his servant, Daulat *Kurmi*, to the town of Padrauna, and there purchased an 8 anna stamp paper in the name of Ram Ghulam *Gond*. Daulat personated Ram Ghulam, and told the stamp vendor that he was Ram Ghulam, so that the stamp vendor put down the name of Ram Ghulam on the stamp paper as the purchaser of it. The stamp paper was subsequently found in the possession of Durga Charan Gir, who had locked it up in a chest in his house. On these facts Daulat has been convicted of fabricating false evidence and Durga Charan Gir, of having abetted him. In my judgment the conviction is correct. Daulat by personating Ram Ghulam, and thereby inducing the stamp vendor to put down Ram Ghulam's name as that of the purchaser of the stamp paper, caused a circumstance to exist which might lead a Court to form an erroneous opinion as to the purchaser of the paper, the intention being that a Court should form such opinion. It is evident that the intention of Durga Charan Gir was to forge a deed in the name of Ram Ghulam on the stamp paper, and make it appear that Ram Ghulam had purchased the paper. Ordinarily the fact of the executant of a document being the purchaser of the stamp paper on which it is engrossed, raises a presumption in favour of the genuineness of the document. In this case the intention was that if a document was prepared on the stamp paper the endorsement would be used as evidence to show that Ram Ghulam had executed it. It is true the act of the applicant or of Daulat did not amount to an attempt to commit forgery, but as Daulat caused the stamp

* Criminal Revision No. 433 of 1902.

(1) (1879) I. L. R. 2 All. 105.

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25 A. 73=
22 A. W. N.
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STANLEY, C. J., and BURKITT, J.—In this suit the plaintiff claimed foreclosure of certain properties which had been mortgaged to him under two deeds of mortgage, dated respectively the 20th of June, 1893, and the 28th of September, 1893. The claim in respect of all the properties other than two shares in two mauzas, to which we shall presently refer, was decreed. In regard to the shares in mauza Kansebhari and mauza Terhi, the lower Court found that the subject matter of the mortgage was land revenue granted by Government as a reward for services to the defendant's ancestor, and that consequently, before any civil suit could be entertained, it was necessary for the plaintiff, under the provisions of the Pensions Act (Act No. XXIII of 1871), to produce a certificate from the Collector, the Deputy Commissioner, or other officer authorized to give a certificate, that the case might be tried. It appears that an application was made by the plaintiff through the Collector to the Board of Revenue for a certificate, and that a reply was received from the Board of Revenue to the effect that no certificate was requisite. It appears upon the evidence that the respondent's interest in the two mauzas in question was merely the right to realize the Government revenue; and this being so, in our opinion, under the provisions of section 4 of the Pensions Act, the matter in dispute being a grant of land revenue made by the Government or the ruling authority, no Civil Court can entertain a suit relating to it without the production of the certificate referred to in section 6. We fail to understand the meaning of the opinion of the Board of Revenue that a certificate was not necessary in this case. It is not a certificate of the Board of Revenue which is requisite, but the certificate of the Collector or other officer mentioned in the section. We are not aware of, and we have not been referred to, any subsequent legislation under which the Board of Revenue has been substituted for the Collector in regard to this matter. We have been asked by the learned pleader for the appellant to allow him time to procure the certificate, if he be able to do so, and we do not think that this application is unreasonable, having regard to the fact that he did [75] apply to the Collector for a certificate, and was informed that no such certificate [illegible] that, in our opinion, the certificate w[illegible], absolutely essential. We shall therefo[illegible] hs from this date to take such steps as he may be advised for the purpose of obtaining a certificate under section 6 of the Pensions Act. We adjourn the hearing of the case for that period. If no certificate is forthcoming within the three months, the appeal will stand dismissed. In granting time for obtaining the certificate, we are following the precedent furnished by the Bombay High Court in the case of *Jijaji Pratabji Raje* v. *Balkrishna Mahadeo* (1).

[The time granted having expired, the appeal was, on the 4th of August, 1902, disposed of by the following order.]

STANLEY, C. J., and BURKITT, J.—Having regard to the fact that the Collector has refused to give the certificate required by section 6 of the Pensions Act this appeal cannot be maintained. It is therefore dismissed. As there is no one appearing for the respondents we say nothing as to costs.

Appeal dismissed.

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(1) (1892) I. L. R. 17 Bom. 109.

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APPELLATE CIVIL

25 A 79=22 A W N 203

proceeds of the sale having proved insufficient to satisfy the mortgage debt the decree holder applied for a decree over under section 90 of the Transfer of Property Act against the unhypothecated property of the mortgagor

Held that the original decree having been in fact passed whether rightly [illegible] property and the sale of [illegible] to satisfy the mortgage [illegible] jection to the mortgagee [illegible]

Semble that there is nothing to prevent a mortgagee relinquishing his claim against a portion of the mortgaged property, and if the sale of the remaining portion proves insufficient to satisfy the mortgage debt obtaining a decree under section 90 of the Transfer of Property Act against the unhypothecated property of the mortgagor

[Diss. 33 Cal 890=10 C W N 863 33 Cal 613=10 C W N 551=3 C L J 576 6 C L J 46 51 I C 81=26 M L T 192=38 M L J 93 Dist 20 I C 320 Fol 28 All 174=1905 A W N 214=2 A L J 630 29 All 369=1907 A W N 83 Ref 25 All 416 2 Pat L J 538 34 All 606 34 I C 148]

IN this case the respondent Behari Lal mortgaged to the appellant Sheo Prasad his ancestral share in certain property [80] together with certain other property which had been purchased by him The mortgage was in the usual form containing a personal covenant for payment of the mortgage debt, the property comprised in the mortgage being simply hypothecated as a security Sheo Prasad instituted a suit for sale on this mortgage, but in his plaint he asked for sale of the purchased property only, for the reason that other portions of the property mortgaged were subject to prior incumbrances A decree was passed in accordance with the prayer in the plaint, and the property sought to be sold was sold, but the proceeds of the sale proved insufficient to satisfy the decree Under these circumstances the decree holder applied for a decree under section 90 of the Transfer of Property Act for the balance due to him The judgment debtor raised an objection that as all the property comprised in the mortgage had not been sold, the decree holder was not entitled to obtain a decree under section 90 The Court of first instance (Subordinate Judge of Mainpuri) disallowed the judgment debtor's objection and gave the decree-holder a decree under section 90 On appeal the District Judge, relying on the ruling of the High Court in *Badri Das* v *Inayat Khan* (1) and *Muhammad Akbar* v *Munshi Ram* (2), and holding that a decree under section 90 could not be given unless and until the whole of the mortgaged property was sold, allowed the judgment debtor's objection and dismissed the application of the decree holder The decree holder accordingly appealed to the High Court

Munshi *Gokul Prasad*, for the appellant

Pandit *Madan Mohan Malaviya*, for the respondent

STANLEY, C J and BURKITT, J —This appeal raises a new point upon the meaning of several sections of the Transfer of Property Act One Behari Lal mortgaged his share in certain ancestral property and also his shares in property which he had purchased, to the appellant Sheo Prasad The mortgage is in the usual form, and contains an agreement on the part of the mortgagor for payment of the mortgage debt the property comprised in the mortgage being simply hypothecated as a security The mortgagee instituted a suit for sale on foot of the mortgage, but [81] in the prayer to his plaint he asked for an order for sale of the purchased shares of the property only the reason being that

(1) (1900) I L R 22 All 401 (2) Weekly Notes, 1899 p 208

vendor to put [77] on the stamp paper the name of Ram Ghulam as the purchaser, the offence of fabricating false evidence was completed, and Durga Charan Gir clearly abetted Daulat in the commission of that offence This case is very similar to that of *Queen Empress* v *Mula* (1) In that case it was held under similar circumstances that Mula had abetted the fabrication of false evidence I dismiss the application

1902 AUG 4

REVISIONAL CRIMINAL

25 A 75= 22 A W N 196.

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25 All 77 (=22 A W. N. 201)

APPELLATE CIVIL

Before Mr Justice Knox

WARIS KHAN AND OTHERS (*Defendants*) v DAULAT KHAN (*Plaintiff*) * [6th August, 1902]

Act No XII of 1881 (*N.-W P Rent Act*), *section* 31—*Landholder and tenant—Relinquishment of part of holding—Relinquishment not made in writing*

A relinquishment made by a tenant of his holding, when he does not hold under a lease, need not necessarily be in writing, nor need such relinquishment necessarily extend to the whole of the tenant s holding, although if the relinquishment is not in writing, the tenant may still be liable for the rent of the holding

[Dist 7 I C. 637, Ref 10 I C. 632=7 N L R 6]

THIS was a suit in ejectment brought under the following circumstances The father of the defendants was at one time an occupancy tenant of the plaintiff in respect of a holding measuring 10 biswas, 5 dhurs Some twenty years before suit the defendants' father ceased to cultivate 6 biswas, 5 dhurs of this holding, which was accordingly entered in the revenue papers as sir of the zamindar and continued to be so recorded for many years In the year 1900, some years after the death of the defendants' father, the defendants made an application to amend the rent roll, their application was granted, and in virtue of the order passed thereon they took possession of the disputed land The Court of first instance (Munsif of Muhammadabad Gohna) dismissed the suit, holding that the plaintiff had not proved his possession of the disputed land The plaintiff appealed The lower appellate Court (District Judge of Azamgarh) found that the defendants father had orally [78] relinquished the land to the plaintiff, which relinquishment, not having been disputed by the parties within limitation, was good in law, and that the defendants had wrongfully dispossessed the plaintiff, and accordingly allowed the appeal and decreed the plaintiff s claim The defendants thereupon appealed to the High Court

Mr *Abdul Raoof*, for the appellants

Mr *Karamat Husain*, for the respondent

KNOX, J —There are two pleas taken in this second appeal The first is, that the suit out of which this appeal has arisen was not cognizable by a Civil Court, and the second is that, the relinquishment not being according to law, the tenancy has not determined To ascertain

* Second Appeal No 623 of 1901, from a decree of J H Cuming Esq, District, Judge of Azamgarh, dated the 23rd day of March, 1901, reversing the order of Babu Murari Lal, Munsif of Muhammadabad Gohna, dated the 16th day of November, 1900

(1) (1879) I L R 2 All 105

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of the section, and that it was not intended by the Legislature that the right to establish proprietary title to the land should be limited The following rulings were relied on —*Kishen Coomar Shaha* v *Jeebun Singh* (1) *Hurronath Roy* v *Shristeedhur Doss* (2) *Ishur Chunder Sen* v *Beepin Behary Roy* (3), *Muhammad Salim* v *Abdul Rahim* (4) and *Ganga Prasad* v *Baldeo Ram* (5)

It was sought to distinguish the ruling in *Dasrath Rai* v *Bhirgu Rai* (6) from the present case But, if that ruling was not distinguishable, it was submitted that it was wrongly decided and was contrary to a long series of previous decisions

STANLEY, C J —The question for decision in this case arises upon the true interpretation to be placed upon section 148 of the Rent Act of 1881 One Ram Lal brought a suit for the rent of a holding for the years 1302 and 1303 Fasli against the tenants of the holding The tenants pleaded that they paid the rent for the years in question *bonâ fide* to one Munawar Shah the plaintiff in the present suit An inquiry was held by the [86] Revenue Court under the provisions of section 148 of the Act, to which I have referred, and this Court found that the defendant appellant Ram Lal was entitled to the rent in question, and his claim was decreed on the 15th of January, 1897 The present suit was then instituted by Munawar Shah on the 13th of May, 1899, against Ram Lal for a declaration of the plaintiff s title to the property and for possession The plaintiff s claim has been decreed The present appeal has been preferred against this decree

The only question which the learned vakil for the appellant has raised before us is a question of limitation His contention is that the plaintiff s suit having been brought on the 13th of May, 1899, that is, more than a year after the determination of the inquiry held under section 148 of the Rent Act the suit was barred under the proviso to that section, that under the proviso to section 148 a party must bring his suit within a year to establish his title to the property out of which the rent issued, in respect of which an inquiry under that section has been held

On the other hand, it is contended on behalf of the respondent that the proviso to section 148 is limited to, and merely deals with the rent referred to in the earlier portion of the section, namely, rent which has already accrued due and has been actually received and enjoyed by a third party

The appellant relies upon a ruling in appeal of a Bench of this Court in the case of *Dasrath Rai* v *Bhirgu Rai* (6) This ruling if it be accepted by us as correct, certainly establishes the appellant s case In it it was held that a suit similar to that in the present case, which was instituted more than a year after the termination of the inquiry held under section 148 of the Rent Act, was barred by limitation The learned Judges who decided that appeal drew a distinction between that case and two earlier cases which were cited before them, namely, the cases of *Muhammad Salim* v *Abdul Rahim* (4) and *Ganga Prasad* v *Baldeo Ram* (5), but I confess that I am unable to appreciate the distinction The facts in each case appear to [87] me to be substantially alike In the first of these two cases, it was held by Brodhurst and Tyrrell, JJ, that section 148 only applied to suits to recover rent which the tenant pleaded that he had paid to the

(1) (1866) 5 W R Act X Rulings 85
(2) (1867) 7 W R 152
(3) (1876) 25 W R C R 481
(4) Weekly Notes 1885 p. 201
(5) (1888) I L R 10 All 317
(6) (1901) I L R 23 All 431

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portions of the property were subject to prior incumbrances. A decree was passed according to the prayer in the plaint for sale of the limited portion of the mortgaged property to which we have referred, and that property was sold under that decree, but the proceeds of the sale proved insufficient to satisfy the mortgage debt. Accordingly the appellant applied to the Court under section 90 of the Transfer of Property Act for a decree for the balance due to him. An objection was raised to this application on the ground that as all the property comprised in the mortgage had not been sold, the mortgagee had no right to obtain a decree under section 90. The Subordinate Judge disallowed this application, but upon appeal the District Judge reversed his decree, and dismissed the plaintiff's application, on the ground that no order can be passed under section 90 of the Transfer of Property Act until the entire property comprised in the mortgage has been sold. It has been urged before us that the policy of the framers of the Act was to preclude the mortgagee from taking any proceeding against his mortgagor in respect of his claim before he had exhausted his remedies against the mortgaged property; and that inasmuch as in this case a portion of the mortgaged property admittedly had not been sold, the benefits given by section 90 were not open to the mortgagee.

Section 89, which is relied upon on behalf of the respondents, provides that if the defendant does not pay the amount ascertained to be due by him to the mortgagee, the latter "may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold." The subsequent section provides as follows: —"When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum." It is contended that under section 89 the Court is bound to pass an order for the sale of the mortgaged property (*i.e.*, the whole of the mortgaged property), or a sufficient part thereof to satisfy the debt, and that it is only [82] when the Court has passed such an order, and the mortgaged property has been sold, and the proceeds of sale have proved insufficient to satisfy the debt, that the mortgagee can apply under the provisions of section 90 for a decree for payment of the balance due to him. It seems to us that great hardship might be entailed on a mortgagee if he could not relinquish his claim to part of the property purporting to be comprised in his mortgage, except on the penalty of losing his right under section 90, if he found that it was to his advantage to do so. For example, it might be that a portion of the property was heavily incumbered; it might also be that the mortgagor's title to a portion of the property was in dispute: in either of these cases the result of endeavouring to sell the portion so incumbered, or the portion the title to which was in dispute, might entail heavy expenses and protracted litigation. Therefore there seems no reasonable objection under such circumstances to the abandonment by a mortgagee of his claim in respect of a part of his security, and to his seeking relief by sale of the remaining portion. We fail to see that there is anything contrary to the policy of the Act in allowing this to be done. This, however, it is unnecessary for us to determine in the present appeal. A decree has been passed under section 88 for the sale of a portion of the mortgaged property; it is not for us to say whether that decree was

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Munawar Shah. An inquiry was held by a Revenue Court under the provisions of section 148 of the North-Western Provinces Rent Act, 1881, and that Court found that Ram Lal was entitled to the rent in question. [84] Ram Lal's suit for rent was decreed on the 15th of January, 1897. On the 13th of May, 1899, Munawar Shah brought the present suit against Ram Lal and certain *pro forma* defendants, whom he alleged to be interested jointly with himself in the property in suit, in which he asked for a declaration of his title to the property and for possession. The main defence to this suit was that the plaintiff had not proved his possession of the property within twelve years from the date of the institution of the suit, and on this ground the Court of first instance (Munsif of East Budaun) dismissed the suit. The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Shahjahanpur) decreed the claim. The defendant Ram Lal thereupon appealed to the High Court, where the plea was raised for the first time that the suit was barred by limitation, having regard to the proviso to section 148 of the North-Western Provinces Rent Act, 1881; and this was the only point argued in appeal.

Babu *Ratan Chand* for the appellant contended that on a proper construction of section 148 of the North-Western Provinces Rent Act, 1881, and the proviso to that section, the plaintiff's suit was barred by the special limitation therein prescribed.* Under the proviso to section 148 a suit such as the plaintiff's present suit must be brought within a year from the termination of the inquiry held by the Revenue Court under section 148. In this case that inquiry had terminated on the [85] 15th of January, 1897, and the present suit had not been instituted until the 13th of May, 1899. The learned vakil relied on the decision of the High Court in the case of *Dasrath Rai* v. *Bhirgu Rai* (1).

Maulvi *Muhammad Ishaq* for the respondent contended that the only question which a Court of Revenue had jurisdiction to determine under section 148 of Act No. XII of 1881, when the right to receive rent was disputed, was that of the "receipt and enjoyment of the rent actually and in good faith before and up to the time when the right to sue accrued." There was no jurisdiction to try the question of title to the rent on any ground other than such receipt and enjoyment; much less any jurisdiction to try any question of proprietary title to the land out of which the rent issued. The proviso should be construed as dealing with the same subject matter as the section itself, and reading it in that light it is clear that it was intended to limit only the right to recover in a Civil Court the very same rent which is the subject of the first portion

* Section 148 of Act No. XII of 1881 is as follows:—

"148. When, in any suit between a land-holder and a tenant under this Act, the right to receive the rent of the land or tenure cultivated or held by the tenant is disputed on the ground that some third person has actually and in good faith received and enjoyed such rent before and up to the time when the right to sue accrued, such third person may be made a party to the suit;

"and the question of such receipt and enjoyment of the rent by such third person may be inquired into, and the suit shall be decided according to the result of such inquiry:

"Provided that the decision of the Court shall not affect the right of either party entitled to the rent of such land to establish his title by suit in the Civil Court, if instituted within one year from the date of the decision."

(1) (1901) I. L. R. 23 All. 434.

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of the section, and that it was not intended by the Legislature that the right to establish proprietary title to the land should be limited The following rulings were relied on —*Kishen Coomar Shaha* v *Jeebun Singh* (1), *Hurronath Roy* v *Shrisleedhur Doss* (2), *Ishur Chunder Sen* v *Beepin Behary Roy* (3), *Muhammad Salim* v *Abdul Rahim* (4) and *Ganga Prasad* v *Baldeo Ram* (5)

It was sought to distinguish the ruling in *Dasrath Rai* v *Bhirgu Rai* (6) from the present case But, if that ruling was not distinguishable, it was submitted that it was wrongly decided and was contrary to a long series of previous decisions

STANLEY, C J —The question for decision in this case arises upon the true interpretation to be placed upon section 148 of the Rent Act of 1881 One Ram Lal brought a suit for the rent of a holding for the years 1302 and 1303 Fasli against the tenants of the holding The tenants pleaded that they paid the rent for the years in question *bonâ fide* to one Munawar Shah, the plaintiff in the present suit An inquiry was held by the [86] Revenue Court under the provisions of section 148 of the Act, to which I have referred, and this Court found that the defendant appellant Ram Lal was entitled to the rent in question, and his claim was decreed on the 15th of January, 1897 The present suit was then instituted by Munawar Shah on the 13th of May, 1899, against Ram Lal for a declaration of the plaintiff's title to the property and for possession The plaintiff's claim has been decreed The present appeal has been preferred against this decree

The only question which the learned vakil for the appellant has raised before us is a question of limitation His contention is that the plaintiff's suit having been brought on the 13th of May, 1899, that is, more than a year after the determination of the inquiry held under section 148 of the Rent Act, the suit was barred under the proviso to that section, that under the proviso to section 148 a party must bring his suit within a year to establish his title to the property out of which the rent issued, in respect of which an inquiry under that section has been held

On the other hand, it is contended on behalf of the respondent that the proviso to section 148 is limited to, and merely deals with the rent referred to in the earlier portion of the section, namely, rent which has already accrued due, and has been actually received and enjoyed by a third party

The appellant relies upon a ruling in appeal of a Bench of this Court in the case of *Dasrath Rai* v *Bhirgu Rai* (6) This ruling, if it be accepted by us as correct, certainly establishes the appellant's case In it it was held that a suit similar to that in the present case, which was instituted more than a year after the termination of the inquiry held under section 148 of the Rent Act, was barred by limitation. The learned Judges who decided that appeal drew a distinction between that case and two earlier cases which were cited before them, namely, the cases of *Muhammad Salim* v *Abdul Rahim* (4) and *Ganga Prasad* v *Baldeo Ram* (5), but I confess that I am unable to appreciate the distinction The facts in each case appear to [87] me to be substantially alike In the first of these two cases, it was held by Brodhurst and Tyrrell, JJ, that section 148 only applied to suits to recover rent which the tenant pleaded that he had paid to the

(1) (1866) 5 W R Act X Rulings 85
(2) (1867) 7 W R 152
(3) (1876) 25 W R C R 481
(4) Weekly Notes, 1885, p. 261
(5) (1888) I L R 10 All 317
(6) (1901) I L R 23 All 434

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intervenor; that the suit before them was one for ejectment of the defendant from land which was in the use and occupation of the plaintiff, and was governed by the longer term of limitation provided in the Statute of 1877. In the latter of these cases Mr. Justice Straight held, upon a somewhat similar state of facts, that the meaning of section 148 was, that when an intervenor has succeeded in a revenue suit in convincing a Revenue Court that he has been in receipt and enjoyment of certain rent distrained for or claimed, or *vice versâ*, the plaintiff or the successful intervenor may go to the Civil Court with a suit to have it declared that he had a title to receive that particular. rent which the Revenue Court refused to give him, and that if he does institute such a suit, he must do so within one year from the date of the Revenue Court's decision. But the learned Judge goes on to observe as follows:—"I cannot hold that by the terms of either of those paragraphs (*i. e.*, of section 148 of the Rent Act, 1881), the period of limitation provided for a suit for a declaration of title to, and possession of, immoveable property in the limitation law, is thus summarily abridged." In addition to these two cases we have been referred to a number of cases which were decided under the corresponding section of the earlier Act No. X of 1859, which is in substance similar to section 148 of the Act of 1881. The decisions are uniform and are consonant with the two earlier decisions of this Court to which I have referred, as regards the true meaning of section 148 of the Act of 1881. I need only mention one or two of these decisions, namely, *Kishen Coomar Shaha* v. *Jeebun Singh* (1), *Hurronath Roy* v. *Srishteedhur Doss* (2), *Ishur Chunder Sen* v. *Beepin Behary Roy* (3). It will thus be seen that the recent decision reported in the case of *Dasrath Rai* v. *Bhirgu Rai* (4) runs counter to a long series of uniform decisions upon this question.

Turning to the section, it is unfortunate that the meaning of the Legislature is not by any means happily expressed. It [88] is undoubtedly vague; but when the language is carefully considered it seems to me reasonably clear that the decision in the case of *Dasrath Rai* v. *Bhirgu Rai* (4) cannot be supported. The first paragraph of the section deals with disputes in respect of rent which has already accrued due, and has been in good faith received and enjoyed. There is no reference in it whatsoever to future rent. The second paragraph describes the rent in respect of which the dispute is as to "the rent," and the use of this word "the" leads undoubtedly to some ambiguity in the section, because it is carried on in the proviso. Now it is clear that the words "the rent" in the second paragraph denote the rent mentioned in the first part of the section, and that rent alone. Instead of the word "the," the more appropriate word would have been "such." That it refers to the rent already received and enjoyed, and does not apply to future rent, is clear, I think, from the fact that it is coupled with the words "such receipt and enjoyment," *i. e.*, the receipt and enjoyment referred to in the first portion of the section. In the proviso the same words "the rent" are used. It appears to me that the rent which is there referred to also means, and is confined to, the rent mentioned in the paragraph immediately preceding, and must be interpreted as meaning "such rent," *i. e.*, the rent already received and enjoyed. The proviso must be treated as dealing with the same subject-matter as the section treats of to which

(1) (1866) 5 W. R. Act X Rulings 85.
(2) (1867) 7 W. R. C. R. 152.
(3) (1876) 25 W. R. C. R. 481.
(4) (1901) I. L. R. 23 All. 434.

of the section, and that it was not intended by the Legislature that the right to establish proprietary title to the land should be limited The following rulings were relied on —*Kishen Coomar Shaha* v *Jeebun Singh* (1), *Hurronath Roy* v *Shristeedhur Doss* (2), *Ishur Chunder Sen* v *Beepin Behary Roy* (3), *Muhammad Salim* v *Abdul Rahim* (4) and *Ganga Prasad* v *Baldeo Ram* (5)

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It was sought to distinguish the ruling in *Dasrath Rai* v *Bhirgu Rai* (6) from the present case But, if that ruling was not distinguishable, it was submitted that it was wrongly decided and was contrary to a long series of previous decisions

STANLEY, C J —The question for decision in this case arises upon the true interpretation to be placed upon section 148 of the Rent Act of 1881 One Ram Lal brought a suit for the rent of a holding for the years 1302 and 1303 Fasli against the tenants of the holding The tenants pleaded that they paid the rent for the years in question *bonâ fide* to one Munawar Shah, the plaintiff in the present suit An inquiry was held by the [86] Revenue Court under the provisions of section 148 of the Act, to which I have referred, and this Court found that the defendant appellant Ram Lal was entitled to the rent in question, and his claim was decreed on the 15th of January, 1897 The present suit was then instituted by Munawar Shah on the 13th of May, 1899, against Ram Lal for a declaration of the plaintiff's title to the property and for possession The plaintiff's claim has been decreed The present appeal has been preferred against this decree

The only question which the learned vakil for the appellant has raised before us is a question of limitation His contention is that the plaintiff's suit having been brought on the 13th of May, 1899, that is, more than a year after the determination of the inquiry held under section 148 of the Rent Act, the suit was barred under the proviso to that section, that under the proviso to section 148 a party must bring his suit within a year to establish his title to the property out of which the rent issued, in respect of which an inquiry under that section has been held

On the other hand, it is contended on behalf of the respondent that the proviso to section 148 is limited to, and merely deals with the rent referred to in the earlier portion of the section, namely, rent which has already accrued due, and has been actually received and enjoyed by a third party

The appellant relies upon a ruling in appeal of a Bench of this Court in the case of *Dasrath Rai* v. *Bhirgu Rai* (6) This ruling, if it be accepted by us as correct, certainly establishes the appellant's case In it it was held that a suit similar to that in the present case, which was instituted more than a year after the termination of the inquiry held under section 148 of the Rent Act, was barred by limitation The learned Judges who decided that appeal drew a distinction between that case and two earlier cases which were cited before them, namely, the cases of *Muhammad Salim* v *Abdul Rahim* (4) and *Ganga Prasad* v *Baldeo Ram* (5), but I confess that I am unable to appreciate the distinction The facts in each case appear to [87] me to be substantially alike In the first of these two cases, it was held by Brodhurst and Tyrrell, JJ, that section 148 only applied to suits to recover rent which the tenant pleaded that he had paid to the

(1) (1866) 5 W R Act X Rulings 85
(2) (1867) 7 W R 152
(3) (1876) 25 W R C R 481
(4) Weekly Notes, 1885, p 261.
(5) (1888) I L R. 10 All 347
(6) (1901) I L R. 23 All. 434

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Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Knox and Mr. Justice Blair.

ALI NASIR KHAN (*Plaintiff*) *v.* MANIK CHAND AND ANOTHER (*Defendants*).* [13th August, 1902.]

Pre-emption—Wajib-ul-arz—Construction of document—Evidence—Act No. 1 *of* 1872—(*Indian Evidence Act*), *section* 35—*Effect, if any, of omission of an entry from a public document—Rules of the Board of Revenue for the settlement of Gorakhpur and Basti Districts* (*Board's Circulars,* 1890, 8—1 *section* 38)—*Meaning of the word* " *nadarad.*"

The plaintiff claimed a right of pre-emption in respect of a share in a certain mauza situated in the district of Gorakhpur. He relied principally on a wajib-ul-arz of the year 1866 as affording evidence of a custom of pre-emption prevailing in the village. The defendants contended that the wajib-ul-arz of 1866 was evidence only of a contract, and not of a custom, and further put forward the " memorandum of village customs " prepared at the settlement of 1886-87 as showing that the right of pre-emption, whether by custom or contract, no longer existed.

The wajib-ul-arz of 1866 contained the following provision as to the right of pre-emption :—" Every co-sharer is entitled to transfer by sale or mortgage, but the condition of his doing so is, that he who wants to transfer do so, firstly, in favour of near co-sharers ; secondly, in favour of other co-sharers of the thok ; and thirdly, in favour of strangers." The memorandum of village customs prepared at the settlement of 1886-87 was prepared under rules framed by the Board of Revenue for the settlement of the Districts of Gorakhpur and Basti. The portion of those rules material to the present case is as follows:—" A memorandum of the village customs will be appended to each khewat by the Assistant Settlement Officer when he verifies the jamabandi, and it will take the place of the document hitherto known as the wajib-ul-arz." * * * * " In regard to any custom or constitution peculiar to the mahal, the following matters should be noted [class (*d*), section 25]: (*a*) pre-emption (as regards mahals which belong to other than Muhammadan [91] proprietors) when the proprietors expressly demand that it may be noted, and prove conclusively that the custom exists." In the memorandum of the village customs prepared at the settlement of 1886-87 the only entry as to pre-emption was the word " *nadarad.*"

Held that as regards the wajib-ul-arz of 1866, in the absence of any evidence showing that the right of pre-emption arose by agreement or contract, it must be taken that the right recorded was customary right. *Majidan Bibi* v. *Sheikh Hayatan* (1) *Isri Singh* v. *Ganga* (2) and *Muhammad Hasan* v. *Munna Lal* (3) referred to.

As to the effect which the entry in the later memorandum of village customs of the word " *nadarad* " was alleged to have as evidence of the disuse or abrogation of the custom or contract of pre-emption, it was *held* that the word " *nadarad* " itself did not, in the absence of any evidence showing that, as a matter of fact, the custom has ceased to exist, mean that the custom of pre-emption no longer subsisted, but was of no more value than if the memorandum of village customs had been completely silent on the subject ; and it could not be inferred from such an entry alone that the custom had fallen into disuse or ceased to exist. *Sadhu Sahu* v. *Raja Ram* (4) referred to. *Ram Lagan* v. *Ram Ugrah* (5), *Gajadhar Pande* v. *Hulas* (6) and *Kodai Sahu* v. *Mahabir* (7) over-ruled.

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* Second Appeal No. 1157 of 1900 from a decree of E. O. E. Leggatt, Esq., District Judge of Gorakhpur, dated the 11th of September 1900, confirming a decree of Maulvi Syed Muhammad Abbas Ali, Subordinate Judge of Gorakhpur, dated the 5th of June 1900.

(1) (1896) Weekly Notes, 1897, p. 3.
(2) (1880) I. L. R. 2 All. 876.
(3) (1886) I. L. R. 8 All. 434.
(4) (1893) I. L. R. 16 All. 40.
(5) Weekly Notes, 1901, p. 29.
(6) S.A. No. 198 of 1900, decided 14th Dec. 1900
(7) S. A. No. 312 of 1900, decided 7th Jan. 1901.

it is a proviso Reading then the words "the rent in the proviso, and the preceding paragraph as equivalent to 'such rent light is thrown upon the meaning of the section The proviso will run in this way — "Provided that the decision of the Court shall not affect the right of either party entitled to such rent to establish his title to such rent by suit in the Civil Court if instituted within one year from the date of the decision It appears to me that this gives a clear and intelligible interpretation to the section, and that it was not intended by the Legislature that the right to establish proprietary possession or title to the property should be limited in the way that is contended for It was only intended to limit the right to recover in a Civil Court the very same rent which [89] is the subject matter of the first portion of section 148 For these reasons I am of opinion that the appeal must fail, and that it should be dismissed with costs

KNOX, J —I was a party to the decision in *Dasrath Rai* v *Bhirgu Rai* (1) On hearing the arguments addressed to this Court this day, and upon considering the general course of rulings both of this Court and in the Calcutta High Court from the time when Act No X of 1859 became law—a course of rulings which, as the learned Chief Justice has pointed out, has been uniform throughout with the exception of this last ruling —I am satisfied that the interpretation which was put by them on this section is the correct interpretation, and that the proviso attached to section 148 was intended to refer only to the title to receive the rent which had been put in suit between the landholder and the tenant, and to claim which the intervenor had come forward There are cases in this Court, as for instance the case of *Bhagmanee Koonwer* v *Furzund Ali* (2), which point out that a Revenue Court is strictly confined to the question, *viz*, receipt and enjoyment of rent up to the date of the commencement of the suit, and that the title in the land could not be looked into It appears to me that it would be inequitable under such circumstances to hold that this proviso is to extend further than I have pointed out above For these reasons I would concur in the order proposed

BANERJI, J —I also agree with the learned Chief Justice, but do so with some hesitation This hesitation is due to the unsatisfactory manner in which section 148 of Act No XII of 1881 is worded

It was probably the intention of the Legislature that the suit referred to in the proviso to that section should be a suit to establish title to receive the rent of the holding in question, and not the particular rent claimed in the suit This intention, however, has not been given effect to in the proviso as it stands Having regard to the wording of that proviso, the numerous cases decided by the Calcutta High Court with reference to the corresponding section 77 in Act No X of 1859, cited by [90] the learned vakil for the respondent and quoted in Mr House's Edition of the Rent Act, p 294, the earlier cases in this Court referred to by the learned Chief Justice were, I think, correctly decided, and the ruling in those cases should be adhered to I would dismiss the appeal with costs.

BY THE COURT —For the reasons stated in the judgment of the Court the appeal is dismissed with costs.

Appeal dismissed

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(1) (1901) I L R 23 All. 434

(2) (1866) N.-W P H C Rep. 1866 R C A 20.

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Gorakhpur. The defendant Manik Chand owned a similar [93] share, which, on the 20th of February, 1899, he sold to the defendant Zaid Ali, who is not a co-sharer in the village. The plaintiff instituted the present suit to pre-empt this sale, relying upon an alleged right of pre-emption by custom and also under the Muhammadan law. The claim to pre-empt under the Muhammadan law was abandoned. The main defence was a denial of the existence of the custom. The only evidence adduced by either party in support of their respective contentions was an extract from the wajib-ul-arz of the village prepared on the settlement of 1866, and also an extract from the record of rights which was prepared on the settlement of 1886-87. No other evidence, either parol or documentary, was adduced. In addition to the defence that there was no custom of pre-emption, the defendants contended that the entry in the wajib-ul-arz of 1866 was not a record of any custom of pre-emption, but merely a record of a contract or agreement entered into between the co-sharers, which, on the expiry of the term of the settlement of 1866, became void. The provisions in the wajib-ul-arz of 1866 upon which the plaintiff relies have been translated without objection as follows:—" Every co-sharer is entitled to transfer by sale or mortgage, but the condition of his doing so is, that he who wants to transfer in the first instance do so, firstly, in favour of near co-sharers; secondly, in favour of other co-sharers of the thok; and thirdly, in favour of strangers." In the settlement of 1886-87 no reference to any custom appears, but in the column provided for recording customs of pre-emption is entered the word "*nadarad.*" The Court of first instance held that the right of pre-emption recorded in the settlement of 1866 was not a right existing by custom, but one arising out of contract, and therefore came to an end on the expiry of the period of that settlement, and accordingly it dismissed the plaintiff's suit. On appeal from this decision the lower appellate Court affirmed the decree of the Court below, holding that the wajib-ul-arz of 1866 did not expressly mention any custom, but simply stated the principles on which the right of pre-emption was to be exercised; that there was nothing to show whether the right was obtained by contract or by custom, and that the plaintiff had therefore failed to [94] prove his case. The present appeal from this decree has been preferred.

It may be convenient here to refer to the rules of the 7th of September 1888, which were sanctioned by the Local Government, for the recording of rights in the districts of Gorakhpur and Basti, in so far as they have a bearing upon the question before us. These rules have the force of law. Rule 38 provides as follows:—" A memorandum of the village customs will be appended to each khewat by the Assistant Settlement Officer when he verifies the jamabandi, and it will take the place of the document hitherto known as the wajib-ul-arz. It will contain the particulars which the Settlement Officer is required to record under section 65 of the Act as amended by section 7 of Act VIII of 1879, and also a note of any custom or constitution peculiar to the mahal. It will be verified, &c., * * * * *. In regard to any custom or constitution peculiar to the mahal, the following matters should be noticed, [class (*d*), section 25 A]. Pre-emption (as regards mahals which belong to other than Muhammadan proprietors) *when the proprietors expressly demand that it be noted and prove conclusively that the custom exists* * * * * ". The other matters referred to in this last paragraph have no bearing upon pre-emption. Sub-section A alone deals with it. The provision which

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The cases of *Uman Parshad* v *Gandharp Singh* (3) and *Rani Lakhraj Kuar* v *Baboo Mahpal Singh* (4) were referred to in the judgment of Knox, J

[Ref 13 C W N 71=1 Ind Cas 376 2 Ind Cas 623 26 All 10 26 All 549= 1904 A. W N 128=1 A L J 278 19 C W N 611=28 I C 705 Fol 7 A. L J 519 Rel 38 All 134=14 A L J 61]

THE plaintiff in this case, Ali Nasir Khan, was a share holder in Mouza Rampur in the district of Gorakhpur The defendant, Manik Chand, also a share holder in the same village, on the 20th of February 1899, sold his share to one Zaid Ali, who was not a co sharer in the village The plaintiff thereupon instituted a suit for pre emption He based his claim upon a custom recorded in the wajib ul arz of the village framed in 1866, and also upon the Muhammadan law of pre emption, but the claim under the Muhammadan law was abandoned The main defence was a denial of the existence of the [92] custom The only evidence adduced by either party in support of their respective contentions was an extract from the wajib ul arz of the village prepared at the settlement of 1866, and also an extract from the record of rights which was prepared at the settlement of 1886 87 In addition to the defence that there was no custom of pre emption, the defendants contended that the entry in the wajib ul arz of 1866 was not a record of any custom of pre emption, but merely a record of a contract or agreement entered into between the co sharers, which became void on the expiry of the term of the settlement The clause of the wajib-ul arz of 1866 relating to pre emption, ran as follows — " Every co sharer is entitled to transfer, by sale or mortgage, but the condition of his doing so is that he who wants to transfer in the first instance do so, firstly, in favour of near co sharers , secondly, in favour of other co sharers of the thok , and thirdly, in favour of strangers ' In the record of rights framed at the settlement of 1886 87 no reference to any custom appears, but in the column provided for recording customs, such as pre emption, the entry is "*nadarad* The Court of first instance held that the right of pre emption recorded at the settlement of 1866 was not a right existing by custom, but one arising out of a contract, and that it came to an end on the expiry of the period of that settlement, and accordingly it dismissed the plaintiff s suit On appeal from this decision the lower appellate Court (District Judge of Gorakhpur) affirmed the decree, holding that the wajib ul arz of 1866 did not expressly mention any custom, but simply stated the principles upon which the right of pre emption was to be exercised , and that there was nothing to show whether the right was obtained by custom or contract, and the plaintiff therefore had failed to prove his case The plaintiff accordingly appealed to the High Court

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the appellant
Maulvi *Muhammad Ishaq*, for the respondents

STANLEY, C J — The suit out of which this appeal has arisen is for pre emption The facts are few and simple The plaintiff owns a share in mauza Rampur, in the District of

(1) (1880) 7 C L R 356
(2) (1884) I L R 10 Cal 1024
(3) (1887) I L R 15 Cal 20
(4) (1879) L R 7 I A 63

the Settlement Officer is directed to record under section 65 of the Land Revenue Act of 1873 as amended by section 7 of Act VIII of 1879, does not expressly mention pre emption, but by sub section (*d*) a Settlement Officer is required to record "any other matters which he may be directed to record under rules framed under section 257" I am not aware of any other provision in these Acts or Rules in regard to pre emption, and no other has been quoted as having any bearing upon the question before us. The memorandum of village customs thus directed to be appended to the khewat is to contain a note of any custom or constitution peculiar to the mahal, but the generality of this direction appears to me to be restricted by the language of the subsequent paragraph, which directs that pre emption should be noticed "*when the proprietors expressly demand that it be noted, and prove conclusively that the custom exists*" From the direction that the custom shall [95] be noted in this particular case, it seems to me to follow that an entry made under other conditions would not be authorized The rule *expressum facit cessare tacitum* is, I think, applicable. This is the reasonable meaning, in my opinion, to be attached to the instructions It was not intended that the Settlement Officer should take upon himself *suo motu* the duty of investigating whether or not any custom of pre emption existed, but that he should only record the custom if all the proprietors required that he should do so.

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I come now to the arguments which have been addressed to us It has been contended on behalf of the respondents that the wajib ul arz of 1866 is only the record of an agreement or contract of the co sharers, which determined on the expiry of that settlement I am unable to yield to this contention There appears to me to be nothing in the language of the wajib-ul arz indicative of contract The word "agreement" or "contract" is nowhere used The statement of the right opening with the words "Every co-sharer *is entitled* to transfer, &c" seems to me more consistent with the right being a right existing by custom than a right existing by contract It has been held by a Full Bench of this Court, consisting of Edge, C J, Banerji and Aikman, JJ, that "if the wajib-ul arz itself did not show, or if it was not otherwise proved, that the pre emption clause was merely the embodiment of a new contract as to pre emption, the reasonable and proper construction of such a document would be that the pre emption clause was merely the recital of a pre-existing custom in force in the village, and in such a case it would be for the defendant in a suit for pre emption to prove by clear evidence that no such custom had existed in the village and that the vendor and the plaintiff had not agreed to be bound by that recital *Majidan Bibi* v *Sheik Hayatan* (1) I agree in the view so expressed In that case the pre emption clause was very similar in its language to that in the case before us It was as follows.—"If any one of the co-sharers wants to transfer his share, he is competent to do so, first, to the nearest sharer, and next, to the sharers of the mahal, and if none of them makes the purchase, he may sell it to some one else" It [96] is not to be overlooked in this case before us that the respondents did not attempt to prove that there was no custom of pre-emption existing in the village when the wajib-ul arz of 1866 was prepared, or that the right recorded in that wajib-ul arz was the creature of contract The only evidence before the Courts admittedly, as I have said, is the two extracts from the wajib-ul arz of 1866, and the record of rights of 1886 87, which

(1) (1896) Weekly Notes, 1897, p 3

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Districts, to which I have already referred, that from the mere fact that the record of rights is silent on the question of pre-emption, it is impossible to draw the inference that a pre-existing custom of pre-emption had fallen into disuse and had ceased to exist. According to these instructions the only duty imposed upon the Settlement Officer in regard to the recording of a custom of pre-emption, in my opinion, is to record it "when the proprietors expressly demand that it may be noted and prove conclusively that the custom exists." In no other case, as it appears to me, would the Settlement Officer be justified, in the case of the districts of Gorakhpur and Basti, in making an entry, either affirming or negativing the existence of such custom. The cases to which I have referred, in which the word "*nadarad*" appeared in the record of rights, I may observe, all arose, as in this case, in the Gorakhpur District.

I further should be prepared to hold that if the meaning which has been assigned to the word "*nadarad*" in the cases mentioned was rightly attributed to it, the entry would have no value as evidence. It is the duty of Settlement Officers in the district of Gorakhpur to make entries of customs, &c., when they exist, but it is no part of their duty, so far as I can discover, to record the non-existence of customs. If they do exceed their duty in this respect, no weight can be attached to any entry which they may make in excess [100] of their duty. The record of rights in fact is not admissible in evidence to show by an entry or by its silence that a particular custom does not exist in a village. It is a record of existing custom. In a matter which came before Garth, C. J., and Field, J., the question as to the admissibility in evidence of public books for the purpose of establishing that a particular entry had not been made in them, was considered, namely, *In the matter of Juggun Lall* (1). In that case Juggun Lall had been convicted under section 461 of the Indian Penal Code, for having inserted in an account book kept in the Sarun Collectorate a sum of Rs. 3 as having been paid on account of the revenue of a certain estate. If this sum had not been credited in the account the estate would have been in arrear, and it would then have been the duty of the Collector of the district to bring the estate to sale. The case for the prosecution was that no such sum had been paid in, and that Juggun Lall improperly made the entry with the object of inducing the Collector to believe that no arrears of Government revenue were due in respect of the estate. The case for the defence was, that the entry was made at the instance of one Girwardhari, and that Girwardhari gave Juggun Lall a written list of items from which he made the entry of payment. Books were tendered in evidence from the Treasurer's office, which ought to contain entries of all the challans which passed through the office, and they contained no mention of any challan which would have justified the prisoner in making the entry. It was argued on behalf of the accused that these books were not evidence *per se* of the fact that no such challan had been produced to the prisoner. On the other hand, it was contended that section 35 of the Evidence Act made these books evidence *per se*. But it was held that the books were not evidence *for the purpose of proving the absence in them of any particular entry*. Garth, C. J., observed:—"The section 35 only provides 'that any entry in an official public book which is duly made by a public servant in the execution of his duty is of itself a relevant fact', but it does not make the public book evidence to show that

(1) (1880) 7 C. L. R. 356.

the custom was recorded as subsisting On the other hand, there was a later wajib ul arz of 1887 in which, under the heading of pre emption, was recorded the entry "*nadarad*" A Bench consisting of Sir Arthur Strachey, C J, and Banerji, J held that the entry of the word "*nadarad*" *amounted to a positive statement in the subsequent wajib ul arz, that there was no custom of pre emption in the village*, and that the lower appellate Court, from which an appeal had been preferred to the High Court, ought [98] to have considered the effect of the word "*nadarad*" *as evidence that the right of pre emption no longer existed in the village* The members of the Bench before whom the present case originally came were not disposed to agree with this ruling, and in consequence the hearing of this appeal was referred to a Bench of three Judges We have been referred to an earlier unreported case of *Gajadhar Pande* v *Hulas*, Second Appeal No 198 of 1900, which came before my brother Aikman sitting alone, and in which judgment was delivered on the 14th December, 1900 In that case the same question arose for determination, and it was contended, as here, that an entry in a village administration paper prepared at the settlement of 1866 proved the existence of a custom of pre emption In a subsequent wajib ul arz prepared at a later settlement the word "*nadarad*" was entered precisely as was done in the case before us It was held that the entry in the former wajib ul-arz *was nullified by the later entry, which was to the effect that there was no right of pre-emption in the village* Again, in the case of *Kodai Sahu* v *Mahabir Barai*, Second Appeal No 324 of 1900 (which is also unreported), the same learned Judge held that the entry in a later wajib ul arz of the word '*nadarad*' nullified the effect of the entry of a custom in an earlier wajib ul arz He observes —"The effect of that entry (*i e*, the earlier entry) is *destroyed by the record made* at the recent settlement, *in which it is distinctly stated that there is no custom of pre emption, so that if ever any custom existed, it is clear that it had fallen into desuetude*"

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I find myself unable to agree in the view that the word "*nadarad*" is equivalent to a positive statement that no custom of pre emption existed in the village The meaning of the word, so far as I can discover, is "*nil*" This is the meaning atached to it by Strachey, C J in the case before him to which I have referred It means "blank" or "wanting" (see Fallon's Hindustani English Dictionary) Its insertion merely denoted, in my opinion, that no custom of pre emption was proved before the Settlement Officer to be in existence, and so he had nothing to record I fail to understand how it can be interpreted to amount to *a positive statement that no such custom* [99] *existed* Assuming that it was part of the duty of the Settlement Officer to record the non existence of the custom, he would not, I think have recorded it by the use of this word, especially as there are, I am informed, familiar words in the language which express more nearly the idea of non existence, such, for example, as the word "*naist*" (*i e*, does not exist) The learned pleader for the respondents admitted that there were such familiar words The word "*nadarad*" to my mind denotes that a record of any such custom has not been supplied or is wanting, and is of no more value than if the document had been completely silent on the subject

It appears to me, moreover, having regard to the specific instructions contained in Rule 33 of the Rules applying to the Gorakhpur and Basti

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entry setting out in detail certain rules regarding pre-emption, which found a place in the village record of rights prepared at the settlement of 1866? Can such an entry be received in evidence one way or the other?

This question was considered by a Full Bench of this Court in *Sadhu Sahu* v. *Raja Ram* (1). In that case Burkitt, J., in a very carefully considered judgment, came to the conclusion that the absence of any note as to pre-emption in the memorandum of village customs was nothing more than at the utmost an expression of the Settlement Officer's opinion that the evidence tendered, if any were tendered, did not conclusively prove the existence of the custom. He declined to regard it as being evidence of the slightest value against the continued existence of that custom, or as being presumptive evidence that no such custom existed at the date of the institution of the suit. He therefore held that the "absence of any note respecting a custom of pre-emption from the memorandum of village customs" did [103] not show that the "custom of pre-emption in that village recorded in the wajib-ul-arz of the 1866 settlement had either been abrogated or cancelled, or that it had fallen into disuse." He fully concurred with the Subordinate Judge in holding that "the burden of proving such a vital change in the village custom lay on the defendant-appellant, who had failed to prove it, except by producing the new memorandum of village customs, which," in his opinion, "established nothing in his favour."

With the view thus stated I fully concur. The village record of rights has an exceptional position accorded to it by law; inasmuch as all entries duly made in it are to be presumed true until the contrary is proved, but every provision contained in it has to be carefully considered. The presumption as to truth and accuracy cannot be extended to entries which were never intended to find a place within its covers. This has been emphatically pointed out by the Privy Council in *Uman Parshad* v. *Gandharp Singh* (2). This was a case in which the Judicial Commissioner of Oudh had treated the wajib-ul-arz as a document of weight, which must be taken as showing local custom until some proof to the contrary was produced. Their Lordships found that the Settlement Officer had entered in the official record of a custom the private expression of a proprietor's view, and that the Oudh Court had held that a proprietor had a right to enter his own views upon the village records, and have them recorded as if they were the official records of the local customs. Their Lordships characterized this as an exceedingly startling thing, and refused to allow the entry even to be received as evidence.

By the rules laid down in the circular of the Board of Revenue above cited, which rules have the force of law, nothing was to be entered in the memorandum of village customs prepared for the Gorakhpur and Basti settlements in 1887, regarding pre-emption in non-Muhammadan villages, except when the proprietors of a village expressly demanded that the custom be noted, and prove conclusively that the custom existed in their village. No provision is made for the record that no custom of [104] pre-emption exists in the village; as no provision has been made, it follows that an entry to this effect could find no proper place in a record of rights prepared under those rules, and further that if, by any mischance or other cause, it found a place in the record no presumption attaches as to its truth. It therefore follows that from

(1) (1893) I. L. R. 16 All. 40. (2) (1887) I. L. R. 15 Cal. 20.

a particular entry *has not been entered in it* ' So also in the case [101] of *Queen Empress* v *Grees Chunder Banerji* (1), it was held by Field, J , that " though under section 34 of the Evidence Act the actual entries in books of account regularly kept in the course of business are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter ' The provisions of section 91 of the Land Revenue Act, 1873, do not appear to me to help the respondent's case That section provides that " all entries in the record so made and attested shall be presumed to be true until the contrary is proved " This section clearly, I think, only applies to entries which it is the duty of the Settlement Officer to make, and does not extend to entries which, from ignorance of his duties, or caprice, or otherwise, he may choose to make If it was intended that the absence of an entry of custom from the record of rights should be treated as evidence of the non existence of a custom, one would have expected to find a provision in the Act to the effect that the non entry of a custom should be deemed to be evidence of its non existence There would, I think, be a provision analogous to that which is found in section 22 of English Statute 23 and 24 Vic , Cap CXXVII making the omission of an entry evidence That section provides that the Law List shall be *prima facie* evidence of the qualification or non qualification of parties to act as attorneys, solicitors, &c After providing that the list of attorneys, &c , purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of attorneys, &c , who have obtained stamped certificates for the current year, shall, until the contrary be made to appear, be evidence that the persons therein named holding such certificates are attorneys, &c , the Statute goes on to provide that the absence of the name of any person from such list shall, until the contrary be made to appear, be evidence that such person is not qualified to practise as an attorney, &c , under a certificate for the current year Some such analogous provision we should expect to find in the Land Revenue Act, if it was intended that the absence of the entry of a custom should be evidence of the [102] non existence of such custom For the foregoing reasons I am of opinion that there was no legal evidence to rebut the *prima facie* case made by the plaintiff, and that the custom of pre emption has been established I would, therefore, allow the appeal, set aside the decrees of the lower Courts, and remand the case to the lower appellate Court under the provisions of section 562 of the Code of Civil Procedure, with directions to re admit the appeal under its original number in the register, and proceed to dispose of it on the merits The defendants respondents should, I think, pay the costs of this appeal

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KNOX, J —I do not propose to go into the facts, as they have been fully set out in the judgment of the learned Chief Justice, and I have nothing more to add concerning them

The cardinal point for consideration may be briefly set out as follows —There being no other evidence of any kind bearing upon the question whether or not a custom of pre emption exists in a village, what effect, if any, has the entry of the word " *nadarad* " in a village *record* of rights prepared in the district of Gorakhpur in acordance with rule 33 of the Circular Orders of the Board of Revenue, Ed 1890, 8—1, upon an

(1) (1884) I L R 10 Cal 1024

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Lordships if it could have been shown in that case, as in the present case, that the jurisdiction of the Settlement Officer to make entries had been strictly limited by law; (2) that what prevailed with their Lordships was the elaborate and definite record of the usages of the Bahrutia clan which found an entry in the village papers before them. Elaborate as that entry was, it found favour with difficulty because there was nothing on record to show that the officer attesting had passed any judgment or finding upon the information received. Their Lordships had to imply the officer's finding from the elaborate record duly authenticated. Would they [106] have attached weight to such an ambiguous and exiguous entry as "*nadarad?*" It may safely be answered—No.

For these reasons I concur in the order proposed.

BLAIR, J.—As the question which is raised in this appeal has been the subject of judicial decision by several Judges, past and present, of this Court, and as I find myself unable to follow them in the conclusion at which they have arrived, I deem it more respectful to them to express briefly the reasons for my dissent than to content myself with a general concurrence with the judgment of the Chief Justice. The sole question at issue is the meaning of the word "*nadarad*" in the column headed "pre-emption" in a memorandum of village customs appended to a khewat drawn by a Settlement Officer in 1886-87 under the "Rules for Gorakhpur and Basti settlements under sections 39 and 257 of Act No. XIX of 1873." It is not disputed that these rules have the force of law in the district of Gorakhpur, where the land is situated which is the subject of this suit. The previous wajib-ul-arz was framed in 1866, and contains a classification of persons possessed of pre-emptive rights in the following terms:—"Every co-sharer is entitled to transfer by sale or mortagage, but the condition of his doing so is, that he who wants to transfer do so, firstly, to near co-sharers; secondly, to other co-sharers of the thok; and thirdly, to strangers." The lower Courts have construed these words as being the record of a new contract to have effect for the duration of the settlement then framed and not of a pre-existing custom. I entirely dissent from that construction. The words "is entitled" seem to me to point to an existing and pre-existing right rather than to one springing into existence with the new settlement. There are no words indicative of consent and none implying novation. In my opinion a wajib-ul-arz recording an innovation upon pre-established custom would have indicated the new departure, either explicitly or by reasonable implication. In a parallel case—*Majidan Bibi* v. *Sheikh Hayatan* (1)—three Judges of this Court have put upon a similar entry the construction which commends itself to my mind, and have interpreted it to be a record of custom and not of contract. [107] That construction is not in this case in conflict with any evidence. If the Courts below had rightly construed the entry in the wajib-ul-arz of 1866 as recording only a contract terminable with the duration of the settlement, there would then have been no evidence of any custom or contract of pre-emption from and after the period when the new settlement came into operation. The conclusion at which I have arrived, that what was recorded in the earlier settlement was a custom and not a contract, materially affects my view of the meaning to be attached to the word "*nadarad*" in the one now in force. The origin of a pre-emptive custom in a village is most commonly obscure, but it forms nevertheless

(1) 1896) Weekly Notes, 1897, p. 3.

the entry "*nadarad*" even if we were to give it the extended meaning for which the respondents ask, no presumption of any kind would arise It is true that in the case of *Ram Lagan* v *Ram Ugrah* (1), a Bench of this Court held that the lower appellate Court ought to have considered the effect of the word '*nadarad* in the record of rights as evidence that the right of pre emption no longer existed in the village With all respect to the learned Judges who so held, I regret that I cannot follow them in their decision To infer from the word "*nadarad*' that such custom no longer exists appears to me to put a strain upon the words which they will not bear If the intention of those who compiled this record had been to express that no such custom existed, I should have expected to find at least the following or similar words, *i e*, "*is gaon men aisa koi rawaj jari nahin hai*' So far as my experience goes, the ordinary meaning of the word "*nadarad*' is "*nil*' or "no entry —a phrase which, standing by itself, it would not be safe to take as meaning that there was no custom, still less that a custom which had existed had fallen into desuetude To infer from these two words the non existence of a custom, or a change in the village custom, would be, in my opinion, a very dangerous leap in the dark Moreover as the learned Chief Justice has pointed out, the entry of these words is not an entry which can be proved in evidence Entries in a public record made by a public officer in the discharge of his official duty by section 35 of the Indian Evidence Act, are, and may be proved as, relevant facts The same privilege has not been extended to entries which a public officer is not expected to, and is not permitted to make In this connection the observations of their Lordships of the Privy Council in *Rani Lekraj Kuar* v *Babu Mahpal Singh*(2) are important In that case village papers were admitted in evidence in order to prove a family custom of inheritance stated therein [105] Before the Judicial Commissioner of Oudh the objection was taken and argued that the village papers related to matters which the Settlement Officer had no jurisdiction to include in them Their Lordships of the Privy Council gave full consideration to this objection, and came to the conclusion that it was unfounded But why did they arrive at this conclusion? Because in that case the village papers were papers prepared under Regulation VII of 1822 By that Regulation (section 9) it was enacted that "It shall be the duty of Collectors, and other persons exercising the powers of Collectors, on the occasion of making or revising settlements of the Land Revenue, to unite with the adjustment of the assessment, and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land," and other purposes are referred to in this section Then in the latter part of it there occurs this passage —"The information collected on the above points shall be so arranged and recorded as to admit of immediate reference hereafter by the Courts of Judicature" Two points will be abundantly clear from a careful perusal of the case as reported, (1) that the objection would have prevailed with their

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(1) Weekly Notes, 1901, p 29 (2) (1879) L R 7 I A 63

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mean "no entry to make" than as meaning "no such custom exists." In my view the insertion of that word in a column in which the only authorized [109] entry is an entry of a custom conculsively proved, and whereof notification has been demanded by the proprietary body, would have no further evidentiary value than if the column had been left blank. It would simply have indicated that no such demand for notification had been made, or no such custom had been conclusively proved to exist. I am of opinion, therefore, that the lower Courts have wrongly decided the preliminary point, the sole admissible evidence upon which establishes that a custom of pre-emption does exist in this village. I therefore concur in the proposed order.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decrees of the lower Courts set aside, and the case remanded to the lower appellate Court under the provisions of section 562 of the Code of Civil Procedure, with directions to re-admit the appeal under its original number in the register and dispose of the case on the merits. The respondents must pay the costs of this appeal.

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25 A. 109 (=30 I. A. 35=5 Bom. L. R. 100=7 C. W. N. 177.)

PRIVY COUNCIL.

PRESENT:

Lord Davey, Sir Ford North, Sir Andrew Scoble, and Sir Arthur Wilson.

TASSADUQ RASUL KHAN AND ANOTHER (*Defendants*) *v.* KASHI RAM AND OTHERS (*Representatives of the Plaintiff*).
[11th June and 12th November, 1902.]

[*Appeal from the Court of the Judicial Commissioner of Oudh*].

Appeal to Privy Council—Civil Procedure Code (Act No. XIV of 1882), *section* 596—*Affirmance of decision of lower Court—Decree of appellate Court that "appeal be dismissed" where decision on questions of fact is not the same.*

The word "decision" in section 596 of the Code of Civil Procedure means merely the decision of the suit by the Court, and cannot, like the word "judgment" be defined as meaning the statement of the grounds on which the Court proceeds to make the decree.

In order to "affirm the decision of the Court below" within the meaning of that section it is sufficient for the appellate Court to affirm the *decree*: it need not also affirm the grounds of fact on which the judgment was passed.

Where the decree of the appellate Court was that "the appeal be dismissed," but the reasons given were not the same as those of the lower Court in respect of some matters of fact. *Held* that the appellate Court affirmed the decision of the lower Court within the meaning of section 596; and a certificate which granted leave to appeal to the Privy Council on the ground [110] that by its decree the appellate Court did not affirm the Court below, and which did not find that the appeal involved a substantial question of law was held not to comply with that section.

[Dist. 31 Cal. 57. Ref. 13 C. L. J. 501=11 I. C. 159; 23 M. L J. 219=12 M. L. T. 260=1912 M. W. N. 962=16 I.C. 486; 33 All. 154=7 A. L. J. 1000; 1 Bur. L. J. 215; Fol. 24 O. C. 164.]

APPEAL from a decree (29th April, 1899) of the Judicial Commissioners of Oudh, affirming a decree (24th August, 1898) of the Subordinate Judge of Bara Banki by which the suit of the respondent was decreed.

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an important, indeed vital, element in village life In its absence, by obsoletion or otherwise, the community is exposed to the intrusion of strangers, which is antagonistic to the family principle which obviously underlies the provisions of so many village papers In cases where attempt had been made to break down the customary barrier by the admission of outsiders to the co parcenary body, or where an attempt had been made by means of a fictitious sale to a stranger to force up the price of a share which some co sharer desired to sell, I should expect to find, especially if litigation had ensued, that the custom established would be set out most explicitly in the ensuing wajib ul arz But in a village where every co sharer desiring to part with his interest had loyally observed the traditional custom, and had sold or offered his share for sale to the persons entitled under that custom, the pre emptive law in operation unquestioned for a generation, would come to be taken for granted, and hence cease to be recorded on the framing of a new wajib ul arz: perfect obedience would therefore produce the same result as obsoletion In the absence of other evidence the conclusion is forced upon me that the omission from a wajib ul arz of mention of a custom of pre emption, which had been recorded in its predecessor, is compatible with either condition of things, and taken by itself furnishes no evidence of a change so momentous as the abolition of an existing custom governing and restraining the alienation of property But if this view of the inference to be drawn from the silence of one record [108] of rights succeeding another record which is explicit, be not accepted as regards village papers unaffected by the rules of 1873, still to districts where, as in this case, such rules have the force of law, the inference of non existence of a custom of pre emption drawn from the absence of an entry under the heading of pre emption in a settlement paper framed under those rules seems to me to be absolutely excluded by their provisions Under Rule 38 the instructions given to the Settlement Officer are —" In regard to any custom or constitution peculiar to the mahal the following matters should be noticed—(a) pre emption" (in non Muhammadan mahals) "when the proprietors expressly demand that it be noted and prove conclusively that the custom exist" That provision appears to me, upon the principle *expressio unius alterum excludit* to forbid the notification by the Settlement Officer of any custom which does not satisfy the two conditions of demand by the proprietary body and conclusive proof In my opinion the reason of that restriction is not far to seek The Government did not intend to entrust the Settlement Officer either with the judicial decision of doubtful questions or with power to express any opinion *suo ipsius mero motu* Upon such matters it preferred to leave the decision to the Civil Courts—a decision unprejudiced by the notification of an executive officer upon what might be a difficult question of fact or law Such a notification, unless made under the prescribed conditions, would be wholly *ultra vires*, and would not be admissible in evidence to prove the custom so mentioned or set forth It is in my judgment impossible to maintain the contention that such an entry would become relevant merely because made in a public document within the meaning of section 35 of the Evidence Act Otherwise any irrelevancy, however gross, so interpolated would be admissible

I do not consider it necessary to add to the careful analysis of the Chief Justice any observations on the obvious ambiguity of the word "*nadarad*," which, in my opinion, is more naturally interpreted to

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PRIVY COUNCIL.

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Narain (1), *Radha Krishn Das* v. *Rai Krishn Chand* (2), *Beni Rai* v. *Ram Lakhan Rai* (3), *Thompson* v. *Calcutta Tramways Co.* (4), and *Ashghar Reza* v. *Hyder Reza* (5) were referred to.

Mr. *DeGruyther* for the appellants contended that where the Courts took different views of the facts the appellate Court could not be said to affirm the "decision" of the lower Court. The word "decision" in section 596 of the Civil Procedure Code does not mean "decree". That is the view taken by the Courts in India. The word "decision" means the reasons given by the Courts for the conclusion they come to, and was used so as not to [112] shut out an appeal under circumstances like the present. It is submitted, therefore, that a right construction has been put upon section 596, and that the appeal has been properly granted. It was also contended that the appeal involved substantial questions of law—*viz.*, (*a*) whether a Court can decree specific performance of an agreement by execution of a conveyance which is at variance with the terms of the agreement; (*b*) whether a Court can give specific performance on terms different from those alleged in the plaint; and (*c*) whether a Court can give findings on points on which there is no evidence. The appellant might be allowed to amend the certificate by stating that these questions of law arise.

Mr. *Mayne* was heard in reply.

1902, *June 11th.*—The judgment of their Lordships was delivered by—

LORD DAVEY:—A preliminary objection has been taken by Mr. Mayne, on behalf of the respondents, to the hearing of this appeal by their Lordships, on the ground that the order giving leave to appeal was not in accordance with the Code of Civil Procedure.

The certificate is in these terms:—

"Certified that the above case fulfills the requirements of section 596, Act XIV of 1882, as regards value and nature, inasmuch as the value of the subject-matter of the suit in the Court of first instance was upwards of Rs. 10,000, and the value of the matter in dispute on appeal to Her Majesty's Privy Council also exceeds that amount, and as the decree appealed from does not affirm the Court immediately below."

Mr. Mayne contends that the statement that the decree appealed does not affirm the decision of the Court immediately below is erroneous, or can only be made correct by showing that the learned Judges who gave the certificate in that form misinterpreted the words of section 596 of the Civil Procedure Code. He points out that in this suit, which was a suit for specific performance of an agreement, the Court below decreed specific performance. There was an appeal by the defendants (the present appellants), and the only order of the appellate Court, the decree which is in fact appealed from, is [113] one which simply dismisses the appeal. It says:—"It is ordered and decreed that this appeal be dismissed, and the respondent's costs of this appeal, amounting to Rs. 412 only as noted below, are to be paid by Nawab Kasim Ali Khan and Raja Tassaduq Rasul Khan, appellants, to Babu Manik Chand, respondent."

It is, however, argued by Mr. DeGruyther, on behalf of the appellants, that that is an erroneous reading and interpretation of the 596th

(1) (1900) L. R. 28 I. A. 11; I. L. R. 23 All. 227.
(2) (1901) L. R. 28 I. A. 182; I. L. R. 23 All. 415.
(3) (1898) I. L. R. 20 All. 367.
(4) (1894) I. L. R. 21 Cal. 523.
(5) (1889) I. L. R. 16 Cal. 287.

The suit was one for specific performance. Both Courts came to the same conclusion, but their reasons for doing so as given in their judgments were different The decree of the appellate Court was "that the appeal should be dismissed with costs."

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The defendants applied for leave to appeal to the Privy Council, and the facts material to this report are sufficiently stated in the judgment given by the Judicial Commissioners on that application, which was as follows:—

"This is an application for leave to appeal to Her Majesty in Council The subject matter of the suit in the Court of first instance and in this Court amounts to more than Rs 10,000 The suit was originally brought by Manik Chand against [illegible]

Rasul Khan was not a *bona fide* purchaser without notice It passed a decree in favour of the plaintiff on the draft conveyance put forward by him The defendants appealed to this Court This Court held that the contract for sale of the 31st August, 1897, was established, that the alleged approved draft conveyance put forward by the plaintiff was not proved, that that approved draft was not an essential portion of the plaintiff's case and that, under the plaintiff's claim for general relief, he could obtain a decree for specific performance by the execution of any sufficient conveyance The draft conveyance put forward by Nawab Kasim Ali Khan originally differed only on one point from the draft conveyance put forward by the plaintiff It excepted from the sale a *dewan-khana* belonging to the vendor, which exception finds no place in the draft conveyance put [111] forward by the plaintiff Certain amendments in the interest of the vendor which do not appear in the plaintiff's draft appear on the face of Nawab Kasim Ali's draft The plaintiff conceded that on the merits the amendments were proper amendments, and therefore the only material difference in the two drafts was the exception of a *dewan-khana* from sale to be found in Nawab Kasim Ali Khan's draft conveyance This Court has therefore not affirmed the decision of the Subordinate Judge in so far as he held that the draft conveyance put forward by the plaintiff [illegible] nquire whether the [illegible] regards value and [illegible] Procedure"

The certificate granting leave to appeal is set out in their Lordships' judgment.

At the hearing of the appeal—

Mr *Mayne*, for the respondents, took a preliminary objection to the appeal being heard on the ground that, on the proper construction of section 596 of the Civil Procedure Code, the Judicial Commissioners had no power to grant leave to appeal to the Privy Council, unless the appeal involved, and was certified by the Court as involving, a substantial question of law The Judicial Commissioners had, it was submitted, "affirmed the decision" of the Court below; and, as the appeal involved no substantial question of law, no appeal to His Majesty in Council would lie On the essential questions of fact in the case there were practically concurrent judgments of both Courts. The cases of *Karuppanan Servai* v. *Srinivasan Chetti* (1), *Banarsi Pershad* v. *Kashi Krishna*

(1) (1901) L. R. 29 I. A. 38; I L. R 25 Mad 215

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course would be irregular, and that the proper course would have been, if the parties intended to appeal on that ground, to have obtained a certificate from the Court of the Judicial Commissioner that there was some substantial question of law.

Their Lordships therefore think that the preliminary objection succeeds, and that the appeal ought to be dismissed, and they [115] will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

NOTE —On the conclusion of the judgment their Lordships intimated that they would withhold their report to His Majesty for three months, to enable the appellant to apply to the Court of the Judicial Commissioner for a certificate that the appeal involved a substantial question of law. The appellant having failed to obtain such certificate, their Lordships, on the 12th November, 1902, intimated that their report would be submitted to His Majesty at the next meeting of the Privy Council.

E. S HOPE,
Registrar of the Privy Council.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Watkins & Lempriere.*
Solicitors for the respondents—Messrs. *T. L. Wilson & Co.*

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25 A. 115 (=30 I. A. 54=5 Bom. L. R. 111=7 C. W. N. 289=8 Sar 435.)

PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bonser.

NIDHA SAH AND ANOTHER (*Defendants*) *v.* MURLI DHAR AND OTHERS (*Plaintiffs*). [20th November and 3rd December, 1902.]
[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

Mortgage—Mortgage with possession for a term certain—Mortgagee unable to obtain possession of part of property mortgaged and consequently failing to recoup money advanced—Suit by mortgagor on expiry of term to recover possession.

The plaintiff representing himself to have absolute proprietary right in certain villages, and in consideration of advances which had been made to him by the defendant, executed what purported to be a mortgage of the villages with possession to the defendant for 14 years, the deed providing that, on "the expiration of the term the mortgagor shall come into possession of the mortgaged villages without settlement of account, that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate which, after the expiration of the term of this mortgage-deed, shall be returned to the mortgagor without his paying the mortgage money secured under this document" When the term had expired the mortgagee refused to give up possession of such of the villages as he had been able to get possession of on the ground that owing to the misrepresentation of the mortgagor he had not received the full benefit purported to be given him by the mortgage, and had consequently been unable to recoup himself the money he had advanced, and he claimed the right to hold the property until he had so recouped himself. In a suit by the mortgagor to recover possession the above ground was held by both the lower Courts to be well founded; and it was contended that the plaintiff, having broken his part of the contract by failing to give the defendant possession of the entirety of the premises comprised [116] in the mortgage, ought not to be allowed to enforce the contract against the mortgagee. *Held* by the Judicial Committee that the plaintiff was entitled to rely and was relying on his proprietary right, and, in the absence of any stipulation express or implied in the mortgage-deed depriving him of the right to recover possession, he was entitled to succeed.

section, and that the interpretation put upon that section by the learned Judges is the correct one The words of the section are these —" And where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law' Mr DeGruyther says, and it appears from the learned Judges' judgment that they took the same point, that " decision does not mean the decision of the Court, or the decree made by the Court, but means the reasons given by the Court for their decree, although the decision in each case may be different If the reasons are not the same in respect of some matter of fact, say the learned Judges, and says Mr DeGruyther, the decree appealed from does not affirm the decision of the Court immediately below

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The facts of this case, as stated by the learned Judges, are these They say the Court of first instance found that a certain contract of sale was proved, and that a certain draft conveyance put forward by the plaintiff was also proved Then they say it was found by the appellate Court that the contract was established, but "that the alleged approved draft conveyance put forward by the plaintiff was not proved, that that approved draft was not an essential portion of the plaintiff s case, and that under the plaintiff s claim for general relief he could obtain a decree for specific performance by the execution of any sufficient conveyance They, therefore, dismissed the appeal and affirmed the decree and the decision of the suit by the Court below

Now, there is no definition of the word "decision in the Civil Procedure Code, but there is a definition of the word " decree It says " decree' means the formal expression of an adjudication upon any right claimed or defence set up [114] in a civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal' Then, " judgment is defined as meaning " the statement given by the Judge of the grounds of a decree or order Therefore their Lordships have two things they have a decree which decides the suit, and they have the word " judgment, meaning the statement of the grounds upon which the learned Judge or the Court proceeds to make the decree

Mr DeGruyther appears to wish to give the word "decision ' the same meaning as the word " judgment and he says that it is necessary that the appellate Court should not only affirm the decree made by the Court below but should also affirm the grounds of fact upon which that judgment was passed Their Lordships cannot come to that conclusion They think that the natural, obvious, and *prima facie* meaning of the word " decision" is decision of the suit by the Court, and that that meaning should be given to it in the section

It was said that there was some practice in India which puts a different meaning on the section , but their Lordships are not satisfied that that is so , they feel themselves free to decide in the way that has been mentioned They will, therefore, hold that this certificate, understood and interpreted by the light of the judgment given by the Judges, does not comply with section 596, because it appears that the decree appealed from does affirm the decision of the Court below, and the certificate does not find that the appeal involved any substantial question of law

It was suggested by Mr DeGruyther that he might amend the certificate in that respect, and he stated to the Court what were the questions of law which in his opinion arose Their Lordships think that that

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The proprietors of patti Dikauli Ratan Singh redeemed the mortgage of that patti in 1290 Fasli, and defendant has not had it eight years of the stipulated period. Similarly they redeemed Aghapur Badainpur in 1293 Fasli and defendant has not had it for five years of the stipulated period. That there was a subsequent agreement a month after the mortgage in respect of Dewasiapur and Mohammadpur is not now denied, but when defendant sued for arrears of rent of those villages, plaintiffs opposed the claim, even asserting that the mortgage had never taken effect. The agreement is not before me, and I can only hold on the deed, dated 10th July, 1876, that plaintiffs have retained the villages without right to do so. The decisions in the rent suits are not binding ; they only show that defendant failed to relalize rents from plaintiffs, in one case because it was held that Dewasiapur had been given for maintenance, and in the other because the agreement was inadmissible in evidence. Defendant is to blame for not trying to recover these two villages in the Civil Court and this omission on his part must go against him."

The Subordinate Judge, however, was of opinion that these objections, however well grounded they might be in fact, were, in law, no answer to the plaintiffs' claim, because they might and ought to have brought an action for possession of Dewasiapur [118] and Mohammadpur, and actions of damages upon his successive dispossessions from Dikauli Patti Ratan Singh, Bilnapara and Aghapur Badainpur. In the result he passed a decree in favour of the plaintiffs for redemption and for possession of the mortgaged property.

Against this decision the defendant appealed to the Court of the Judicial Commissioner of Oudh, and that Court (consisting of the Judicial Commissioner and Additional Judicial Commissioner) on 14th April, 1896, gave judgment dismissing the appeal with costs. They accepted the finding of fact by the Subordinate Judge, to which no objection had been made. On the question of law they agreed with the Subordinate Judge. In concluding their judgment they said :—

" But even if it be conceded that the appellants are not barred by the rule of *res judicata* from raising the question in the present suit whether they or their predecessor in title, the mortgagee have, or has, been prevented from realising the mortgage money in full, from the mortgaged property by being deprived of part of the security, still the appellants have no answer to the respondents' claim, unless they can show that they are entitled to make up the deficiency by retaining possession of the rest of the security beyond the 14 years. And this they cannot show, because there is no such provision in the mortgage-deed, nor is any such provision annexed to, or imported into, the contract by the law."

The defendants appealed to His Majesty in Council.

On the appeal, which was heard *ex parte*—

Mr. *Mayne* for the appellant contended that the decision of the Judicial Commissioners holding that the respondents had deprived the appellants of the full benefit of the mortgage contract, and yet allowing them to enforce the contract against the appellants, was wrong in law. Where a mortgagor was found to have misrepresented the nature of his interest in some of the mortgaged property, and to have wrongly deprived the mortgagee of the possession of other portions of it, the mortgagee, it was submitted, could plead those circumstances as a defence to a suit for redemption. The cases of *Forbes* v. *Ameeroonissa Begum* (1) and *Mukhun Lall* v. *Sreekishen Singh* (2) were cited. When the object of a contract is to form a fund to pay off a debt in a certain time, the period of time allowed being sufficient to pay off the debt, and one party to the contract takes [119] away or deteriorates property from which the fund was calculated to be derived, so as to render it less beneficial for the object for which it was intended, and so prevent the fund being formed in the stipulated

(1) (1865) 10 Moo. I. A. 340 (347, 356). (2) (1868) 12 Moo. I. A. 157 (186).

Fol 6 O C 839, 12 I C 407, Dist 27 I C 122=1914 M W N. 939=28 M L J 154=39 Mad 269, 26 I C 71=16 M L T 444=1914 M W N 891 44 I C 153=4 Pat L W 146 Ref 39 Cal 527 52 I C 473 50 I C 154]

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25 A 115= 30 I A 54= 5 Bom L R 111=7 C. W N 289= 8 Sar 435

APPEAL from a judgment and decree (14th April, 1896) of the Judicial Commissioner of Oudh confirming a decree (25th October, 1893) of the Subordinate Judge of Bahraich by which the respondent s suit was decreed

The plaintiffs were the representatives of one Indarjit Lal, who, on 10th July, 1876, executed a mortgage of certain villages in favour of one Ishri Sah, the original defendant in the suit, out of which this appeal arose The mortgage was executed in consideration of Rs 11,530 8 0, of which Rs 244 8 0 were retained by the mortgagee in repayment of money advanced to the mortgagor to cover the costs of conveyance, including stamps and registration, while Rs 2 085 were set off against antecedent debts due by the mortgagor to the mortgagee, and Rs 9,201 were left with the mortgagee for the redemption of prior mortgages The mortgagee was to have possession for a time certain, 14 years, and the rents and profits for this term were to be received by him in full payment of the mortgage money, that is the Rs 11,530 8 0, nothing being said in the mortgage deed about interest, and after the expiry of this term the mortgagor was to be entitled to re enter during the fallow season in the month of *Jeyt* (May and June) without any account of the payment of the said money

Indarjit Lal died on 2nd September, 1880, leaving two sons, Murli Dhar and Ram Prasad, and a grandson, Gur Prasad, the son of a third son, Bansi Dhar, who had predeceased his father On the expiration of the term of 14 years Murli Dhar applied for mutation of names by expunging the name of Ishri Sah the mortgagee, from the register This application was opposed by the mortgagee and was rejected on 21st December, 1890

Murli Dhar then on 10th June, 1892, brought a suit in the Court of the Subordinate Judge of Bahraich against the mortgagee for recovery of the mortgaged property for mesne profits from the expiration of the term to the institution of the suit [117] and for an account of the Rs 9,201 left with the mortgagee for payment of prior incumbrances In this suit Ram Prasad and Gur Prasad were afterwards joined as co plaintiffs

The defendant resisted the claim on the ground that the plaintiff had misrepresented the nature of his interest in some of the villages, and had wrongly deprived him of the possession of others, so that he had not been allowed to retain possession over the whole of the mortgaged lands during the stipulated term, and he disputed the claim to an account on the ground that by the conditions of the mortgage deed, the right to an account had been expressly waived by the mortgagor

The Subordinate Judge found that the objections of the mortgagee were well grounded in respect of five of the villages mortgaged, and after referring to the express declaration in the mortgage deed that "all these villages were the proprietary villages of Indarjit, thus inducing the defendant to believe in that tenure and to act on that belief" he said —

"As a fact defendant has never had possession of Dewasiapur, and plaintiffs father took possession of Mohammadpur in Rabi 1286 Fasli and defendant has not had it for 11½ years of the stipulated period of 14 years Plaintiffs father Indarjit the original mortgagor, dying, the *muafi* Bilnapara was resumed by the grantor in 1290 Fasli, and defendant has not had it for eight years of the stipulated period

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PRIVY COUNCIL.

As there was no appearance by the respondents it will not be necessary to make any order as to costs.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Young, Jackson, Beard and King.*

25 A. 115=30 I. A. 54=5 Bom. L. R. 111=7 C. W. N. 289=8 Sar. 435.

25 A. 121.

[121] PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bonser.

SATRUPA KUNWAR (*Defendant*) *v.* HULAS KUNWAR (*Plaintiff*). [19th November, 1902.]

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

Will—Validity of Will—Will of Oudh Taluqdar not registered under Oudh Estates Act (I of 1869), section 13—Subsequent addendum executed and duly registered referring to and explaining will.

Where a will made by an Oudh taluqdar was executed on the 29th of April, 1881, but was not registered within one month of its execution under section 13 of the Oudh Estates Act (I of 1869), and on the 26th of April, 1883, an addendum was made to it, in which the will was referred to and explained, and the addendum was then duly executed as a will and registered on the same day, an objection that the original will had not been registered in accordance with section 13 of the Oudh Estates Act and was therefore invalid, was overruled, and the document was held to be effective as a testamentary instrument whether the addendum was regarded as a codicil or a will.

APPEAL from a judgment and decree (27th June, 1899) of the Judicial Commissioner of Oudh reversing a decree (30th November 1898) of the Subordinate Judge of Unao and decreeing the respondent's suit.

The plaintiff Rani Hulas Kunwar sued to recover from the defendant Rani Satrupa Kunwar the profits of two villages, Fatehpur-Chaurasi and Jamania Katch, on the ground that she was entitled to them (1) by a grant made to her by her father Hardeo Bakhsh Singh, C.S.I., which grant was confirmed by her uncle Raja Tilak Singh, (2) and by a will executed on the 29th of April, 1881, and registered on the 26th of April, 1883.

The defence was that there was no valid grant by Raja Hardeo Bakhsh Singh which could be confirmed by Raja Tilak Singh, and that the will of Raja Tilak Singh was invalid for want of registration.

The latter ground of defence raised the only question material to this report, which was whether the will was invalid as not having been properly registered under section 13 of the Oudh Estates Act (I of 1869).

On this point the Subordinate Judge found that the will was invalid, not having been properly registered under the provisions of that Act.

From his decision the plaintiff appealed.

[122] The facts relating to the execution and registration of the will are fully stated in the judgment of the Court of the Judicial Commissioner now appealed from which was as follows:—

"In appeal the learned counsel for the appellant rests his case entirely on the will of Raja Tilak Singh. The will, dated 29th April, 1881, contains the following passage:—

'Maintenance of the daughter of Raja Hardeo Bakhsh, my deceased brother, and of the male issue of the said daughter. First, that the entire profits of the

time, it was submitted that it did not lie in the mouth of such party to insist on the property being restored in the same state as before such taking away or deterioration The Contract Act, IX of 1872, section 67, was referred to

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The respondents did not appear

1902 · 3rd December —Their Lordships' judgment was delivered by SIR JOHN BONSER :—

On the 10th of July, 1876, one Indarjit Lal, representing himself to have absolute proprietary right in certain villages, executed an instrument purporting to be a mortgage of them with possession to one Ishri Sah "for a period of 14 years from 1284 Fasli to 1297 Fasli" by which it was provided that on the expiration of the term the mortgagor "shall come in possession of the mortgaged villages without settlement of accounts that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate and after the expiration of the term this mortgage deed shall be returned to the mortgagor without his accounting for (paying) the mortgage money secured under this document"

This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word It is not a security for the payment of any money or for the performance of any engagement No accounts were to be rendered or required There was no provision for redemption expressed or implied It was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances

It appears that the so called mortgagor had not absolute proprietary rights in all the villages, and that the mortgagee did not get the full benefit purported to be given him by the mortgage

[120] At the expiration of the 14 years the representatives of the original mortgagee refused to give up possession of such of the mortgaged property as the mortgagee had been able to get possession of on the ground that, owing to the misrepresentations of the mortgagor, they had been unable to recoup themselves the money they had advanced, and they claimed the right to hold the property until they had so recouped themselves

The respondents, who are the representatives of the mortgagor, then brought the action out of which this appeal arises to recover the property

The Subordinate Judge made a decree in favour of the plaintiffs, but deprived them of costs on the ground that the mortgagor had not "dealt honestly" with the mortgagee, and that decree was affirmed by the Court of the Judicial Commissioner of Oudh

It was contended before their Lordships that the mortgagor having broken his part of the contract by failing to give the mortgagee possession of the entirety of the premises comprised in the mortgage ought not to be allowed to enforce the contract as against the mortgagee, but the answer to this contention appears to their Lordships to be that the plaintiffs are not seeking to enforce the contract, they rely on their proprietary right, and it is for appellant to show some stipulation either express or implied in the mortgage deed which deprives the plaintiffs of the right to recover possession This the appellant cannot do and their Lordships will therefore humbly advise His Majesty that the appeal be dismissed

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As there was no appearance by the respondents it will not be necessary to make any order as to costs.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Young, Jackson, Beard and King.*

25 A. 115= 30 I A. 54= 5 Bom. L. R. 111=7 C. W. N. 289= 8 Sar. 435.

25 A. 121.

[121] PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bonser.

SATRUPA KUNWAR (*Defendant*) *v.* HULAS KUNWAR (*Plaintiff*).
[19th November, 1902.]

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

Will—Validity of Will—Will of Oudh Taluqdar not registered under Oudh Estates Act (I of 1869), section 13—Subsequent addendum executed and duly registered referring to and explaining will.

Where a will made by an Oudh taluqdar was executed on the 29th of April, 1881, but was not registered within one month of its execution under section 13 of the Oudh Estates Act (I of 1869), and on the 26th of April, 1883, an addendum was made to it, in which the will was referred to and explained, and the addendum was then duly executed as a will and registered on the same day, an objection that the original will had not been registered in accordance with section 13 of the Oudh Estates Act and was therefore invalid, was overruled, and the document was held to be effective as a testamentary instrument whether the addendum was regarded as a codicil or a will.

APPEAL from a judgment and decree (27th June, 1899) of the Judicial Commissioner of Oudh reversing a decree (30th November 1898) of the Subordinate Judge of Unao and decreeing the respondent's suit.

The plaintiff Rani Hulas Kunwar sued to recover from the defendant Rani Satrupa Kunwar the profits of two villages, Fatehpur-Chaurasi and Jamania Katch, on the ground that she was entitled to them (1) by a grant made to her by her father Hardeo Bakhsh Singh, C.S.I., which grant was confirmed by her uncle Raja Tilak Singh, (2) and by a will executed on the 29th of April, 1881, and registered on the 26th of April, 1883.

The defence was that there was no valid grant by Raja Hardeo Bakhsh Singh which could be confirmed by Raja Tilak Singh, and that the will of Raja Tilak Singh was invalid for want of registration.

The latter ground of defence raised the only question material to this report, which was whether the will was invalid as not having been properly registered under section 13 of the Oudh Estates Act (I of 1869).

On this point the Subordinate Judge found that the will was invalid, not having been properly registered under the provisions of that Act.

From his decision the plaintiff appealed.

[122] The facts relating to the execution and registration of the will are fully stated in the judgment of the Court of the Judicial Commissioner now appealed from which was as follows:—

"In appeal the learned counsel for the appellant rests his case entirely on the will of Raja Tilak Singh. The will, dated 29th April, 1881, contains the following passage:—

'Maintenance of the daughter of Raja Hardeo Bakhsh, my deceased brother, and of the male issue of the said daughter. First, that the entire profits of the

villages Fatehpur-Chaurasi and Jamania Katch, Ilaka tahsil, Safipur, district Unao, should be made over to the daughter of Raja Hardeo Bakhsh, my deceased brother, generation after generation, so that after the said daughter (it should be given) to her male children in every season But the said daughter and her male children shall not have power over the said profits of mortgage, hypothecation or sale Nor shall they have power, on account of their right to the profits, to take possession of the aforesaid villages Nor shall any other person obtain the attachment, sale or other transfer of the profits in lieu of his demand against them By profits is meant the profits which remain after deducting Government demand and village expenses out of the *nikasi* in every year'

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25 A 121

"On 26th April, 1883, Raja Tilak Singh added the following words to the will —

'I have received back from the Treasury for registration the will which I executed on 29th April, 1881, and which I delivered to Mr John Quin, Deputy Commissioner of Hardoi, who, after my verification, deposited it in the Treasury I promise to have the document formally registered as it now stands The following details should be taken as forming part of this will The words "Rani Sahiba" mentioned in the will mean Musammat Mahtab Koer (daughter of Daryai Singh), my wife The words "immoveable property" mentioned in the will mean the property situtate in the districts of Hardoi, Unao, and Farrukhabad The residence . . . . . . Katyari Thakur Chain Singh's . . . . is Khair ud-dinpur, hamlet of . . . . . ; Lala Kunwar Sen and his residence is Purwa Sheo Charan, hamlet of Chanda Mohammadpur, pargana Katyari Lala Jwala Pershad's father's name is Chaturbhuj and his residence is Fatehgarh, district Farrukhabad All the provisions of this will shall come into effect after my death Therefore I have executed this will, so that it may serve as a *sanad* Dated 26th April, 1883, at Hardoi'

"This addendum was dated and signed by Raja Tilak Singh His signature was attested by further witnesses and the document was registered on the same date The plaintiff summoned the original document from the defendant, who admitted her inability to produce it

[123] "Section 13 of Act I of 1869 lays down that no taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, shall have power to give or bequeath his estate, or any portion thereof, or any interest therein, to certain persons therein specified, except by an instrument of gift or a will executed and attested not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution

"Under section 2 of the Act, 'will' means the legal declaration of the intentions of the testator with respect to his property affected by this Act which he desires to be carried into effect after his death 'Codicil' means an instrument made in relation to a will, and explaining, altering or adding to its dispositions it is considered as forming an additional part of the will

"The learned counsel for the appellant has contended that the addendum of the 26th April, 1883, is either a codicil or a republication of the will Inasmuch as the addendum explains the original will, it falls within the definition of codicil By section 19 of Act I of 1869, sections 51 and 60 of the Indian Succession Act are made applicable to all wills and codicils made by any taluqdar or grantee, or by his heir or legatee, under the provisions of Act I of 1869, for the purpose of bequeathing to any person his estate, or any portion thereof, or any interest therein

"Section 51 of Act X of 1865 is as follows —'If a testator, in a will or codicil duly attested, refer to any other document then actually written as expressing any part of his intentions, such document shall be

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considered as forming a part of the will or codicil in which it is referred to.' The same rule is to be found in Williams' Law of Executors and Administrators, 9th edition, Vol. I, at page 86 :—'If the testator, in a will or codicil or other testamentary paper duly executed, refers to an existing unattested will or other paper, the instrument so referred to becomes part of the will.' The learned counsel has also cited, *In the Goods of Harris* (1) where a subsequent [124] will was held to ratify and confirm and thereby to incorporate the terms of a previous will.

"On the question whether the addendum amounted to a republication of the original will, the learned counsel has cited section 60 of the Succession Act, which runs thus:—'No unprivileged will or codicil, nor any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same.' He has also referred to Williams' Law of Executors and Administrators, page 170, to the effect that 'it has long been settled law that the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republishing and makes it speak as it were *at that time*. In short, the will so republished is a new will.' Also a passage at page 164 :—'As to republication by codicil, the cases on wills, made before the Wills Act, show that a codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will whether it be so described in such codicil or not; and as such furnishes conclusive evidence of the testator's considering his will as then existing.'

"The learned counsel for the respondent contends that the will was taken back from the Treasury merely for the purpose of being registered 'in its present state'. There are no additions and no alterations in the addendum, which accordingly cannot be considered to be a codicil. He contends that under section 13 of Act I of 1869 the will expired on the 26th May, 1881, not having been registered within one month from the date of its execution. He contends that only wills, the execution of which was imperfect, or wills which have been revoked, can be republished, and that the execution of this will having been perfected, the will died after the period of one month and became incapable of republication. He contends that the only course open to Raja Tilak Singh was to rewrite the whole will afresh, and then to sign and attest the paper so rewritten. No authorities were cited in support of this proposition. It seems [125] unnecessary in this case to discuss minutely whether the addendum of the 26th April, 1883, is in strictness a republication of the whole will or a codicil explaining the previous will. The addendum undoubtedly explains the dispositions in the will. It therefore falls within the definition of codicil, unless it is excluded on the ground that at the date of the addendum the will was no longer the 'legal' declaration of the testator.

"I do not think it is so excluded. A revoked will can be revived by a codicil showing an intention to revive the same.

"If the codicil is duly registered and fulfils the conditions of section 13, Act I of 1869, it would incorporate the terms of the will, even though the will were unregistered or even unattested, and give validity to its terms. Assuming, however, that the addendum is not strictly a

(1) (1870) L. R. 2 P. & D. 83.

villages Fatehpur-Chaurasi and Jamania Katoh, Ilaka tahsil, Safipur, district Unao, should be made over to the daughter of Raja Hardeo Bakhsh, my deceased brother, generation after generation, so that after the said daughter (it should be given) to her male children in every season But the said daughter and her male children shall not have power over the said profits of mortgage, hypothecation or sale Nor shall they have power, on account of their right to the profits, to take possession of . . . attachment, sale or . . . By profits is meant . . . and village expenses out of the *nikasi* in every year'

"On 26th April, 1883, Raja Tilak Singh added the following words to the will —

'I have received back from the Treasury for registration the will which I executed on 29th April, 1881, and which I delivered to Mr John Quin, Deputy Commissioner of Hardoi, who, after my verification, deposited it in the Treasury . . . it now stands Tha follow . . . The words 'Rani Sahiba . . . (daughter of Daryai Singh), . . . oned in the will mean the . . . Farrukhabad The residence . . . Katyari Thakur Charan Singh's . . . is Khair ud dinpur, hamlet of . . . Lala Kunwar Sen and his residence is Purwa Sheo Charan, hamlet of Chanda Mohammadpur, pargana Katyari . . . residence is Fatehgarh, . . . come into effect after . . . may serve as a *sanad* . . .

"This addendum was dated and signed by Raja Tilak Singh His signature was attested by further witnesses and the document was registered on the same date The plaintiff summoned the original document from the defendant, who admitted her inability to produce it

[123] "Section 13 of Act I of 1869 lays down that no taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, shall have power to give or bequeath his estate, or any portion thereof, or any interest therein, to certain persons therein specified, except by an instrument of gift or a will executed and attested not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution

"Under section 2 of the Act, 'will' means the legal declaration of the intentions of the testator with respect to his property affected by this Act which he desires to be carried into effect after his death 'Codicil' means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, it is considered as forming an additional part of the will

"The learned counsel for the appellant has contended that the addendum of the 26th April, 1883, is either a codicil or a republication of the will Inasmuch as the addendum explains the original will, it falls within the definition of codicil By section 19 of Act I of 1869, sections 51 and 60 of the Indian Succession Act are made applicable to all wills and codicils made by any taluqdar or grantee, or by his heir or legatee, under the provisions of Act I of 1869, for the purpose of bequeathing to any person his estate, or any portion thereof, or any interest therein

"Section 51 of Act X of 1865 is as follows —'If a testator, in a will or codicil duly attested, refer to any other document then actually written as expressing any part of his intentions, such document shall be

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AUG. 18.

REVISIONAL CRIMINAL.

25 A. 126= 22 A. W. N. 197.

Certain persons who had been discharged after a complaint against them of the offences of kidnapping and extortion, applied to the Magistrate who had discharged them for sanction to prosecute the complainants. This application was refused by the Magistrate. The applicants then, instead of appealing or applying in revision to the Sessions Judge against the order of the Magistrate, made a fresh and independent application to the Sessions Judge for sanction to prosecute the complainants. The Sessions Judge declined to entertain this application. On application under section 195 of the Code of [127] Criminal Procedure being made to the High Court against both the orders above referred to, the High Court refused to interfere on the ground that the applicants had not pursued their proper remedy in the Court below.

THE facts of this case sufficiently appear from the order of the Court.

Messrs. *C. C. Dillon* and *B. E. O'Conor*, and Pandit *Sundar Lal*, for the applicants.

Mr. *C. Ross Alston* and Babu *Satya Chandra Mukerji*, for Chunni Lal.

Babu *Sital Prasad Ghosh*, for Ram Prasad.

BURKITT, J.—I think this application in its present form cannot be entertained. After the trial of Harbans Rai and others, who were discharged, the said Harbans Rai and others applied to the Magistrate for permission to prosecute certain persons, who, they alleged, had concocted false charges of extortion and kidnapping against them. The Magistrate rejected the application without giving any reasons for his order. The applicants seem to have submitted to that order of the Magistrate. They took no proceedings in revision or by way of appeal, if an appeal lay against it. What they did was, that they made an original application to the Sessions Judge, asking him to grant them the sanction which they had asked for in vain from the Magistrate. They did not ask the Sessions Judge to take up in revision, or to take any action on, or notice of, the proceedings before the Magistrate. The Sessions Judge very properly refused to entertain an application made under such circumstances. The application is now renewed to this Court. I think it cannot be sustained, because the applicants, on the rejection of their first application by the Magistrate, should have applied in revision to the Sessions Judge, or they might, in the first instance, have applied (without having gone to the Magistrate) to the Sessions Judge for sanction, but that they did not think fit to do. The order of the Magistrate refusing sanction could have been taken up, if the applicants had so asked, in revision by the Sessions Judge, but, as it is, it stands untouched. It is a valid order, unreversed, passed by a competent Court rejecting the applicants' application for sanction to prosecute the opposite party. I therefore think I ought not to entertain the present application, and I therefore reject it.

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25 A. 128 (=22 A. W. N. 200.)

[128] REVISIONAL CRIMINAL.

Before Mr. Justice Burkitt.

EMPEROR *v.* MADAR BAKHSH.* [21st August, 1902.]

Criminal Procedure Code, section 438—Revision—Practice—Reference by District Magistrate questioning an order of acquittal.

* Criminal Revision No. 510 of 1902.

codicil, there can be no doubt that it is a will The addendum purports to be a will and it does in terms declare that all the provisions entered in the former will will take effect after the testator's death and that therefore 'this will' has been written as a *sanad* That addendum having been signed and probably attested on the 26th April, 1883, and having been registered on the same date, is a valid will under section 13 of Act I of 1869 in which by virtue of the provisions of section 51 of Act X of 1865 the document of 29th April, 1881, is incorporated Whether therefore the addendum be considered as a will or codicil, in either case the will of the 29th April 1881 is incorporated and forms part of the addendum and is legally enforceable "

1902 NOV 19 — PRIVY COUNCIL — 25 A 121

The Court of the Judicial Commissioner therefore passed a decree in favour of the plaintiff

The defendant appealed to His Majesty in Council

Mr. *Haldane*, K C, for the appellant contended that under section 13 of the Oudh Estates Act (I of 1869) the will was invalid because it was not properly registered within one month of its execution The will was taken from the Treasury to be registered as a will of the original date The addendum written at a later date made no addition to or alteration in it, and could not be considered as a codicil Nor was it a republication of the will so as to make it a new will Owing to the omission to carry out a provision of the law which would have retained [126] its validity, the will had become invalid and of no effect There could be no valid registration of it after one month from its execution Act I of 1869, sections 19 and 20, and the Indian Succession Act (X of 1865), sections 51 and 60, were referred to

Mr *Cohan*, K C, and Mr *DeGruyther* for the respondents were not heard

1902 *November* 19 —Their Lordships' judgment was delivered by Lord Macnaghten

Their Lordships are of opinion that the judgment of the Judicial Commissioner is right Whether the document in question is regarded as a codicil or as a will, it is perfectly good as a testamentary instrument and it must have its legitimate effect

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed The appellant will pay the respondent's costs of the appeal

Appeal dismissed

Solicitors for the appellant—Messrs *Gordon, Dalbiac and Pugh*
Solicitors for the respondent—Messrs *T L Wilson & Co*

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25 A 126 (=22 A. W N 197)

REVISIONAL CRIMINAL

Before Mr Justice Burkitt

HARBANS RAI AND OTHERS (*Applicants*) v CHUNNI LAL AND RAM PRASAD (*Opposite Parties*) *

[18th August, 1903]

Revision—Practice—Criminal Procedure Code section 195—Sanction to prosecute—Application for sanction refused by Magistrate—Independent application subsequently made to the Sessions Judge.

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* Criminal Revision No 487 of 1902

1902 AUG. 29.

REVISIONAL CRIMINAL.

25 A. 129= 22 A. W. N. 191.

to two years' rigorous imprisonment. As under section 418 of the Code of Criminal Procedure an appeal lies in a case like this on a matter of law, I have treated this application as if it were a memorandum of appeal. The first ground taken and urged by the learned counsel for the applicant is that the facts proved disclose no offence punishable under section 379 of the Indian Penal Code. The facts are that one Bhairo, an elderly man, had sustained injuries at the hands of the applicant, which are said to have caused his death the next afternoon. That night, while the body was lying outside the house of the mother of the deceased waiting to be taken to the river, the applicant with some other men came up, seized upon the corpse, carried it off, and threw it into the river. It is alleged that the object of this act was to prevent its being ascertained whether the deceased had died in consequence of the injuries inflicted on him by the the applicant. Anyhow, on the above facts, the applicant was committed for trial, and was tried by a jury on a charge under section 380 of the Indian Penal Code, afterwards altered into one under section 379 of the Indian Penal Code, and being convicted on the latter charge he was sentenced to two years' rigorous imprisonment. In his charge the learned Sessions Judge told the jury that if they [130] found that the accused, that is the applicant here, had the body taken off without the consent of the mother of the deceased, they should find the accused guilty of the offence of theft. The jury unanimously found a verdict of guilty.

Now it is urged by the learned counsel for the applicant that the facts found do not disclose an offence punishable under section 379 or 380 of the Indian Penal Code. In my opinion that contention is sound and must be sustained. The law in England is that there can be no property in a human being, whether living or dead, and that therefore stealing a corpse is not larceny, though it might be punishable as an offence against public decency. I know of no case in which a contrary view has been expressed in this country, and indeed I may say I know of no case, nor has any been cited to me, in which the question was raised in British India. Looking at the definition of the word "theft" as contained in section 378 of the Indian Penal Code, it is difficult to understand how the deceased here, an elderly man about fifty years of age, could be considered to have been "moveable property" in "the possession of" his mother during his life-time. If then he was not such property so possessed when alive, I fail to see how on his death his corpse became "moveable property in possession of" his mother. And further, with reference to the definition of the word "dishonestly," I am unable to see any "dishonest taking" in the removal of the corpse. I take it that the law on this question is the same in British India as in England; and as in England a human body, whether living or dead, cannot be the subject of larceny, so in India I hold that a human body, whether living or dead, cannot be the subject of "theft" as defined in the Indian Penal Code. These observations do not, of course, include the case of human bodies, or portions of such, or mummies, preserved in museums or scientific institutions. A different rule would probably be applicable to them. For the above reasons I accept the contention of the learned counsel that the facts of the case do not disclose the commission of the offence of theft. The conviction and sentence of two years' imprisonment are therefore set aside.

. . . . reference under section 438 which is to have an order of

1902 AUG 21

REVISIONAL CRIMINAL

25 A. 128= 22 A W N 200

[Fol 15 Cr L J 236=23 I C 188=26 M L J 160 15 Cr L J. 304=3 Cr L R 192 =12 A L J 255=23 I C 512 1 Ind Cas 238=5 N L R 4=9 Cr L J 211 29 I C 830=28 M L J 690=17 M L T 457=1915 M W N 411=16 Cr L J 558 Ref 38 Mad 1028 19 C W N 184]

IN this case one Abdul Ghani Khan, the servant of a zamindar, filed a complaint in the Court of a Tahsildar Magistrate to the effect that a certain tenant of the zamindar, by name Madar Bakhsh, who had been evicted by due process of law from his holding, had re entered upon the holding from which he had been evicted and had cut the crop that was growing thereon, and forcibly resisted attempts made to prevent him so doing The complainant charged Madar Bakhsh and those with him with theft Madar Bakhsh pleaded that the ejectment proceedings had been taken behind his back, and that he knew nothing about them, and he claimed to have sown the crop, and to be entitled to cut it The Tahsildar entertaining doubts as to whether the ejectment proceedings against Madar Bakhsh were not fraudulent and collusive, and inclining to the opinion that they were, acquitted Madar Bakhsh

The District Magistrate, disagreeing with the findings of the Tahsildar, reported the case through the Sessions Judge to the High Court for orders under section 438 of the Code of Criminal Procedure On this reference the following order was passed —

BURKITT, J —This is a reference in revision, the object of which is to induce this Court to set aside the acquittal of Madar Bakhsh I decline to entertain such an application on the revisional side If the Local Government desire to appeal from the acquittal, section 417 of the Code of Criminal Procedure is open to it Let the papers be returned

(See also *In the matter of Sheikh Aminuddin*, I L R 24 All 346—ED)

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25 A 129 (=22 A W N 191)

[129] REVISIONAL CRIMINAL

Before Mr Justice Burkitt

EMPEROR v RAMADHIN * [29th August, 1902]

Act No XLV of 1860 (*Indian Penal Code*), *section* 378—*Theft*—*Human body not capable of being the subject of theft*

Held that a human body, whether living or dead (except perhaps bodies, or portions thereof, or mummies, preserved in museums or scientific institutions), cannot be the subject of theft as defined in section 378 of the Indian Penal Code.

THE facts of this case sufficiently appear from the order of the Court

Mr *C C Dillon*, for the applicant

The Assistant Government Advocate (for whom Munshi *Gokul Prasad*), for the Crown

BURKITT, J —This is an application in revision on behalf of one Ramadhin, who has been convicted on a trial by jury of an offence punishable under section 379 of the Indian Penal Code, and sentenced

* Criminal Revision No. 520 of 1902

1902 Sep. 29.

APPELLATE CRIMINAL.

25 A. 132= 22 A.W.N. 198.

25 A. 132 (=22 A. W. N. 198.)

APPELLATE CRIMINAL.

Before Mr. Justice Burkitt.

EMPEROR *v.* IMTIAZAN AND OTHERS.* [29th September, 1902.]

Criminal Procedure Code, section 198—Act No. XLV of 1860 (Indian Penal Code), section 495—Bigamy—Prosecution started at the instance of the second husband's brother—"Person aggrieved."

Held, that in respect of a prosecution for bigamy the brother of the second (bigamous) husband of the accused was not a "person aggrieved" within the meaning of section 198 of the Code of Criminal Procedure, *Queen-Empress* v. *Bai Rukshmoni* (1) followed.

[Ref. 3 C. L. J. 38=3 Cr. L. J. 187; 7 Cr. L. J. 157=11 O. C. 148.]

IN this case one Rustam Khan brought a charge under section 420 of the Indian Penal Code against two persons, Basharat Khan and Karamat Khan, the brothers of Musammat Imtiazan. In his deposition as complainant in that case, Rustam Khan further formulated a charge against Imtiazan of having entered into a marriage with his brother Khiali Khan during the life-time of her legal husband Taleyar Khan, suppressing the fact of such former and subsisting marriage. A charge was framed against Imtiazan under section 495 of the Indian Penal Code, and against Basharat Khan and Karamat Khan under the same section read with section 109 of the Code, and they were all three committed to the Court of Session. It was there argued on behalf of the accused that the commitment could not stand because Rustam Khan, the complainant, was not a "person aggrieved" within the meaning of section 198 of the Code of Criminal Procedure, and reference was made to the case of *Queen-Empress* v. *Bai Rukshmoni* (1). The Sessions Judge, however, considered that, under the circumstances of the case, Rustam Khan was a "person aggrieved," and ultimately convicted and sentenced the three accused in respect of the offences charged. Against these convictions and sentences the convicts appealed from jail to the High Court.

The Government Pleader (for whom Munshi *Gokul Prasad*) for the Crown.

[133] BURKITT, J.—The conviction in this case cannot possibly stand. It is alleged that the appellant, Musammat Imtiazan, contracted a second marriage with one Khiali Khan during the life-time of one Taleyar Khan, to whom she had been married several years previously. She has been convicted of an offence punishable under section 495, and the other appellants have been convicted of abetment of the said offence. Now it has been distinctly laid down in the case of *Queen-Empress* v. *Bai Rukshmoni* (1) that the brother of a man, even though the latter was a lunatic, whose wife was prosecuted for bigamy, is not a person "aggrieved" within the meaning of section 198 of the Code of Criminal Procedure. In that opinion I fully concur, and I cannot understand how the Sessions Judge held otherwise. In this case, however, the complainant is neither the man to whom the woman was first married, nor his brother, but is a brother of the man with whom the alleged bigamy was committed. No complaint was made by the first husband, nor by the second, and I fail

* Criminal Appeal No. 681 of 1902.

(1) (1886) I. L. R. 10 Bom. 340.

25 A 131 (=22 A W N 197)

[131] REVISIONAL CRIMINAL

Before Mr Justice Burkitt

1902 Sep 13

REVISIONAL CRIMINAL

25 A. 131= 22 A.W N 197

EMPEROR v SHIB SINGH * [13th September, 1902]

Criminal Procedure Code, section 122—Security for good behaviour—Sureties offered refused on the ground of their relationship to the person required to find security

Where, on an order to find security for good behaviour, the Magistrate refused to accept the sureties tendered on the sole ground that they were relations of the person against whom the order had been passed, it was held that relationship to the person called upon to find security was, so far from being an objection, a most useful qualification in the persons tendered as sureties

[Ref 8 Cr L J 166=1 S L R 46 59 I C 134=22 Cr L J 22 Fol 142 P L R 1914=6 P R 1914=4 Cr L R 144]

IN this case a Magistrate, acting under section 110 and the following sections of the Code of Criminal Procedure, passed an order calling upon one Shib Singh to find security for good behaviour Sureties were tendered who were relations of Shib Singh, but they were rejected by the Magistrate under section 122 of the Code Against the order of rejection an application in revision was presented to the High Court, and on inquiry from the Magistrate concerned, it was ascertained that, except for their relationship to Shib Singh, the sureties offered were otherwise unobjectionable

Babu *Satya Chandra Mukerji*, for the applicant

BURKITT, J —The Magistrate of the District, in reply to an inquiry from this Court, has reported that if the relationship between the appellant and the persons tendered as sureties be not taken into consideration, those persons are fit persons to be accepted as sureties for the said person In my opinion the Magistrate is wrong in refusing to accept as sureties persons otherwise fit, because those persons are relations of the person ordered to give security In fact, to my mind it is, on the contrary, desirable that relations should, under such circumstances, be accepted as sureties, they being persons who not only would be interested in restraining their relative from committing offences, but who also by reason of their relationship might be able effectually to use their family influence over him for that purpose So far from considering relationship a reason for refusing, I am of opinion that it is a most useful qualification in the persons tendered as sureties, if they be in other respects suitable I must set aside that part of the Magistrate's [132] order, which declines to accept as sureties those persons, because they are relations, and as they are reported to be otherwise persons whose security may be accepted, I direct that it be accepted

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* Criminal Revision No 561 of 1902

1902 Nov. 3. — APPELLATE CIVIL. — 25 A. 133=22 A. W. N. 215.

commends itself to us. We see no reason for restraining the wide language of section 53, and the provisions of section 32 of the Code of Civil Procedure appear to us to be in no way inconsistent with anything contained in Act No. I of 1894. To us it appears distinctly in the interest of all that the questions which arise as to compensation to be paid for a piece of land taken up should be dealt with as far as possible at one and the same time. We [135] asked the appellant to point out to us what injury would accrue to him from the adoption of such procedure. No particular injury was pointed out. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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25 A. 135 (=22 A. W. N. 219.)

MISCELLANEOUS CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

RAMLAL (*Defendant*) v. KABUL SINGH (*Plaintiff*).*
[3rd November, 1902.]

Civil Procedure Code, section 646B—Small Cause Court—Jurisdiction—Question of jurisdiction not raised in the Court of Small Causes—Reference by District Judge under section 646B declined.

Section 646B of the Code of Civil Procedure does not apply to every case in which a Court of Small Causes has failed to exercise a jurisdiction vested in it by law, or has exercised a jurisdiction not vested in it by law, but only to a restricted number of such cases, namely those cases in which a Court of Small Causes has erroneously held a suit to be, or not to be, cognizable by it.

Where no question as to the Court's jurisdiction was raised by either party, and the Court of Small Causes proceeded to judgment as if the case was properly cognizable by it, the High Court refused to interfere upon a reference made by the District Judge purporting to be made under section 646B of the Code of Civil Procedure.

[Fol. 19 C. W. N. 900=27 I. C. 972=21 C. L. J. 141; Ref. 30 Mad. 41; 6 M. L. T. 121; 33 Mad. 323; Rel. 37 I. C. 991=1 Pat. L. W. 232.]

ONE Kabul Singh brought a suit against Ram Lal, a civil court amin, and Shib Lal, the judgment-creditor, on account of damage done to his country cart while under attachment in execution of a decree. The case was tried as a Small Cause Court suit, and no question as to its not being a suit of the nature cognizable by a Court of Small Causes was raised at the hearing. A decree having been passed in favour of the plaintiff, the defendant Ram Lal applied to the District Judge asking that a reference might be made to the High Court under the provisions of section 646B of the Code of Civil Procedure, and the case was referred accordingly.

Dr. *Tej Bahadur Sapru*, in support of the reference.

KNOX and BLAIR, JJ.—The learned District Judge of Meerut has referred this case, which is now before us, under section 646B of the Code of Civil Procedure. The learned Judge is of opinion that a Court subordinate to him, namely the [136] Court of the Munsif of Meerut, in trying a suit between one Kabul Singh and Ram Lal, defendant, exercised a jurisdiction which was not vested in that Court by law. The learned Judge appears to have overlooked the fact that section 646B does not apply to any or every case in which a Court of Small Causes has exercised a jurisdiction not vested in it by law, but only to a

* Miscellaneous No. 95 of 1902.

to see how the brother of the second husband can in any way be considered an aggrieved party

1902 Sep 29

I set aside the convictions and sentences passed on the appellants and I direct their release

APPELLATE CRIMINAL

25 A 132= 22 A W N 198

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25 A 133 (=22 A W N 215)

APPELLATE CIVIL

Before Mr Justice Knox and Mr Justice Blair

KISHAN CHAND (*Defendant*) v JAGANNATH PRASAD AND ANOTHER (*Plaintiffs*) AND GANESH PRASAD (*Applicant*) *
[3rd November, 1902]

Act No 1 of 1894 (Land Acquisition Act) sections 30, 53—Civil Procedure Code, section 32—Parties—Reference by Collector as to apportionment of compensation—Addition by Judge of party to reference

Judge to add a party to the proceedings before him having regard to section 53 of the Act and section 32 of the Code of Civil Procedure

[Appr 11 C W N 430 Ref 12 Bom L R 34 34 Bom 618]

[134] THIS was an appeal against an order of the District Judge of Benares in a proceeding under the Land Acquisition Act 1894 There was pending before the District Judge a reference made by the Collector under section 30 of that Act One Ganesh Prasad filed an application in the District Judge's Court asking to be made a party to those proceedings on the allegation he had been in adverse possession of a portion of the property claimed by one of the parties to the reference The District Judge entertained this application made Ganesh Prasad a party, and proceeded to fix issues regarding the rights of all the parties on the record Against this order one of the parties to the reference appealed to the High Court

Mr *R Malcomson* for the appellant

Pandit *Madan Mohan Malaviya*, for the respondents

KNOX and BLAIR, JJ —This is an appeal from an order passed by the District Magistrate of Benares under the Land Acquisition Act of 1894 The Collector had before him a dispute which had arisen, and which he was empowered to refer, and did refer, under section 30 To that dispute at the time when it was referred, Ganesh Prasad, one of the respondents before us, was no party After the matter had reached the District Court, Ganesh Prasad, considering himself interested in the result, applied to the District Court to be made a party He was made a party and it is from the order making him a party that this appeal arises The contention before us is that the Judge had no jurisdiction under the Land Acquisition Act to deal with any matter but the particular dispute which was referred to him by the Collector The answer on the other side is that the provisions of section 53 of Act No I of 1894 are sufficiently large to allow the adaptation of section 32 of the Civil Procedure Code to the matter before the Judge The latter argument

* First Appeal No 32 of 1902 from an order of J Sanders, Esq, District Judge of Benares, dated the 12th of March 1902

1902 NOV. 5.

APPELLATE CIVIL.

25 A. 137= 22 A. W. N. 206.

Mr. *Karamat Husain* and Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C. J. and BANERJI, J.—The suit out of which this appeal has arisen was a suit brought by one Musammat Zainab, who claimed a right to sue *in forma pauperis*. On the 24th of April, 1896, Musammat Zainab, who had gone on a pilgrimage to Mecca, died; but in ignorance of her death the hearing of the suit was allowed to proceed, and a decree was passed in her favour on the 30th of June, 1896. Subsequently, the death of Musammat Zainab having been in the meantime ascertained, an appeal was preferred to the High Court to have the decree of the 30th of June, 1896, set aside; the present respondent Musammat Alia Bibi, as legal representative of Musammat Zainab, being made a party to the suit for the purpose of that appeal. On the 15th of March 1899, the appeal came on for hearing before a Bench of the High Court, whereupon both parties agreed that the decree should be set aside, and the case remanded to the Court below for trial as between the [138] defendants and the legal representative of the deceased plaintiff. Accordingly, by consent of the parties, the Court passed an order allowing the appeal, setting aside the decree of the Court below, and remanding the case to that Court to be readmitted under its original number on the register, and to be tried on the merits. The suit has, in accordance with the order of this Court, been tried on the merits between the parties to the appeal, that is the present appellant and the present plaintiff respondent as representative of Musammat Zainab, with the result that a decree was passed in favour of the plaintiff.

It is now objected that a decree ought not to have been passed, nor should the respondent have been allowed to sue *in formâ pauperis* without an inquiry first having been held as to her alleged pauperism, and a determination obtained in her favour upon that issue.

It appears to us that there is nothing in this objection, for this reason that the parties to this appeal by consent in Court agreed that the case should be remanded to the Court below for trial on the merits, and an order was made accordingly. This order presupposes that the parties were properly before the Court, and that the suit *in formâ pauperis* had been properly instituted. It is too late now to seek to go behind this order. Accordingly, as none of the other objections in the memorandum of appeal have been pressed before us by the learned counsel for the appellant, for the reasons which we have stated, the appeal fails. We therefore dismiss it with costs.

Appeal dismissed.

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25 A. 138 (=22 A. W. N. 220.)

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

GOMTI KUNWAR (*Defendant*) *v.* GUDRI (*Plaintiff*).* [5th November, 1902.]

Civil Procedure Code, section 13—Res judicata—Decision by a Court of Revenue in a suit for rent as to the genuineness of a document no bar to the determination of such issue by a Civil Court.

In a suit for rent brought in a Court of Revenue the plaintiff produced in support of his claim the counterpart of a lease alleged to have been exe-

* First Appeal No. 62 of 1902, from an order of C. Rustomji, Esq., District Judge of Allahabad, dated the 30th of April, 1902.

restricted number of such cases, namely those cases in which the Court of Small Causes has, by reason of erroneously holding a suit to be cognizable by it, exercised a jurisdiction not vested in it by law There is procedure sanctioned by law which provides for cases in which a Court of Small Causes has acted without jurisdiction In the present case the learned vakil who appears for the applicant Ram Lal has very properly allowed that the question of jurisdiction or want of jurisdiction was never raised before the Court of Small Causes If not raised there, there could be no holding and no decision It was contended, first, that Ram Lal, by mentioning in his written reply that he attached the articles under a decree of Court, raised the question of jurisdiction, if we may so term it, in spirit, secondly, that the Court of Small Causes should have considered whether the suit before it was one which it had jurisdiction to entertain independently of whether an actual plea was or was not taken to that effect Neither of these contentions approves itself to us What took place in the case is very evident The defendant lost his case, and then, for the first time, had it suggested to him that there was a plea which he might have raised before a Court of Small Causes with effect, and thereupon tried to get the decision reversed by an application to the District Judge We are not in favour of assisting parties to set aside decrees upon points which they did not raise before the Court which tried the matters in issue, and of which they gave no notice to the opposite party The plea of want of jurisdiction could have been met by facts showing that the want alleged did not exist, and if the other side had had notice, it might have shown that the alleged act was an act of wanton mischief, or some similar kind which would have rebutted the plea of want of jurisdiction We decline to interfere.

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25 A. 137 (=22 A W. N 206)

[137] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji

AKBAR HUSAIN (*Defendant*) v ALIA BIBI (*Plaintiff*) *
[5th November, 1902]

Civil Procedure Cod
plaintiff—Decre
order for retrial—
Estoppel

The plaintiff in a suit brought *in forma pauperis* died, but in ignorance of her death the Court passed a decree in her favour The defendant appealed, making respondent to his appeal a lady whom he alleged to be the legal representative of the deceased plaintiff On this appeal an order was passed by consent of parties sending back the suit to be re tried on the merits as between the defendant and the person nominated by him as plaintiff, and it was so re tried, and a decree was again passed in favour of the plaintiff *Held* that it was not thereafter open to the defendant to object that there had been no inquiry into the right of the representative of the original plaintiff to sue as a pauper

THE facts of this case sufficiently appear from the judgment of the Court

Mr *Abdul Majid*, for the appellant

* First Appeal No 58 of 1900, from a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 19th day of December 1899

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APPELLATE CIVIL.

25 A. 138= 22 A. W. N. 220.

On these grounds we are asked to hold that the relief asked for was of such a nature as should not be granted.

Reliance was placed on the case of *Rai Krishn Chand* v. *Mahadeo Singh* (1). We have examined this precedent. What was held there was, that a Civil Court should not make a declaration that the compromise of proceedings in the Revenue Court, upon which the Revenue Court had made a decree or order, was illegal or without authority. That question is very different from the one before us, and it is sufficient to say with regard to that precedent that it can be no guide to the issue which we have to decide. The compromise was intended by the parties to be, and did merge into, a decree, and may practically be looked upon as a decree of the Rent Court.

The real point that we have to see, first, in this case is whether section 13 does or does not prevent a Civil Court from trying the issue which has been raised before it. In considering this we have to ask ourselves the further question, was the Rent Court which tried the issue in the first instance a Court of jurisdiction competent to try the present suit? The answer to this must be in the negative. A second Court, so far as [141] this point is concerned, is only debarred from trying an issue which has been directly and substantially in issue in a former suit, and has been determined in the former suit when the Court which so heard and determined it was a Court of jurisdiction competent to try the subsequent suit. What we have just laid down is no new matter. It has come before their Lordships of the Privy Council in the case of *Gokul Mandar* v. *Pudmanund Singh* (2). Indeed the issue now before us may be said to be precisely the same as that which came before their Lordships in the case just quoted, for that case is of still further assistance to us, as their Lordships went on to observe "that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction." This is precisely what we should be doing if we acceded to the argument we have heard to-day. We have the clear provisions of section 13, which are applicable to the Rent Courts, and outside this we do not propose to go. As regards the further point as to whether a declaratory decree should be given in the present case, we are prepared to follow the learned vakil in the view he takes that the decree will be of no value. We therefore dismiss the appeal with costs.

Appeal dismissed.

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25 A. 141 (=22 A. W. N. 221.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

MUNAWAR ALI (*Objector*) v. SHAKIRAT-UN-NISSA BIBI AND OTHERS (*Applicants*).* [5th November, 1902.]

Act No. XIX of 1873 (*N.-W. P. Land Revenue* [illegible] [illegible]*ion* 114—*Partition—Order refusing to stay partition—Appeal—Jurisd*[illegible] [illegible]*h Court.*

[illegible] under section 114 of the No[illegible] [illegible]rovinces Land Revenue [illegible] High Court can only en[illegible] from orders and deci-

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[illegible] Assistant

52 of 1900, from a [illegible]

Co[illegible] the 17th January, 1[illegible]

(1) [illegible] 49. (2[illegible]

on, but the Revenue
that the counterpart
vil Court, asking for
vas not executed by
him, and was not a genuine document *Held*, that the decision of the Revenue Courts could not operate as *res judicata*, such Courts having no jurisdiction to try the subsequent suit, and section 13 of the Code of Civil Procedure being exhaustive on the subject of what constitutes *res judicata* *Gokul Mandar* v *Pudmanund Singh* (1) referred to *Rai Krishn Chand* v *Mahadeo Singh* (2) distinguished.

1902 NOV 5

APPELLATE CIVIL

24 A 138= 22 A W N 220.

[Ref 31 Mad. 62=3 M L T 186=17 M L J 601 51 I C 127=29 C L J 137 37 I C 358, 12 P R 1909=73 P W R 1908=124 P L R 1908=1 Ind Cas 321, Dist 37 All. 41, 26 All 468, Fol 23 I C 705]

THE facts of this case sufficiently appear from the judgment of the Court

Babu *Satya Chandar Mukerji*, Pandit *Madan Mohan Malaviya*, Babu *D N Ohdedar* and Munshi *Datti Lal*, for the appellant

Dr *Satish Chandar Banerji*, for the respondent

KNOX and BLAIR, JJ —The proceedings out of which this appeal has arisen derived their origin from a suit which was instituted in a Rent Court In that Court the husband of Musammat Gomti Kunwar, who is now defendant and appellant before us, sued Gudri, the plaintiff in the Court of first instance and respondent before us, for the rent of certain land In support of the claim for rent the husband of Musammat Gomti Kunwar filed a counterpart, which he alleged had been executed in his favour by Gudri Gudri denied the execution of the counterpart The Rent Court went into the question thus raised, and determined the point in favour of the husband of Musammat Gomti Kunwar The matter was carried on in appeal as far as it could be, but in all the Courts the decision arrived at was that the counterpart was valid, and had been executed by Gudri in favour of the husband of Musammat Gomti Kunwar Having failed in the Rent Courts, Gudri instituted a suit in the Civil Court, and asked for a declaration to the effect that the counterpart was not executed by him, and was not a genuine document The Court of first instance dismissed his claim on the ground that the particular issue, having been heard and determined by the Rent Court, was *res judicata*, and the Civil Court was debarred from trying it. In appeal the learned Judge held that the decision of the Rent Courts upon this issue must be taken to be a decision on an incidental issue, and one that could not operate as *res judicata* [140] He accordingly set aside the decision of the Court of first instance, and remanded the suit under section 562 of the Code of Civil Procedure It is from that order of remand that the present appeal has been filed

The pleas taken in the memorandum of appeal, and the arguments addressed to us, impugn the decision of the appellate Court The issue, it is contended, was not an incidental issue, but an issue upon a material point necessary for the proper decision of the suit in the Rent Courts Further, it was contended that if section 13 of the Code of Civil Procedure did not operate as bar, the principle contained in section 13 was powerful enough, and should be applied Further argument is addressed to us to the effect that, though the decree asked for is a declaratory decree, the real object of the plaintiff was to reagitate a question which had been heard and finally determined in the Rent Courts, and that such a decree, if granted, could have no beneficial effect

(1) (1902) 6 C W N 825 (2) Weekly Notes, 1901, p 49.

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Where a person, though alive at the time the plaintiff closed his case, was not called as a witness, statements in writing by such person filed before his death in support of the plaintiff's case were held by the Judicial Committee to be inadmissible in evidence as statements of a deceased person.

A genealogical table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for the purposes of a former suit, was held to be inadmissible in evidence, having been made without the personal knowledge and belief which must be found or presumed in any admissible statement by a deceased person.

In the report of a patwari as to the date of a death, the native date was given and after it what purported to be the corresponding English date. The dates being found not to correspond: *Held,* on a question of limitation, that the substantive statement was that given in the vernacular and that the rest was a miscalculation.

[Ref. 8 O. C. 94; 31 Cal. 871; 26 All. 393.]

APPEAL from a decree (26th October, 1898) of the Court of the Judicial Commissioner of Oudh, Lucknow, reversing a decree (29th August, 1895) of the Judge of the Small Cause Court of Lucknow (vested with the powers of a Subordinate Judge), by which the respondents' suit was dismissed with costs. The suit raised the question of title to the estate of Dasrathpur, a taluqa in the Partabgarh district of Oudh, which was granted by the British Government in March 1858 to one Thakur Hanuman Singh whose name was entered in lists 1 and 2 prepared under the provisions of section 8 of the Oudh Estates Act (I of 1869), and that Act therefore regulated the succession to the estate. His son Sheoambar Singh predeceased his father, and on Hanuman Singh's death the estate descended to his grandson Rudar Narain Singh, who died a minor intestate and unmarried on the 8th of May, 1869.

[144] The plaintiff alleged that Rudar Narain was the last absolute owner of the estate. On his death his mother Kharag Kunwar had possession of it as a Hindu mother until her death on the 29th of July, 1879. Shagunath Kunwar, the step-mother of Rudar Narain, also had her name recorded on the register of owners and she remained in possession after the death of Kharag Kunwar, until the 21st of November, 1881, when she died. Ran Bijai Bahadur then obtained possession of the estate, claiming under a will alleged to have been executed by Shagunath Kunwar, and on the 28th of February 1882, her name was recorded as owner in the Revenue Register. On the 7th of December 1882, the defendant's father Jagmohan Singh (who was insane and sued by his wife as his next friend) and Bisheshar Singh his younger brother, brought a suit against Ran Bijai for possession of the estate. On Jagmohan's death, Jagatpal Singh his son, was brought on the record of that suit and on the 30th of April 1890, obtained a decree of Her late Majesty in Council for possession of taluqa Dasrathpur—see *Jagatpal Singh* v. *Ran Bijai Bahadur Singh* (1). In that case the Judicial Committee held that the estate was impartible and that its descent was governed by the rule of primogeniture. The present suit was brought by Jageshar Bakhsh Singh and Rajendra Bahadur Singh the son of Ran Bijai Bahadur Singh against Jagatpal to recover possession. The suit was instituted on the 23rd of July, 1891.

The plaint stated that the succession opened on the death of Kharag Kunwar on the 29th of July, 1879, and at that time the next heir of Rudar Narain Singh was entitled to succeed; that that heir was Sangram Singh, the plaintiff, Jageshar's father, all the persons nearer in degree to

(1) (1890) L. R. 17 I. A. 173; I. L. R. 18 Cal. 111.

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sions whereby the rights of parties are declared No power is given to the High Court to restrain the Collector or Assistant Collector from entertaining an application for perfect partition

IN this case Musammat Shakirat un nissa Bibi and others, as zamindars of some 11 annas odd of the village of Yunuspur, [142] in the District of Jaunpur, filed an application in the Court of the Assistant Collector of Jaunpur under section 108 of the N-W P Land Revenue Act, 1873, asking for perfect partition of their share This application was opposed by Munawar Ali, the owner of the remainder of the village, upon the ground that, although the applicants claimed title under a decree of the High Court, that decree was at present under appeal before the Privy Council and might possibly be upset, in which case the expenses of the partition would be wasted The Assistant Collector considering that on the strength of their decree the applicants were entitled to a partition, disallowed the objection, and directed the partition to be proceeded with Against this order the objector appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellant

Babu *Satya Chandra Mukerji*, for the respondents

STANLEY, C J and BANERJI J —This is an appeal in substance to restrain the Assistant Collector from entertaining an application for perfect partition of property The question at once arises as to whether the Court can entertain such an appeal Under section 114 of the Land Revenue Act of 1873, under which this application for partition is made, this Court is only empowered to decide appeals from orders or decisions passed by the Collector or Assistant Collector of the District under the preceding clause, in the words of the section, "for declaring the rights of the parties The word "for" appears to us to be somewhat out of place No force can be attached to it It is perfectly clear that according to the true meaning of the section this Court can only entertain appeals from orders and decisions whereby the rights of parties are declared No power is given to this Court to restrain the Collector or Assistant Collector from entertaining an application for perfect partition, and therefore it appears to us that the appeal cannot be sustained It may be that, under the circumstances under which the application was made, if a proper application be made to the Collector he may think fit to stay all proceedings, but that is a matter entirely for his discretion We, therefore, must dismiss this appeal with costs

Appeal dismissed

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25 A 143 (=30 I A 27=7 C W N 20=8 Sar 367)

[143] PRIVY COUNCIL

PRESENT

Lord Davey, Lord Robertson, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser

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JAGATPAL SINGH (*Defendant*) v JAGESHAR BAKHSH SINGH AND OTHERS (*Plaintiffs*) [3rd and 18th July and 3rd December, 1902]

[*On appeal from the Court of the Judicial Commissioner of Oudh*]

Evidence—Admissibility in evidence of statement in writing by person who could h[ave] been called as a witness but was not—Statement of deceased persons—Act No 1872 (Indian Evidence Act), section 32—Report of patwari—Native and En[glish] dates not corresponding—Limitation.

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is deciding the case now, and the person making the statement is no longer in the world, hence it is admissible. The evidence of plaintiff's witnesses Nos. 6, 7 and 8 shows that Beni Bakhsh was alive when the document in question was filed. The Court is required to see whether the document was admissible at the time it was presented, and not at the time of deciding the case. Beni Bakhsh was alive at the time of the presentation of the document: his evidence was therefore available. It is only when a person who made the statement is dead, or cannot be found or is incapable of giving evidence, that his statement can be admitted in evidence; what I mean to say is that the statement made is admissible when the person making it is not in a position to come to the witness-box. It was never intended that a statement of a person alive at the time of presentation, but who has died since then during the trial of the case, may be admitted in evidence, because the ordinary test of truth afforded by the administration of oath, and by cross-examination, which were available at the time, should not have been made use of, this test is not exercised as the witness is not available; thus, I think, as it is shown that Beni Bakhsh was alive, plaintiff ought to have put him in the witness-box and have subjected him to cross-examination, but he did not do so: he is to blame and nobody else. This exhibit is therefore inadmissible."

Exhibits 6, 12, and 56 were rejected for the same reasons. Another document, exhibit No. 9, was a copy of a genealogical table filed on behalf of Gurdat Singh in a suit brought by him against Drigbijai Singh, and dated the 2nd of December, 1891. This was admitted in evidence by the first Court.

In the result, on the point relating to the pedigree, the first Court dismissed the suit with costs. From this decree the plaintiffs appealed to the Court of the Judicial Commissioner of Oudh, and that Court held (1) that Kharag Kunwar took only a woman's estate of inheritance, and that on her death the heir of Rudar Narain Singh was entitled to succeed; (2) that on the question of pedigree it had been proved that Pahalwan Singh was senior to Zabar Singh, that Sheo Prasad was senior to [147] Sarnet Singh and that Sitla Bakhsh had predeceased Kharag Kunwar, the plaintiffs, and that the first Court had improperly rejected exhibits 5, 6, 12 and 56 and had applied too severe a test to the oral evidence; and (3) that Kharag Kunwar did not die before the 24th of July, 1879, placing much weight on the statement in the plaint in the suit instituted by Jagmohan on the 7th of December, 1882, which stated the 29th of July, 1879, as the date of her death.

On the second point the Judicial Commissioner said:—

"The Subordinate Judge has held Exhibits Nos. 5, 6, 12, and 56 inadmissible. The circumstances are as follows:—Documents were filed on 1st December, 1891. Their genuineness was admitted on the 2nd of December, 1891. Beni Bakhsh was summoned as a witness by both parties. He did not appear. The Court refused to issue a warrant for his arrest, and ordered that he should be again summoned. Eventually, the plaintiffs closed their case on the 4th July, 1892, without examining Beni Bakhsh. Beni Bakhsh was personally served with a summons on the 31st of March, 1893. On the 30th of September, 1893, plaintiffs applied to have Beni Bakhsh examined. The Court postponed passing orders on this petition until the return of the evidence taken on commissions. Defendant's petition of 21st July, 1894, shows that Beni Bakhsh was then dead. On that date the Court received three documents from the defendant on the ground that Beni Bakhsh was dead, and could no longer give evidence for him. They are: A16, plaint of Beni Bakhsh, dated 7th June, 1871, for declaration of right to village Bahuta; A17, statement of Beni Bakhsh and others as to pedigree, dated 28th of August, 1871, already referred to; and A18, deed of gift by Gurdat to Beni Bakhsh, dated 8th of February, 1871. The Subordinate Judge reserved the question of admissibility of all documents till final argument and judgment. In his judgment he held plaintiff's documents referred to above inadmissible, because plaintiffs had not

him and also Sitla Bakhsh of those equal in degree to him, being then dead that according to the true pedigree, Pahalwan Singh was the eldest son of Zorawar Singh, and Sheo Prasad the eldest son of Pahalwan Singh, and that Sangram Singh died on the 7th of January, 1882 The plaintiff Jageshar then claimed to be descended from the eldest line of those equal in degree He also claimed that his father was entitled to succeed as being the senior in [145] age of the persons alive when the succession opened, and pleaded that Jagmohan Singh, the father of the defendant, was excluded from inheritance in consequence of his insanity

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The pedigree relied upon by the plaintiff is set out in their Lordships' judgment

In his written statement the defendant pleaded that Kharag Kunwar, having succeeded under the provisions of Act No I of 1869, section 22, became a fresh stock of descent, and that the plaintiff was not, and did not claim to be, her heir, that even if the succession opened on her death to the next heir of Rudar Narain Singh, the plaintiff's father was not such next heir, that the true pedigree showed persons other than the parties to the suit and their ancestors, who, if alive, were nearer in degree than the plaintiff, that Sitla Bakhsh did not predecease Kharag Kunwar, that Sangram Singh was not the eldest in age on the death of Kharag Kunwar, and that such circumstance even if true was immaterial, and that Kharag Kunwar died on the 20th of July, 1879, and consequently the suit brought on the 23rd of July, 1891, was barred by limitation

The first Court held on the main points raised in the suit (1) that Kharag Kunwar neither under the Hindu law nor the provisions of Act I of 1869 took a larger estate than a Hindu woman's estate of inheritance, and that on her death the succession opened to the next heir of Rudar Narain Singh, (2) that "taking the oral as well as the documentary evidence into consideration," it did not prove that Pahalwan Singh was older than Zabar Singh, that on this issue the documents admissible were the plaintiff's exhibits 1, 2, 9, 10, 32, 33, 36, 45, 46, 54 and 55, and the defendant's exhibit A15, and that no reliance could be placed on the oral evidence produced by the plaintiffs, and (3) that in the previous suit by Jagmohan Singh against Ran Bijai Bahadur, the 29th of July, 1879, had been stated as the date of Kharag Kunwar's death, that the burden of proof was thus shifted to the defendant to establish that she did not die on that date, and that having failed to discharge it, that must be assumed to be the correct date of her death, and consequently the suit was not barred by limitation

[146] On the second point (as to the pedigree) the first Court rejected documents produced by the plaintiff and Nos 5, 6, 12 and 56 As to No 5 he said —

"Exhibit No 5 is a copy of the plaint, dated 12th February 1869 [illegible] by [illegible] at [illegible] y. [illegible] of relationship are not included, about which I have already expressed my opinion Secondly, on the ground that when this document was filed, Beni Bakhsh Singh being alive, it was not the statement of a dead person Plaintiff's pleader contends that as the Court

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if they were held to be inadmissible, there was not sufficient evidence to show that Pahalwan Singh, the ancestor of the respondents, was senior to Zabar Singh, from whom the appellant was descended; and this was a fact in the respondent's case which was essential to their success. On the question of the admissibility of the evidence, oral and documentary, the Civil Procedure Code (Act No. XIV of 1882), sections 138, 142A, 179 and 180, the Evidence Act (I of 1872), section 32, clause 5, and section 158, and *Sangram Singh* v. *Rajan Bahi* (1), were referred to. The Judicial Commissioner's decree should, it was submitted, be reversed and the suit dismissed with costs.

Mr. *Mayne* for the respondents contended that it had been rightly decided by both Courts below that Kharag Kunwar took under section 22 of the Oudh Estates Act only a limited estate, and that the property in suit descended to the senior and the nearest in degree of the members of the family, and not according to the rule of lineal primogeniture. *Ran Bijai Bahadur Singh* v. *Jagatpal Singh* (2) and *Narindra Bahadur Singh* v. *Achal Ram* (3) were referred to.

As to limitation, the Courts below were concurrent on the facts on which the question depended, both Courts having held that Kharag Kunwar did not die before the 24th of July, 1879, and therefore the suit, having been instituted on the 23rd of July, 1891, was in time.

The documents, exhibits 5, 6, 12 and 56, relating to the respondents' pedigree, had been rightly admitted by the Judicial Commissioners. They became admissible at any rate on Beni Bakhsh's death, and at that time when produced they should have been admitted. Documents produced by the appellant were admitted on the ground that Beni Bakhsh was then dead. But even if the above-mentioned exhibits produced by the respondents were wrongly admitted, such admission was merely an irregularity which was covered by section 578 of the Civil [150] Procedure Code, and did not cause the suit to be wrongly decided as they were not essential to the respondents' case. There was sufficient evidence without them to establish it. To show this the evidence, oral and documentary, was discussed at length, and it was submitted that the decision of the Judicial Commissioners should be upheld and the appeal dismissed.

Mr. *DeGruyther* replied.

1902, *December 3rd.*—Their Lordships' judgment was delivered by LORD ROBERTSON:—

The subject of the present dispute is Dasrathpur, a taluq in Oudh, which was granted by the British Government in 1858 to a certain Thakur Hanuman Singh. His name was entered in lists 1 and 2, prepared under the provisions of the Oudh Estates Act (I of 1869). It results that the succession is regulated by section 22 of that Act; and,

(1) (1885) L. R. 12 I. A. 183; I. L. R. 12 Cal. 219.
(2) (1890) L. R. 17 I. A. 173; I. L. R. 18 Cal. 111.
(3) (1893) L. R. 20 I. A. 77; I. L. R. 20 Cal. 649.

called Beni Bakhsh as a witness The Court subsequently found Exhibits A16 and A17 inadmissible I can find no ruling as to the admissibility of A18 on the record The appellants contend that the Lower Court, having accepted documents from defendant in consequence of Beni Bakhsh s death, should also have accepted documents from them, which they might have put to Beni Bakhsh in cross examination Section 158 of the Evidence Act lends support to this view, and in this Court the pleader for the respondent was unable to contend that these exhibits were inadmissible under that section I find these documents, Exhibits 5, 6, 12, and 56, admissible "

As to exhibit No 9 he said —

"Exhibit 9 is only said to have been filed 'on behalf of Gurdat' It shows Sheo Pershad to be younger than Gurdat I find the statement admissible as that of Gurdat, a member of the family '

On the second point the Court of the Judicial Commissioner reversed the decree of the first Court and passed a decree in [148] favour of the plaintiff, and from this decree the defendant appealed to His Majesty in Council

Mr *DeGruyther* for the appellant contended that Kharag Kunwar acquired an absolute estate in the property in suit, and formed a fresh stock of descent On her death therefore her heirs were entitled to succeed her, and not the heirs of Rudar Narain Singh The question depended on what was the true construction of section 22 of the Oudh Estates Act (I of 1869) Kharag Kunwar took under clause 11 of that section, and was an " heir within the meaning of that clause The definition of " heir in section 2 excluded a widow, but Kharag Kunwar took as a " mother and succeeded as an absolute heir and owner of the estate, taking a full taluqdari title just as any other member would inherit under the preceding ten clauses of section 22 As to the devolution of an estate under that section *Brij Indar Bahadur Singh* v *Jankee Koer* (1), *Dewan Ran Bijai Bahadur Singh* v *Rae Jagatpal Singh* (2) and *Narindar Bahadur Singh* v *Achal Ram* (3), and Sykes' Compendium of the Oudh Taluqdari Law were referred to

As to limitation it was contended that there was evidence which showed that Kharag Kunwar died on the 20th and not on the 29th of July, 1879, and that the respondents had not proved that her death took place within 12 years of the institution of the suit, which, therefore, should have been held to be barred by lapse of time

As to the pedigree put forward by the respondents, it was contended that the evidence on the record was wholly insufficient to establish it The oral evidence adduced by the respondents was worthless, and was besides inadmissible The principal documentary evidence in support of the pedigree was also inadmissible The documents 5, 6, 12 and 56 which had been rightly rejected by the first Court on the ground that they were statements by Beni Bakhsh, who was alive at the time the respondents closed their case, and yet had not been called as a witness, had been wrongly admitted by the Judicial [149] Commissioners They should, it was submitted, be rejected, and,

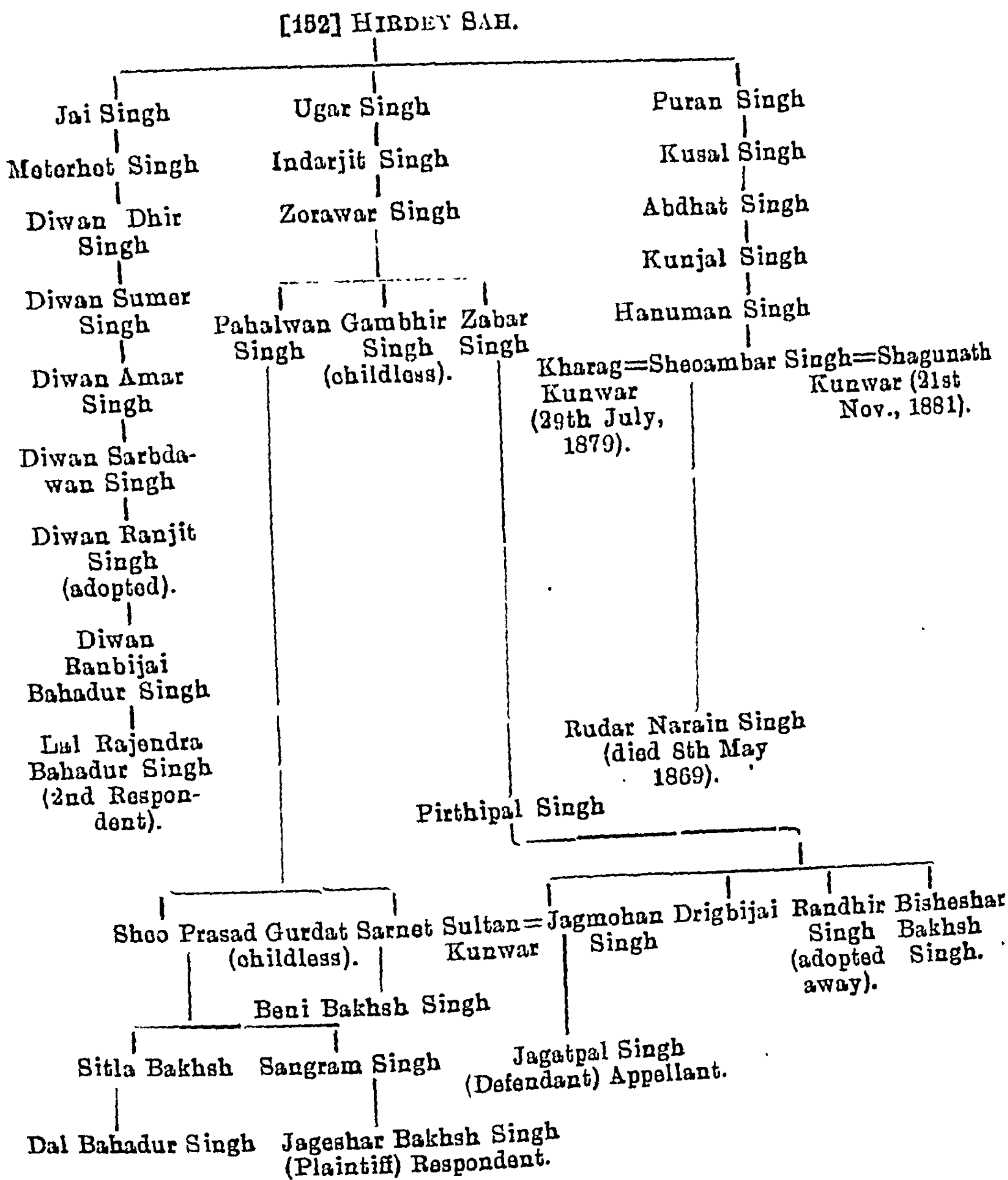
(1) (1877) L R. 5 I A 1
(2) (1890) L. R. 17 I A. 173 I L R 18 Cal 111
(3) (1893) L. R 20 I A 77 I L. R. 20 Cal 649

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convenient to set out the pedigree put forward in the respondents' case. It is as follows :—



The questions raised by the appellant's written statement were numerous, but it is unnecessary to enumerate these, as the vital controversy came to be on three points, and ultimately on one point, in the genealogical tree of the respondents. That point may be thus stated with reference to the central part of the pedigree :—Were the Judicial Commissioners right in holding that the respondents have established that Pahalwan Singh, from whom they descend, was born before Zabar Singh, from whom the appellant descends? Unless the respondents have made this out, the other highly disputable propositions maintained by them never arise.

[153] Now the Subordinate Judge of Partabgarh who tried the case decided this question against the respondents on the 19th of December, 1895, and in reversing this judgment the Judicial Commissioners largely proceeded on documentary evidence, which the Subordinate Judge

as the first ten sub sections of section 22 do not apply, the rule is to be found in the 11th sub section, the estate goes to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar are subject On the death of Hanuman, his grandson, Rudar Narain succeeded, and, on Rudar's death in 1869, his mother took the estate of a Hindu mother She died in July, 1879, and the question in this appeal is as to the descent of the estate upon her death The interval, however, between her death and the institution of the present suit on the 23rd of July, 1891, yielded important events bearing on the present dispute On her death, possession was taken by the stepmother of Rudar Narain, who admittedly had no good right, and on her death in 1881, by Bijai Bahadur, who again was a pretender, claiming under a will of the stepmother He was ultimately dispossessed in favour of the present appellant's father, under an Order of Her late Majesty Queen Victoria in Council made on the 1st of May, 1890 The fact has been fairly commented on that this same Bijai Bahadur, who is proved by deed produced to be the true promoter of the present suit, never raised in this former proceeding the genealogical theory now advanced But for present purposes it is more important to observe that the decision of the Judicial Committee in 1890 was that this estate [151] was impartible and followed the line of primogeniture, and in their Lordships judgment this must be held to be one of the conditions governing the present controversy

The present suit was instituted on the 23rd of July, 1891, and the present appellant being *de facto* in possession, it seeks possession The action is therefore one of ejectment and it was for the respondents to *establish their title*

Before considering the grounds upon which this claim was based, it is convenient to notice the plea of limitation stated by the appellant The plaint having been filed on the 23rd of July, 1891, the appellant alleged that the death of Kharag Kunwar occurred on the 20th of July, 1879, more than twelve years before To this it was answered that the death occurred on the 29th of July, 1879, and that this date had been stated in a pleading of the father of the appellant acting (owing to insanity) through the mother of the appellant, in some former suit

It appears, however, that in that suit the exact date was of no materiality and that it had originally been left blank Against this evidence (for it is not pleaded as an estoppel) is to be set the much more deliberate and intentional statement of the date of this lady's death which is contained in the report regarding mutation of names which is on page 206 of the record The report of the patwari is that she died on Sawan sudi 5th, 1886 Fasli That day admittedly corresponds to the 25th of July It is true that the report adds the words "corresponding to the 20th of July" But their Lordships agree with the Court below in holding that in a statement thus made by the patwari the substantive statement is that given in the vernacular and that the rest is a miscalculation

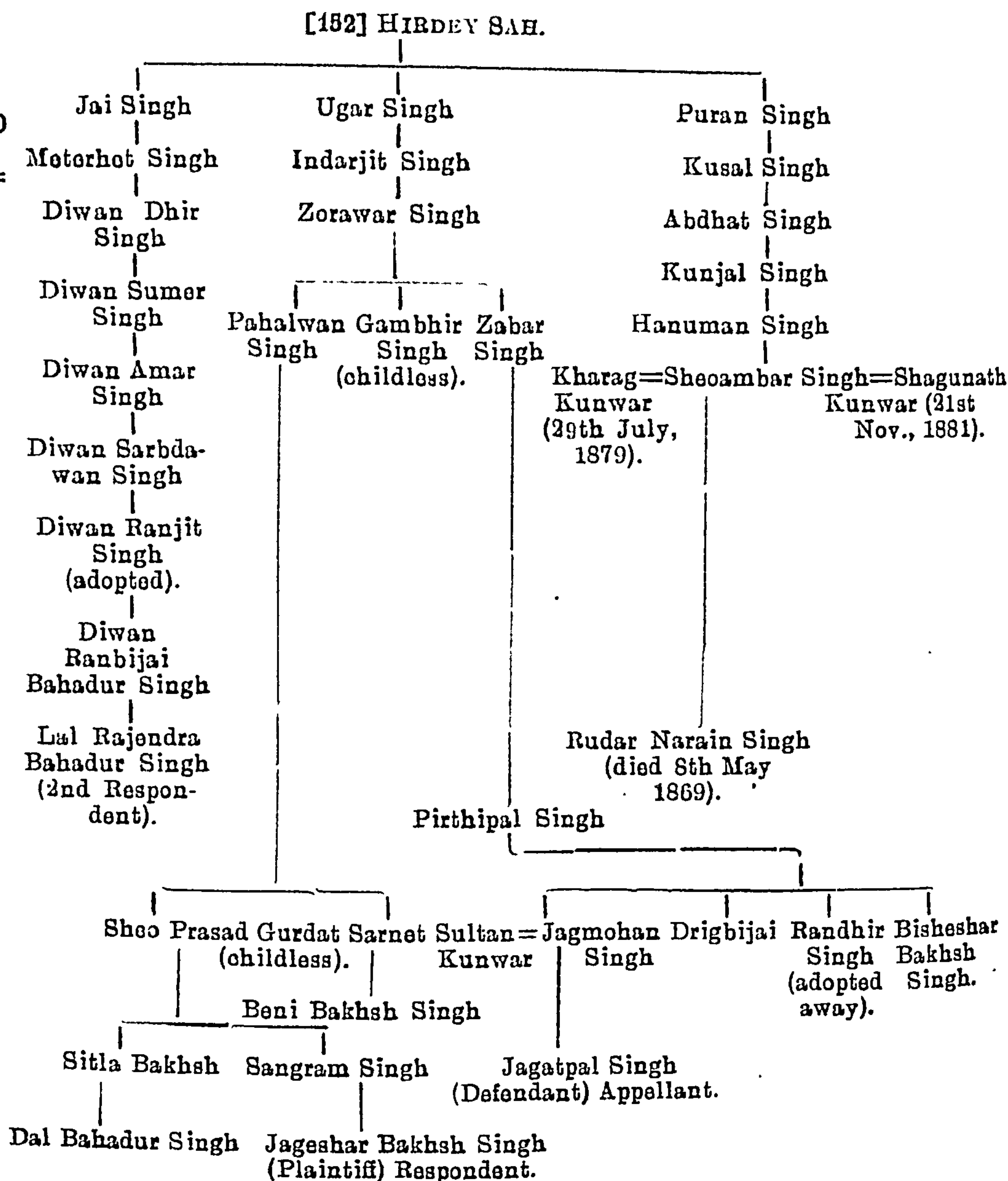
Turning now to the case of the respondents on its merits, it may be

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convenient to set out the pedigree put forward in the respondents' case. It is as follows:—



The questions raised by the appellant's written statement were numerous, but it is unnecessary to enumerate these, as the vital controversy came to be on three points, and ultimately on one point, in the genealogical tree of the respondents. That point may be thus stated with reference to the central part of the pedigree:—Were the Judicial Commissioners right in holding that the respondents have established that Pahalwan Singh, from whom they descend, was born before Zabar Singh, from whom the appellant descends? Unless the respondents have made this out, the other highly disputable propositions maintained by them never arise.

[153] Now the Subordinate Judge of Partabgarh who tried the case decided this question against the respondents on the 19th of December, 1895, and in reversing this judgment the Judicial Commissioners largely proceeded on documentary evidence, which the Subordinate Judge

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ated as some of it inadmissible and some valueless At their Lord-s' bar neither party attached much importance to the oral evidence, while the respondents' counsel quite properly declined to admit that disputed documents were indispensable to his success, they addressed separate argument to their Lordships on the assumption that the *uments in dispute* were disregarded The questions about these documents are therefore of crucial importance

The first set of documents were filed by the plaintiffs in the suit and now founded upon by the respondents (as proving certain statements to have been made by one Beni Bakhsh Singh, now deceased) But Beni Bakhsh was alive on the 4th of July, 1892, when the plaintiff ed his case He had been summoned as witness by both parties After appellant had closed his case the plaintiffs on the 30th of September, 93, applied for leave to examine a number of witnesses, among them ng Beni Bakhsh This application was refused, and, their Lordships e no doubt, rightly refused In these circumstances the question is what ground can the written statements of a person alive when the ty founding on them closed his case be received as evidence It was *empted to* distinguish the case on the ground that the appellant had nself on the 21st of July, 1894 (after Beni Bakhsh was dead), filed tain other statements of this same man But those documents, which re doubtless filed in case the respondents documents should be admitt are not evidence, and their production by the appellant cannot be ld to compel the Court to depart from the rules of evidence in the ision of the case The Subordinate Judge held the documents in estion to be inadmissible on the ground that the plaintiffs had not led Beni Bakhsh as a witness On appeal the documents were mitted

It appears to their Lordships that the reception of those documents nnot be supported, their alleged author having been alive down to the osing of the plaintiff's case

[154] The other document stands in a different position Its alleged thor, Rai Gurdat Singh, had died before the trial But the exhibit in estion is merely a genealogical table filed on behalf of Gurdat in a claim ade by him for certain villages The object of Gurdat in this proceeding as to make himself out to be of the eldest branch of his family and this mittedly was untrue But the fatal objection to the admissibility of e document is that it is in no way brought home to Gurdat except as ing an exhibit binding on him for the purposes of that suit His lation to the document is therefore something entirely different from e personal knowledge and belief which must be found or presumed in y statement of a deceased person which is admissible in evidence For ught that appears, the genealogical table in question might never have een seen or heard of by Gurdat personally, but have been entirely the ork of his pleader

These questions being decided adversely to the respondents there emains no substance in their case The rest of the evidence onsists of documents of no importance or authority and oral evidence hich their Lordships were not asked to accept Into such evidence ney do not think it necessary to enter Their Lordships therefore hold hat it has not been proved that Pahalwan Singh was older than Zabar ingh, and the respondents' case therefore fails The burden of proof was n the respondents and that burden they have failed to discharge

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Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the decree of the Court of the Judicial Commissioner of Oudh reversed with costs, and the judgment of the Judge of the Small Cause Court, Lucknow, restored. The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant.—Messrs. *Young, Jackson, Beard & King.*

Solicitors for the respondents.—Messrs. *T. L. Wilson & Co.*

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25 A. 155 (=22 A. W. N. 216.)

[155] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MANZUR ALI (*Defendant*) v. MAHMUD-UN-NISSA (*Plaintiff*).*
[18th November, 1902.]

Suit for contribution by debtor who has paid money due under a bond against heir of co-obligor of bond—Limitation—Act No. XV of 1877 (*Indian Limitation Act*), *section* 8—*Minority—Nature of the rights of co-obligees discussed.*

In the case of co-obligees of a money bond, in the absence of anything to the contrary, the presumption of law is that they are entitled to the debt in equal shares as tenants in common. *Steeds* v. *Steeds* (1) referred to.

Hence where one of two co-obligees is a minor, limitation will run as against the other co-obligee who is not a minor in respect of that portion of the debt to which he is entitled and section 8 of the Indian Limitation Act, 1877, will not apply.

[Ref. 6 C. L. J. 383; (1911) 2 M. W. N. 450=10 M. L. T. 418=21 M. L. J. 1041=12 I. C. 695; 1 N. L. R. 24; Fol. 32 All. 164=7 A. L. J. 99=5 Ind. Cas. 129.]

ONE Mahmud-un-nissa and her son Kudrat Ali, on the 17th of August, 1889, executed a bond payable on demand in favour of Tehzib Ali, the minor son of Hadi Ali, and of Ibn Ahmad, to secure a sum of Rs. 1,125 with interest at 2 per cent. per mensem. In the bond Mahmud-un-nissa hypothecated some of her property, but, as regards Kudrat Ali the bond was personal only. Kudrat Ali died not long after the execution of the bond, leaving as his heirs his mother Mahmud-un-nissa and his uncle Manzur Ali. On his death Manzur Ali under the Muhammadan law became entitled to two-thirds of his estate, and his mother Mahmud-un-nissa to the remaining one-third. On the 18th of December, 1896, Mahmud-un-nissa paid up the amount which was at that time due under the bond, amounting in all to Rs. 5,000, and took back the bond. On the 19th of December, 1899, Mahmud-un-nissa filed the suit out of which this appeal has arisen against Manzur Ali, claiming contribution out of the estate of Kudrat Ali in his hands to the extent of two-thirds of half of the amount paid by her in satisfaction of the bond with interest, the whole amounting to Rs. 2,265-10-8. The Court of first instance (Subordinate Judge of Shahjahanpur) dismissed the suit. The lower appellate Court [156] (District Judge of Shahjahanpur) found that Tahzib Ali was still a minor at the date when the bond debt was paid up by

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* Second Appeal No. 1222 of 1900, from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 9th of August, 1900, reversing a decree of Babu Nihal Chander, Subordinate Judge of Shahjahanpur, dated the 14th of February, 1900.

(1) (1889) 22 Q. B. D. 537.

rejected as some of it inadmissible and some valueless At their Lordships' bar neither party attached much importance to the oral evidence, and while the respondents' counsel quite properly declined to admit that the disputed documents were indispensable to his success, they addressed no separate argument to their Lordships on the assumption that the documents in dispute were disregarded The questions about these documents are therefore of crucial importance

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The first set of documents were filed by the plaintiffs in the suit and are now founded upon by the respondents (as proving certain statements said to have been made by one Beni Bakhsh Singh, now deceased) But this Beni Bakhsh was alive on the 4th of July, 1892, when the plaintiff closed his case He had been summoned as witness by both parties After the appellant had closed his case the plaintiffs on the 30th of September, 1893, applied for leave to examine a number of witnesses, among them being Beni Bakhsh This application was refused, and their Lordships have no doubt, rightly refused In these circumstances the question is on what ground can the written statements of a person alive when the party founding on them closed his case be received as evidence It was attempted to distinguish the case on the ground that the appellant had himself on the 21st of July, 1894 (after Beni Bakhsh was dead), filed certain other statements of this same man But those documents, which were doubtless filed in case the respondents documents should be admitted, are not evidence, and their production by the appellant cannot be held to compel the Court to depart from the rules of evidence in the decision of the case The Subordinate Judge held the documents in question to be inadmissible on the ground that the plaintiffs had not called Beni Bakhsh as a witness On appeal the documents were admitted

It appears to their Lordships that the reception of those documents cannot be supported, their alleged author having been alive down to the closing of the plaintiff's case

[154] The other document stands in a different position Its alleged author, Rai Gurdat Singh, had died before the trial But the exhibit in question is merely a genealogical table filed on behalf of Gurdat in a claim made by him for certain villages The object of Gurdat in this proceeding was to make himself out to be of the eldest branch of his family and this admittedly was untrue But the fatal objection to the admissibility of the document is that it is in no way brought home to Gurdat except as being an exhibit binding on him for the purposes of that suit His relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence For aught that appears the genealogical table in question might never have been seen or heard of by Gurdat personally, but have been entirely the work of his pleader

These questions being decided adversely to the respondents there remains no substance in their case The rest of the evidence consists of documents of no importance or authority and oral evidence which their Lordships were not asked to accept Into such evidence they do not think it necessary to enter Their Lordships therefore hold that it has not been proved that Pahalwan Singh was older than Zabar Singh, and the respondents' case therefore fails The burden *of proof* was on the respondents and that burden they have failed to discharge

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cannot be set up as a defence against the other obligee or obligees suing for his or their share of the debt. This was so held in the case of *Steeds* v. *Steeds* (1), a case which is referred to and treated as an authority for the proposition which we have laid down in the text books bearing on the subject. In delivering judgment in that case Mr. Justice Wills observes :—"In equity it would appear as if the general rule with regard to money lent by two persons to a third was that they will *primâ facie* be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it;" (*Petty* v. *Styward*; *Rigden* v. *Vallier*, cited in the notes to *Lake* v. *Craddock*, 1 White and Tudor, 5th Ed., 208). "Though they take a joint security," the learned Judge observes, quoting from Lord Alvanley, M. R., [158] "each means to lend his own money and to take back his own," (*Morliy* v. *Birde*, 3 Ves. 631). And further on he says :—"This is on the ground that the debt is held by the two in common and not jointly, and the principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract." We think that the principle laid down by Wills, J., is applicable in India as well as in England, and that section 8 of the Limition Act does not interfere with its application in this country. That section does not, as it appears to us, alter the rule which prevails in equity. It merely provides that time will run against all of several joint creditors when one of such joint creditors is under disability, and when a discharge can be given without the concurrence of the creditor so under disability. A discharge given by one tenant in common of a debt will not, as we have pointed out, bind his co-tenant in common, and therefore the provisions of section 8 do not appear to us to disturb the relations which, upon principles of equity, subsist between co-tenants in common of a bond debt. The result is, then, that, as regards half of the portion of the debt for which Kudrat Ali was liable, Ibn Ahmad, who was beneficially entitled to a moiety, was able to give a good discharge; but as regards the remaining half, to which Tahzib Ali was presumptively entitled, an effectual discharge could not be given by Ibn Ahmad. We should perhaps observe that the presumption that joint obligees of a money bond are entitled to the debt in equal shares as tenants in common may be rebutted. In this case, however, there was no evidence to rebut the presumption. To the extent, then, of two-thirds of one-half of Rs. 2,500, that is two thirds of Rs. 1,250, the plaintiff, in our opinion, was entitled to a decree. The lower appellate Court has, however, passed a decree in favour of the plaintiff for two-thirds of a half of Rs. 5,000. The decree therefore of the lower appellate Court must be modified by reducing the amount decreed by one-half. The parties should bear the costs in this Court, and also in the lower Courts proportionate to failure and success.

Decree modified.

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(1) (1889) 22 Q. B. D. 537.

Mahmud un nissa, that under section 7 of the Limitation Act he could have sued to recover the amount of the bond at any time within six years after his disability had ceased, and that Ibn Ahmad could not give an effectual receipt for Tahzib Ali. The Court ultimately gave the plaintiff a decree to the full extent of her claim. From this decree the defendant appealed to the High Court. 1902 Nov 18 APPELLATE CIVIL. 25 A 155 = 22 A W N 216

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C J, and BANERJI, J.—On the 17th of August, 1889, the plaintiff Mahmud un nissa, and her son Kudrat Ali, executed a money bond payable on demand in favour of Tahzib Ali and Ibn Ahmad to secure Rs. 5,000. In the bond Mahmud un nissa hypothecated some of her property to secure the amount of the debt, but as regards Kudrat Ali the bond was personal only. Kudrat Ali died ten years before the institution of the suit out of which this appeal has arisen, leaving as his heirs his mother Mahmud un nissa, and his uncle, the defendant Manzur Ali. Upon his death, Manzur Ali under the Muhammadan law became entitled to two-thirds of his estate, and his mother, the plaintiff, became entitled to the remaining one third. The plaintiff paid the amount due on the bond on the 18th December, 1896. This was more than six years after the date of the execution of the bond, when, under ordinary circumstances, the debt as against Kudrat Ali would have been statute barred. One of the obligees of the bond, however, namely, Tahzib Ali, was a minor, so that, if he had been the sole obligee, the debt would not have been barred by reason of section 7 of the Indian Limitation Act. The plaintiff in this suit sued Manzur Ali for contribution to the payment which she made in satisfaction of the bond.

The Court of first instance, for reasons which it is unnecessary to discuss, dismissed the suit on several grounds. The lower appellate Court reversed the decision of the Court of first instance, and held that Tahzib Ali could, under section 7 of the Limitation Act, have sued to recover the amount of the bond [157] at any time within six years after his disability had ceased, and that Ibn Ahmad could not give an effectual receipt for Tahzib Ali. In the result the lower appellate Court found in favour of the plaintiff, holding that the defendant Manzur Ali was liable to the extent of two-thirds of one-half of Rs 5,000. From this decree the present appeal has been preferred.

The contention on the part of the appellant is that an effectual discharge could be given by Ibn Ahmad without the concurrence of the minor Tahzib Ali, and therefore time ran against Tahzib Ali, and the suit became time barred. The learned advocate for the appellant relied upon the provisions of section 8 of the Limitation Act. That section provides that "When one of several joint creditors or claimants is under any such disability (*i e*, the disability referred to in section 7), and when a discharge can be given without the concurrence of such person, time will run against them all, but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." The sole question for our determination is, whether or not this contention on the part of the appellant is correct. When a claim is on a money bond to two or more obligees the presumption in equity is that the obligees are tenants in common, and not joint tenants of the debt, and any security held for it. Consequently the discharge by one obligee

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also, like her husband, objected to the compound interest as being penal interest. The Subordinate Judge found the mortgage-deed to be genuine, and that the consideration passed was Rs. 1,375 paid before the Registrar. He found that the compound interest was penal, and he gave a decree for Rs. 1,375 with simple interest at Rs. 1-8 per cent. per mensem from the date of the bond to the date of the suit, and thenceforward at Rs. 6 per cent. per annum. The plaintiff appeals.

Three questions were argued before us at the hearing of this appeal; (1) as to Rs. 625 principal disallowed by the Court below; (2) as to whether the compound interest was penal interest and such as should be relieved against; and (3) it was contended that the contractual interest should be allowed up to the date of payment. As to the first plea, there can be no doubt that in face of the admissions made by the mortgagor Ahmad Husain when registering the document, it lay upon him to prove that he had not received the full amount of consideration. He gave no evidence whatever. As to Alijah Begam, the case is different. She was no party to the mortgage-deed. She put, as she was entitled to do, the plaintiff to proof of the mortgage. The plaintiff called certain witnesses to prove the payment of full consideration. The Subordinate Judge found that the plaintiff had failed to prove full consideration and that the **[161]** amount paid was that actually paid before the Registrar. We see no reason whatever for doubting that finding, and we affirm it. The question then is, whether we can give a decree for Rs. 2,000 as against the husband, Ahmad Husain, whilst holding that the amount proved to have been actually paid was Rs. 1,375. The lower Court relied upon a ruling of this Court in *Makund* v. *Bahori Lal* (1). The facts in that case are not exactly similar to those of the present case. But we think the principle laid down therein is one that we should act upon. It seems to us that it would be illogical to hold in one and the same decree that the full amount of consideration was paid as far as the mortgagor, Ahmad Husain, is concerned, and that a smaller sum was paid as far as Alijah Begam is concerned. We think that the mortgagor, Ahmad Husain, is entitled to take advantage of the plaintiff's failure to establish as against Alijah Begam that the consideration paid was Rs. 2,000. Therefore, agreeing with the lower Court, we find that the amount advanced upon the mortgage was only Rs. 1,375.

The next question is that of compound interest. As to that we are unable to say, looking at the language of section 74 of the Contract Act as amended by Act No. VI of 1899, that the stipulation for the payment of compound interest at the same rate of interest as was payable upon the principal is "increased interest" within the meaning of the explanation to section 74 of the Contract Act. This has been held in *Ganga Dayal* v. *Bachchu Lal* (2). We therefore sustain the appellant's contention that the compound interest claimed is not penal.

As to the third plea urged before us, we are of opinion that the stipulated rate of interest should be allowed up to the date fixed by the lower Court for payment of the mortgage money to avoid sale. No doubt it is open to a Court to allow the contractual rate of interest up to the date of realization. But we have not been shown any authority, nor do we know any, which would make it compulsory upon a Court to pass such an order. The present case is certainly one in which, in the exercise of o[illegible]n, we think we ought not to make the stipulated

(1[illegible] R. 3 All. 824. (2) Weekly Notes, 1902, p. 178.

25 A 159 (=22 A W N 218)

[159] APPELLATE CIVIL

Before Mr Justice Burkitt and Mr Justice Aikman

1902
Nov 19

APPELLATE
CIVIL

25 A 159=
22 A W N
218

JANKIDAS (*Plaintiff*) v AHMAD HUSAIN KHAN AND OTHERS (*Defendants*) * [19th November, 1902]

Mortgage—Suit upon mortgage against mortgagor and subsequent transferee—Failure of plaintiff to prove as against transferee that the consideration entered in the bond was correct—Such failure con ... dence was not tendered by him ... on ... Act) section 74—Penalty—Compou ...

In a suit for sale on a mortgage a subsequent transferee of a portion of the ...

... the bond The mortgagor himself had offered no evidence to rebut the inference derivable from his own previous statements and conduct that he had received the full consideration stated in the bond *Held* that the mortgagor was nevertheless entitled to the benefit of the finding of the Court in favour of the other defendant *Makund* v *Bahori Lal* (1), referred to.

Held also, following the ruling in *Ganga Dayal* v *Bachchu Lal* (2), that a stipulation for the payment of compound interest at the same rate as was payable upon the principal is not a stipulation by way of penalty within the meaning of the explanation to section 74 of the Indian Contract Act, 1872

[Fol 58 P R 1904 25 I C 500 Ref 1 N L R 9 Dist 35 I C 455 21 I C 554]

THE facts of this case sufficiently appear from the judgment of the Court

Babu *Durga Charan Banerji*, for the appellant

Pandit *Suraj Nath*, for the respondents

BURKITT and AIKMAN, JJ —In the suit out of which this appeal has arisen the plaintiff appellant, Lala Janki Das, sued upon a mortgage for Rs 2,000, executed on the 15th of October, 1887, by one Ahmad Husain The interest stipulated in the mortgage was at Rs 1 8 0 per cent per mensem with half yearly rests It was provided that compound interest at the same rate should be charged upon interest unpaid for six months The defendants Nos 2 and 3 are the wives of Ahmad Husain, the mortgagor The defendant No 4, Prasadi Lal, is a puisne mortgagee holding under the defendant No 3, Musammat Alijah Begam Alijah Begam s title is that, in execution of a money decree against her husband, the mortgagor, she purchased at public auction a portion of the mortgaged property [160] This purchase was subsequent to the mortgage The defendant No 2, Musammat Bigga Begam, is impleaded as being a transferee from her husband, the mortgagor, the transfer having taken place subsequent to the mortgage Neither Bigga Begam nor Prasadi Lal contested the suit in the lower Court, and neither of them has appeared in this appeal The contesting defendants were the mortgagor and Alijah Begam Ahmad Husain, the mortgagor, denied the receipt of consideration in full He pleaded that he had only received Rs 1,375 He also objected to the plaintiff s claim for compound interest Alijah Begam put the plaintiff to the proof of his mortgage, the execution of which, and the consideration thereof, she denied She also raised another plea as to a charge possessed by her, amounting to Rs 100 per mensem That plea was overruled by the lower Court, and has not been repeated in this appeal She

* First Appeal No 83 of 1900 from a decree of Babu Achal Behari, Additional Subordinate Judge of Moradabad, dated the 7th of March 1900

(1) (1881) I L R 3 All 824 (2) Weekly Notes, 1902, p 178

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APPELLATE CIVIL.

25 A. 162= 22 A. W. N. 223.

Court modified the first Court's decree, and passed a decree in respect of the mortgage of the 27th of September alone. From this decree the plaintiff appealed to the High Court.

Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *E. A. Howard* (for whom Mr. *Karamat Husain*), for the respondents.

STANLEY, C. J., and KNOX, J.—The suit out of which this appeal has arisen was brought by the plaintiff-appellant to recover the amount due on foot of two mortgages by sale of the mortgaged property. On the 27th of September, 1885, Sher Singh and Kunjal Singh, who were the managers of a joint Hindu family, executed the first mortgage to secure a sum of Rs. 350 and interest, and hypothecated thereby a 1½ biswa share of certain property. On the 10th of August, 1886, the same parties mortgaged a one biswa share of the same property to secure a principal sum of Rs. 600 and interest. The plaintiff brought a suit against the mortgagors on foot of the mortgage of the 10th of August, 1886, and obtained a decree. He also, in October, 1892, brought a suit for sale on foot of the mortgage of the 27th of September, 1885, but finding that that suit was defective, withdrew it in 1896. He thereupon instituted the present suit on both the mortgages, and in this suit he has impleaded, not only the original mortgagors but also the other members of the joint Hindu family, [164] forming together the defendants first party, and also Girwar Singh and Tara Singh, puisne mortgagees of the property. The Court of first instance gave the plaintiff a decree on both mortgages, but on appeal the Additional Judge set aside the decree passed on the mortgage of the 10th of August, 1886. He held that the two causes of action were separate, that the plaintiff had already obtained a decree against Sher Singh and Kunjal Singh, and that if the defendants in group No. 2 (that is the other members of the joint family) refused to be bound by that decree, he should sue them for a declaration of their liability. Accordingly he modified the decree of the Court of first instance, and passed a decree in respect of the mortgage of the 27th of September, 1885, alone. It appears to us, in view of the decisions of this Court, that the learned Additional Judge was wrong in the view which he took, and that it was open to the plaintiff to sue the other joint members of the family together with the mortgagors under the circumstances of the case. It is true that in respect of the mortgage of the 10th of August, 1886, the plaintiff had already obtained a decree against the mortgagors ; but this does not preclude the plaintiff from making the mortgagors parties to the present suit, which is brought also on foot of the mortgage of the 27th of September, 1885. The course which the plaintiff adopted appears to us to have been a proper and convenient course. As authority for holding that a suit properly lay against the members of the family other than the mortgagors, we may refer to the following cases, *viz.*, *Dharam Singh* v. *Angan Lal* (1), *Muhammad Askari* v. *Radha Ram Singh* (2), *Lachhman Das* v. *Dallu* (3), and also to the judgment in the unreported case of *Chunni Lal* v. *Makund Singh* (First Appeal No. 100 of 1898), in which the late Chief Justice Sir Arthur Strachey and Mr. Justice Burkitt followed the ruling in *Dharam Singh* v. *Angan Lal* (1). For these reasons we are of

(1) (1899) I. L. R. 21 All. 301.
(2) (1900) I. L. R. 22 All. 307.
(3) (1900) I. L. R. 22 All. 394.

rate of interest run beyond the date mentioned above We therefore [162] modify the decree of the lower Court by directing that compound interest be calculated upon the principal sum found due namely Rs 1,375, from the date of the mortgage to the date named in the lower Court's decree, namely the 7th of September, 1900 The calculation should be made with half yearly rests To this extent we allow the appeal and vary the decree of the Court below The parties will pay and receive costs here and in the Court below according to their failure and success in this Court, and the necessary entry as to costs will be made in the new decree that will be prepared under section 88 of the Transfer of Property Act We fix the 19th of May, 1903, as the date by which the money must be paid to save the property from sale

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Decree modified

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25 A. 162 (=22 A W. N 223)

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Knox

JAS RAM (*Plaintiff*) v SHER SINGH AND OTHERS (*Defendants*) *
[11th July, 1902]

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man Das v *Dallu* (3) referred to

ON the 27th of September, 1885, Sher Singh and Kunjal Singh, who were the managers of a joint Hindu family, executed a mortgage in favour of one Jas Ram to secure a sum of Rs 350 with interest, and hypothecated a one and a half biswa share in certain property On the 10th of August, 1886, the same parties mortgaged a one biswa share of the same property to secure a principal sum of Rs 600 and interest The mortgagee, Jas Ram, sued the mortgagors on his mortgage of the 10th of August, 1886, and obtained a decree He subsequently brought a suit for sale on the earlier mortgage, but finding that that suit was defective he withdrew it He then instituted a third suit upon both the [163] mortgages, and therein impleaded, not only the original mortgagors, but also the other members of the joint Hindu family He also made defendants two puisne mortgagees of the property The Court of first instance (Subordinate Judge of Aligarh) gave the plaintiff a decree on both mortgagees, but on appeal the lower appellate Court (Additional District Judge of Aligarh) set aside the decree passed upon the mortgage of the 10th of August, 1886 That Court held that the two causes of action were separate, that the plaintiff had already obtained a decree against Sher Singh and Kunjal Singh, and that if the other members of the joint family refused to be bound by that decree, the plaintiff ought to sue them for a declaration of their liability The lower appellate

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* Second Appeal No 24 of 1900, from the decree of B J Dalal, Esq, Additional District Judge of Aligarh, dated the 27th September 1899, modifying the decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 15th January, 1898

(1) (1899) I L R 21 All. 301.
(2) (1900) I L R 22 All 307
(3) (1900) I L R 22 All 304

1902 JULY 22.

REVISIONAL CRIMINAL.

25 A. 165= 22 A. W. N. 224.

and got an order from him on the 10th of May, 1902, in accordance with the provisions of section 490 of the Code of Criminal Procedure, directing Prabhu Lal to pay Musammat Rami Rs. 18, which was due to her under the order. It appears that on the 27th of February, 1902, the parties executed an agreement, which was further registered. Under this agreement it was stipulated that Prabhu Lal should pay Musammat Rami Rs. 144, and give her a cow worth Rs. 15. Musammat Rami admits having received Rs. 144. The Magistrate considers that as Musammat Rami entered into this agreement, it is inequitable for her to enforce the order of the 10th of October, 1901, any longer. In his order of reference he cites the case of *Rangamma* v. *Muhammad Ali* (1). This case certainly does appear to support the view taken by the Magistrate. On the other hand, I have before me the clear provisions of section 490. As I understand these provisions, it was not the intention of the Legislature that the Magistrate to whom the application is made to enforce an order of maintenance, should take into consideration anything further than the identity of the parties and the non-payment of the allowance. It is true that in this Court one step further has been taken, and we have held that it is open to the Magistrate to consider whether the person to whom the order of maintenance **[167]** has been given is, at the time she makes the application, still holding the position of wife, but I know of no further step relaxing the clear words of section 490. To me the reason appears obvious. If a person against whom an order for maintenance has been made considers that such an order should no longer be in force against him, it is for him to apply under section 489 and get the order altered. It does not seem suitable or expedient that it should be open to a second Magistrate to call in question an order duly given upon proof. I do not think this is a case in which I should interfere. Let the record be returned.

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25 A. 167 (=22 A. W. N. 225.)

APPELLATE CIVIL.

Before Mr. Justice Banerji.

SHEO PRASAD (*Defendant*) *v.* MUHAMMAD MOHSIN KHAN (*Plaintiff*).*
[13th August, 1902.]

Civil Procedure Code, section 310 *A*, 320—*Execution of decree—Section* 310*A not applicable to proceedings in execution held by a Collector under section* 320.

Held that the provisions of section 310A of the Code of Civil Procedure have no application to execution proceedings taken by a Collector under section 320 of the Code and the rules framed by the Local Government thereunder governing such proceedings.

[Ref : 31 Bom. 207=9 Bom. L. R. 15.]

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba* for the appellant.

Mr. *Abdul Raoof* for the respondent.

BANERJI, J.—This was a suit brought by the respondent for the cancellation of an auction sale, for possession of the property comprised

* Second Appeal No. 650 of 1901, from the decree of Maulvi Syed Siraj-ud-din Judge of the Small Cause Court at Agra, dated the 29th March, 1901, reversing the decree of Babu Baidya Nath Das, Officiating Munsif of Agra, dated the 28th June, 1900.

(1) (1886) I. L. R. 10 Mad. 13.

opinion that this appeal must be allowed We accordingly set aside the decree of the lower appellate Court, and restore the decree of the Court of the first instance, but with some modifications The Subordinate Judge has in the [163] decree treated the two mortgages as if, in fact, they constituted one mortgage We think that there ought to have been a separate declaration in respect of each mortgage, and accordingly we modify the decree and declare that on the 15th of July, 1898, the sum of Rs 1,110 12 0 was payable for principal, interest and costs on foot of the mortgage of the 27th of September, 1885, and that on the same date there was payable to the plaintiff the sum of Rs 749 12 0 for principal, interest and costs on foot of the mortgage of the 10th August, 1886 And we direct that on payment of the sum due on the mortgage of the 27th September, 1885, with further interest on the 11th of January, 1903, the plaintiff shall deliver up to the defendants all documents relating to the property comprised in that mortgage, and transfer such property to the defendants free from incumbrances, and in like manner that on payment on the same date of the sum due on the mortgage of the 10th of August, 1886, with further interest, the plaintiff shall deliver up all documents relating to the property specified in that mortgage, and transfer such property to the defendants free from incumbrances In each case we direct the mortgaged property to be sold in default of payment in order to satisfy the mortgage debt The appellant will be entitled to his costs here and hitherto

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25 A 165 (=22 A W N. 224)

REVISIONAL CRIMINAL

Before Mr Justice Knox

PRABHU LAL (*Applicant*) v RAMI (*Opposite party*) *
[22nd July, 1902]

Criminal Procedure Code, sections 488, 489, 490—Maintenance—Agreement between the parties subsequent to the order for maintenance—Such agreement no bar to enforcement of order for maintenance so long as such order subsists

Where an order for maintenance is passed under section 488 of the Code of Criminal Procedure and the parties afterwards come to an agreement between themselves as to what is to be paid, the existence of such agreement will not of itself be a bar to the enforcement of the order for maintenance but it will be the duty of the party chargeable, if he wishes to be relieved from the [166] payment of the maintenance allowance, to bring such settlement to the notice of the Court and obtain a cancellation of the order for maintenance *Rangamma* v *Muhammad Ali* (1), not followed

THIS was a reference under section 438 of the Code of Criminal Procedure, made by the District Magistrate of Dehra Dun The facts out of which the reference arose sufficiently appear from the order of the Court

Pandit *Mohan Lal Nehru*, for the applicant

KNOX, J —This is a reference sent by the District Magistrate of Dehra Dun On the 10th of October, 1901, an order was passed in favour of Musammat Rami, giving her maintenance at the rate of six rupees per mensem under the provisions of section 488 of the Code of Criminal Procedure Musammat Rami, alleging that the sum awarded to her had not been paid, applied to the Deputy Magistrate of Mussorie,

* Criminal Reference No. 437 of 1902

1 (1886) I L. R. 10 Mad 18

APPELLATE CIVIL.

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plaintiff had no cause of action. The mortgage to him was made after the attachment of the property and before the auction sale. It was, therefore, void under the provisions of section 276 of the Code against all claims enforceable under the attachment, and cannot prevail against the auction sale which took place in pursuance of that attachment. The sale having been confirmed has become final, and no suit can be brought to have it set aside. The lower appellate Court has overlooked the fact that section 310A of the Code of Civil Procedure had no application to the proceedings before the Collector. For the above reasons I allow this appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

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25 A. 169 (=22 A. W. N. 226).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BRIJ BHUKHAN DAS (*Plaintiff*) *v.* SAMI-UD-DIN AHMAD KHAN AND OTHERS (*Defendants*).* [21st November, 1902].

Act No. IX of 1872 (Indian Contract Act), section 74—Act No. VI of 1899, sections 1 and 4—Bond—Stipulation for enhanced interest from date of bond in breach of covenant to pay interest—Penalty.

In a bond executed on the 8th of November, 1892, to secure a sum of Rs. 8,000, it was stipulated that interest should be paid every six months at the [170] rate of 1 per cent. per mensem, but that in case of default in payment the mortgagor should pay interest at the rate of 2 per cent. per mensem from the date of the execution of the bond. On suit upon this bond to recover the principal sum secured with interest at the enhanced rate, it was *held* that the provisions of Act No. VI of 1899 were applicable, the question whether interest was recoverable at the enhanced rate having been put in issue since that Act came into force, although the bond might have been executed before.

Held also that under section 74 of the Indian Contract Act, as amended by Act No. VI of 1899, the stipulation for enhanced interest as from the date of the execution of the bond was a stipulation by way of penalty against which relief should be granted.

THE defendant Sami-ud-din Ahmad Khan borrowed from the plaintiff the sum of Rs. 8,000, as security for which he executed a bond dated the 8th of November, 1892. In the bond the rate of interest was fixed at Re. 1 per cent. per mensem payable every six months. The deed contained a provision that in case of default in payment of the interest at the time stipulated, the mortgagor should pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond. The plaintiff sued on the bond to recover the principal sum advanced with interest at the enhanced rate. Some of the defendants, who were impleaded as having derived interests in the mortgaged property from the mortgagor, resisted the suit mainly on the ground that there was no consideration for the bond. They also objected to the enhanced rate of interest charged in the bond. The lower Court (Subordinate Judge of Moradabad) found on the evidence that no interest at all was payable on the bond in suit, and gave the plaintiff a decree for the principal amount only with costs of suit. The plaintiff appealed to the High Court, as to the disallowance of interest, and the question was there raised whether Act No. VI of 1899, amending the Indian Contract Act,

* First Appeal No. 97 of 1900, from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 18th January, 1900.

in the sale and for mesne profits, under the following circumstances The property in question belonged to Har Bakhsh, the ancestor of the defendants Nos 1 to 4 One Salim Khan obtained a money decree against Har Bakhsh on the 13th of April, 1896, and in execution thereof caused the property in question to be attached As the property was ancestral within the meaning of the notification of Government, [168] the execution of the decree was transferred to the Collector under section 320 of the Code of Civil Procedure The Collector decided to sell the property, and fixed the 20th of January, 1899, for the sale On the 19th of January, 1899, the defendants Nos 1 to 4 mortgaged the attached property to the plaintiff respondent The amount of the decree not having been paid, the property was sold on the 20th of January, 1899, and was purchased by the appellant, Sheo Prasad On the 24th of January, 1899, the defendants Nos 1 to 4 made an application to the Collector, purporting to be an application under section 310A of the Code of Civil Procedure, by which they tendered the amount of the decree, together with the additional 5 per cent required by the section, and applied to have the sale set aside On the 16th of February, 1899 the defendant Tika withdrew that application On the 18th of February, 1899, the plaintiff, Hafiz Muhammad Mohsin Khan, asked the Collector to consider the application of the 24th of January 1899, to be an application made by him, to accept the decretal amount and the additional 5 per cent from him, and to set aside the sale This application was refused, and on the 23rd of March, 1899, the sale was confirmed in favour of Sheo Prasad, who afterwards got possession Thereupon the present suit was brought by the plaintiff on the ground that the application of the 24th of January, 1899, was withdrawn by Tika in collusion with Sheo Prasad and with a view to defraud the plaintiff This is the only ground on which the plaintiff seeks by this suit to have the sale, which was confirmed by the Collector, set aside and to obtain possession of the property sold as mortgagee thereof The Court of first instance dismissed the suit, but the lower appellate Court has set aside the decree of the Court of first instance and decreed the claim From that decree the present appeal has been brought

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APPELLATE CIVIL

25 A 167= 22 A W N. 2?5

In my opinion the appeal must prevail The plaintiff has no cause of action unless he can show that the provisions of section 310A of the Code of Civil Procedure applied to the proceedings before the Collector Section 320 of the Code of Civil Procedure provides that the local Government may frame rules for regulating the procedure of the Collector and his subordinates [169] in execution of decrees transferred to the Collector under that section The general provisions of the Code of Civil Procedure do not apply to proceedings held by the Collector for the execution of such decrees The rules framed by the Government under the authority vested in it by section 320 are printed in Appendix A to the rules of Court of the 4th of April, 1894 These rules do not contain any provisions similar to those of section 310A Consequently, even if there had been no collusion between Tika, defendant, and the auction purchaser, and if the application of the 24th of January, 1899, had not been withdrawn by Tika the Collector was not competent to set aside the sale upon that application The learned Counsel for the respondent has not been able to point out any order of Government which has made section 310A applicable to proceedings held by the Collector in such cases That being so, the Court of first instance, in my opinion, rightly held that the

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made before the 'Sub-Registrar. In the document there is the aknowledgment of the advance of the entire Rs. 8,000, and by endorsement made by the Sub Registrar it appears that the mortgagor admitted that he had received the entire sum of Rs. 8,000. To rebut this evidence not one particle of reliable evidence was given. What the Judge says of the evidence which was given in support of the defendants' contention is this. Of the two witnesses examined on behalf of the defendants, namely, Fatch Khan and Muhammad Bakhsh, he says, as to Fatch Khan, that "he had no personal knowledge of the bond in suit, and his very statements showed that he was a hired and tutored witness holding no position." Of the other he observes:—"The witness Muhammad Bakhsh states that no consideration was paid, that the plaintiff had given a *rukka* for the payment of the consideration, and that this *rukka* was given by the plaintiff as he took back the money from the defendant after having the bond registered. This story quite conflicts with Sami-ud-din's version, and leaves no room for doubt that the allegation as to the supply of a *rukka* to Sami-ud-din and the non-payment of consideration is entirely a fiction." He disbelieved also the evidence of Sami-ud-din, and had not before him any evidence whatever to rebut the presumption created by the recital in the deed itself and the acknowledgment before the Sub-Registrar that the Rs. 8,000 was paid. We are entirely at a loss to [173] understand how the learned Judge came to the conclusion that the Rs. 8,000 included prospective interest. Interest on the full sum must be allowed.

The further question arises as to what rate of interest should be allowed to the plaintiff. This raises a difficult question, if this case be not governed by the recent Act amending the Contract Act, namely Act No. VI of 1899. Under that Act, section 74 of the Contract Act, namely Act No. IX of 1872, was repealed, and the section substituted in its place provides in the explanation to the section that a stipulation for increased interest from the date of default may be a stipulation by way of penalty. It appears to us clear that the provision in the deed before us as to an increased rate of interest was a provision to which the provisions of the amended section were intended to apply. It is argued, however, that the amending Act is not applicable to the present case, inasmuch as it came into force a few days after the institution of the present suit. Under ordinary circumstances the Act would not have a retrospective effect. We find, however, that the issue as to the liability of the defendants to payment of the higher rate of interest was raised in the defence, and that the issues in the suit were not joined until some time after the passing of the Act. The question, therefore, arises whether or not the Act has operation by reason of the provisions of sub-section (3) of section 1. That sub-section provides that the Act shall apply to every contract in respect of which any suit is instituted, or which is put in issue in any suit after the commencement of this Act. It appears to us that this section comprises two cases, namely first, the case of any contract in respect of which any suit may be instituted after the commencement of the Act; and secondly, the case of any contract which is put in issue in any suit after the commencement of the Act. The contract in this case was put in issue in the present suit after the commencement of the Act, and consequently we think that the Act applies. If this be so, it lies in our discretion to say what is reasonable compensation under the circumstances for the breach of the defendant

applied The suit was filed on the 26th of April, 1899, and the Act in question came into force on the 1st of May 1899, but the defendants' written statements were not put in until July, 1899, and the issues consequently not framed until a later date 1902 Nov. 21

APPELLATE CIVIL

Babu *Jogindro Nath Chaudhri*, for the appellant

Mr *Muhammad Raoof*, Munshi *Ratan Chand* and Dr *Satish Chandra Banerji*, for the respondents 25 A 169= 22 A W N 228

[171] STANLEY, C J, and BANERJI, J —The main question which has been argued in this appeal is whether, or not the plaintiff is entitled to interest on the principal sum expressed to have been advanced by him to the mortgagor in a mortgage, which was executed in his favour by the first defendant, Sami ud din Ahmad Khan The suit is brought to recover the principal sum of Rs 8,000 and interest, which was expressed to be secured by a bond, dated the 8th of November 1892 In that bond the rate of interest was fixed at Re 1 per cent per mensem payable every six months The deed contained a provision that in case of default in payment of the interest at the time stipulated, the mortgagor should pay interest at the rate of Rs 2 per cent per mensem, instead of 1 per cent per mensem, from the date of the execution of the bond The defendants to the suit are the mortgagor and 35 other defendants, all of whom derive interest in the mortgaged property from the first defendant The mortgagor himself has not filed any defence, but three of the other defendants have done so, and the main defence which they have set up is that there was no consideration for the bond The learned Subordinate Judge after reviewing the evidence came to the conclusion that there was consideration for the bond He disbelieved the evidence of the witnesses who were examined on behalf of the defendants and gave a decree for the principal amount expressed to be secured by the mortgage Strange to say, however, he has found that the plaintiff was not entitled to any interest, because he surmised that under the circumstances under which the money was advanced interest was really included in the principal sum, that is he came to the conclusion as a matter of conjecture that the Rs 8,000, the amount of the principal debt, included prospective interest What period of time this prospective interest covered does not appear, nor does he attempt to solve that difficulty Whether it was for one year or for two years, or for ten years, there is no suggestion in the judgment The bond was payable on demand, so that there was *no period in respect of* which interest could with certainty have been calculated The grounds upon which the learned Judge surmises that interest was included in the sum of Rs 8,000 are these He says —" Sami-ud din Khan wanted money at any [172] cost He became indebted to the plaintiff for Rs 6,500 within a few months—three or four months—before the 15th October, 1892, when he gave a bond for Rs 8,000 in the plaintiff's favour A few days after, namely on the 8th November, 1892, he gave this bond in suit to plaintiff for another Rs 8,000 A little later, namely on the 22nd November, 1892, he gave a third bond to plaintiff for Rs 10,000 Then he observes —" One should not, therefore, be surprised to find that the sum of Rs 8,000 represented not only the amount paid in cash but also the amount of interest in advance And later on he says —" Under these circumstances I must hold that he is entitled to no interest whatever on the sum of Rs 8 000 " Now the learned Judge had before him the evidence afforded by the document itself, and by the endorsement on it

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FULL BENCH.

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again raising the question of the valuation of the suit. On this appeal the lower appellate Court (Extra Additional Subordinate Judge of Aligarh) held that the misrepresentation as to value was intentional on the part of the plaintiffs, that the value of the suit was Rs. 1,580, and that the Munsif had no jurisdiction to entertain it. The decree of the Munsif was therefore discharged and the plaint was directed to be returned to the plaintiffs for presentation to the proper Court. From this order the plaintiffs appealed to the High Court.

Babu *Satya Chandra Mukerje*, for the appellants.

Maulvi *Ghulam Mujtaba* (for whom Pandit *Baldeo Ram*), for the respondent.

STANLEY, C. J., and KNOX and BANERJI, JJ.—A preliminary objection has been raised to the hearing of this appeal on the ground that under the circumstances of the case no appeal lies. The suit was brought for recovery of possession of property valued at a sum of Rs. 700, and was filed in the Munsif's Court. An objection was raised on the part of the defendants that the suit was undervalued. The Court of first instance considered the question of valuation, and came to the conclusion that the suit had been undervalued, but that the undervaluation was not intentional, and heard the suit; a decree was passed in favour of the plaintiffs, and from this decree an appeal was preferred. The lower appellate Court held that the valuation had been intentionally misrepresented; that the value of the suit was a sum of Rs. 1,580, and that consequently the Munsif had no jurisdiction to entertain the suit, and the appeal was accordingly allowed, the decree of the Munsif discharged, and a direction given that the plaint should be returned for presentation to the [176] proper Court. It is now objected that no appeal lies. Reliance has been placed upon a decision of this Court, reported in the Indian Law Reports, 3 Allahabad, at page 456, namely the case of *Bindeshri Chaubey* v. *Nandu*. The decision in that case is an authority for the preliminary objection which has been raised. It was there held that under similar circumstances article (6) of section 588 of the Code of Civil Procedure related to orders "returning plaints for amendment or to be presented to the proper Court" passed by a Court of first instance, and not to a decision of an appellate Court upon an appeal to it from the decree of a Court of first instance on general grounds. We observe from a perusal of that case that the attention of the Court was not called to the provisions of section 582 of the Code of Civil Procedure. This section provides that in appeals, such as the appeal in this case, the appellate Court shall have "the same powers and perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted under Chapter V." Now under section 57 of the Code provision is made that a plaint shall be returned to be presented to the proper Court in, amongst other cases, a case where "a suit has been instituted in a Court whose grade is lower or higher than that of the Court competent to try it, where such Court exists, or where no option as to the selection of the Court is allowed by law." Section 582, as it seems to us, gives the appellate Court the same power, where a plaint has been presented in a Court of lower grade than that of the Court competent to try it, to return it for presentation to the proper Court as the Court of first instance had when the plaint was originally presented. We see nothing in the language to limit it to the Court of first instance. No doubt the order contemplated

gor's contract in respect of interest We are of opinion that the ginally fixed, namely Re 1 per cent per mensem, is a reasonable id we [174] shall allow that rate of interest only We do not under the circumstances we should be justified in giving the higher interest which is asked for The result is that the appeal is l, the judgment of the lower Court modified by adding to the principal amount of the debt, namely the sum of Rs 8,000, interest upon that the rate of Re 1 per cent per mensem up to the date of pay We extend the time up to the 20th of May, 1903, for payment mortgage debt The parties will pay and receive costs both in urt and in the lower Court proportionate to failure and success

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1 this connection see *Ganga Dayal* v *Bachchu Lal*, supra, p 26, *nki Das* v *Ahmad Husain Khan*, supra, p 159 —ED]

Decree modified

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25 A 174 (=22 A W N 222)

FULL BENCH.

e Sir John Stanley, Knight, Chief Justice, Mr Justice Knox, and Mr Justice Banerji

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/AHID ULLAH AND ANOTHER (*Plaintiffs*) v KANHAYA LAL (*Defendant*) * [25th and 26th November, 1902]

ocedure Code, sections 582, 588 (6), 589—*Order of Appellate Court returning nt for presentation to proper Court—Appeal—Act No VII of* 1887 *(Suits uation Act), section* 11

Section 588 (6) of the Code of Civil Procedure refers not only to orders ssed by a Court of first instance, but to similar orders which an appellate urt may pass by virtue of section 582 of the Code Where an order return g a plaint for amendment, or to be presented to the proper Court, is pas d by a Court of appeal, an appeal will lie from such order in the manner ovided by section 589 of the Code

Bindeshri Chaubey v *Nandu* (1) overruled, *Chinnasami Pillai* v *Karuppa layan* (2), and *Goor Bux Sahoo* v *Birj Lal Benka* (3) followed

Where, however, an appellate Court makes an order returning a plaint for esentation to the proper Court, the Court of first instance having heard and cided the suit, it is the duty of the appellate Court under section 11 of the its Valuation Act, 1887, first to find, and to record its reasons for so find g, whether the error in valuation complained of has prejudicially affected e disposal of the suit on the merits

) All 58=12 A L J 21=22 I C 614 Ref 52 I C 801=17 A L J 1034= All 74 , (appeal—order of appellate Court returning plaint) Ref 31 1 344]

[5] THE plaintiffs in this case brought a suit claiming possession of a house and also arrears of rent The plaintiffs valued their Rs 700, and filed it in the Court of a Munsif An objection was y the defendant that the suit was undervalued The Munsif ed the objection, and came to the conclusion that the suit was lued , but he was of opinion that the undervaluation was entirely nadvertence and accordingly entertained the suit The Munsif a decree in favour of the plaintiffs The defendant appealed,

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:st Appeal No 38 of 1902, from an order of Munshi Achal Behari, Extra al Subordinate Judge of Aligarh, dated the 10th of January, 1902

91) I L R 3 All 456. (3) (1899) I. L. R 26 Cal 275
00) I. L. R 23 Mad. 234

1902 Dec 3 — Appellate Civil. — 25 A 179= 23 A W N 2

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellants

Munshi *Govind Prasad* and Munshi *Gokul Prasad*, for the respondent

STANLEY, C J and BURKITT, J —The suit out of which this appeal has arisen was brought by the plaintiff for redemption of a mortgage, dated the 3rd of September, 1868, executed by Gur Bakhsh Singh and Fateh Singh in favour of Dal Singh On the 14th of June, 1897, that is more than a year anterior to the filing of the plaint, the plaintiff had deposited in the Court of the Subordinate Judge of Mainpuri, under the provisions of section 83 of the Transfer of Property Act, the sum of [180] Rs 3,700, which sum the plaintiff alleged was sufficient to satisfy the claim of the mortgagees The mortgagees did not draw this sum out of Court, and hence the suit for redemption was instituted On the 25th of November, 1898, the Court of first instance decreed the plaintiff s claim and declared that on the 25th of May, 1899, the sum of Rs 3,709 4 0 would be due to the defendants mortgagees, namely Rs 3,700 for the mortgage money under the deed of the 3rd of September, 1868, and Rs 9 4 0 for the costs of the suit, and passed the usual decree for redemption on payment of this amount From this decree we gather that the sum which was deposited by the plaintiff under the provisions of the section of the Transfer of Property Act to which we have referred, was sufficient to satisfy the claim of the defendants on foot of their mortgage From this decree the defendants preferred an appeal which was dismissed An appeal to this Court was then preferred on several grounds, and amongst others, that a much larger sum was due to appellants on foot of their mortgage than the sum which had been declared by the decree to be due Pending this appeal the appellants drew out of Court the sum which had been deposited by the plaintiff, and delivered up their mortgage security and also possession of the mortgaged property

It is now contended on the part of the respondent that the defendants having drawn out of Court the money so deposited must be taken to have accepted it in full discharge of the amount due to them, and that they cannot consequently prosecute the appeal There is no answer, in our opinion, to this contention Except under the provisions of section 83 of the Transfer of Property Act, the appellants had no right whatever to obtain payment of the money which had been deposited under that section The money was deposited in Court " to the account of mortgagees," only, however, to be paid to them on their expressing their " willingness to accept the money so deposited in full discharge " of the amount due to them Upon no other terms would the Court have been justified in passing an order for payment of it to them, unless at least such order had been passed with the consent of the plaintiff, and there is no suggestion here that any such [181] consent was given It has been argued on behalf of the appellants that inasmuch as in the plaint the plaintiff alleged that the appellants had in bad faith abstained from withdrawing the money so deposited, and the proceedings under section 83 had been struck off, the conditions contained in that section in regard to the receipt of the money no longer attached to it, and that the payment made to the appellants subsequently was a payment, not under the provisions of section 83 of

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellants

Munshi *Govind Prasad* and Munshi *Gokul Prasad*, for the respondent

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lants as defendants against whom the decree for redemption had been passed were not the parties who could apply for execution, and (2) that in the application which they did make to have the money paid to them, it is distinctly stated that the money was lying in deposit under section 83 of the Transfer of Property Act From remarks made by their learned advocate we gather that the reasons why the appellants changed their [183] minds about accepting this deposit were, firstly, because they did not care to lose any more interest; and, secondly, because a portion of the deposit had been attached and taken out of Court by some of their creditors How the learned Subordinate Judge conceived that he had any jurisdiction to allow such a deposit, not accepted by the mortgagees, to be attached and drawn out of Court by creditors of the mortgagees we are at a loss to understand

1902 DEC 8. — APPELLATE CIVIL — 25 A 179= 23 A W N 2.

For the foregoing reasons we hold that the appellants' claim has been wholly satisfied by the withdrawal from Court by them of the money deposited by the plaintiff to meet that claim, and we accordingly dismiss the appeal with costs

Appeal dismissed

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25 A 183 (=23 A. W N 4)

REVISIONAL CIVIL

Before Mr. Justice Knox and Mr Justice Blair

GAPPU LAL (*Plaintiff*) v. MATHURA DAS (*Defendant*) *
[5th December, 1903]

Act No XII of 1887 (*Bengal, N W P and Assam Civil Courts Act*), *sections* 11 *and* 17—*Civil Procedure Code, section* 25—*Transfer—Jurisdiction—Construction of Statutes*

Held, that the words "in the event of the death, resignation or removal of a Subordinate Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held," occurring in section 11, clause (1) of Act No XII of 1887, include the abolition by order of Government of a special Court temporarily constituted by Government to exercise jurisdiction in a particular district, and that therefore where such Court, being the Court of a Subordinate Judge, had ceased to exist, and the District Judge had taken upon his own file a suit which had been pending before the said Court, it was competent to the District Judge under section 11, clause (3), of the Act abovementioned to [illegible] Subordinate Judge in his [illegible] been transferred by him to [illegible] *mir Begam v Prahlad Das* [illegible]

[Dist 10 C W N 903]

A SUIT was instituted in the Court of the Subordinate Judge of Gorakhpur After issues had been framed by the Subordinate Judge the suit was transferred to the Court of the Additional Subordinate Judge While pending before the Additional [184] Subordinate Judge the suit was referred to arbitration, but before the award was ready the Court of the Additional Subordinate Judge was abolished by order of Government Thereupon the suit was registered as a suit in the Court of the District Judge, though without any formal order of transfer being made, and the District Judge took certain proceedings in the suit Finding, however, that the arbitration award was likely to be disputed, and that the suit,

* Civil Revision No 23 of 1903

(1) (1902) I. L. R 24 All 301 (2) (1889) I L R 13 Bom 654

1902 DEC 3 — APPELLATE CIVIL — 25 A 179= 23 A W N 2

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellants

Munshi *Govind Prasad* and Munshi *Gokul Prasad*, for the respondent

STANLEY, C J and BURKITT, J —The suit out of which this appeal has arisen was brought by the plaintiff for redemption of a mortgage, dated the 3rd of September, 1868, executed by Gur Bakhsh Singh and Fateh Singh in favour of Dal Singh On the 14th of June, 1897, that is more than a year anterior to the filing of the plaint, the plaintiff had deposited in the Court of the Subordinate Judge of Mainpuri, under the provisions of section 83 of the Transfer of Property Act, the sum of [180] Rs 3,700, which sum the plaintiff alleged was sufficient to satisfy the claim of the mortgagees The mortgagees did not draw this sum out of Court, and hence the suit for redemption was instituted On the 25th of November, 1898, the Court of first instance decreed the plaintiff's claim and declared that on the 25th of May, 1899, the sum of Rs 3,709 4 0 would be due to the defendants mortgagees, namely Rs 3,700 for the mortgage money under the deed of the 3rd of September, 1868, and Rs 9 4 0 for the costs of the suit, and passed the usual decree for redemption on payment of this amount From this decree we gather that the sum which was deposited by the plaintiff under the provisions of the section of the Transfer of Property Act to which we have referred, was sufficient to satisfy the claim of the defendants on foot of their mortgage From this decree the defendants preferred an appeal which was dismissed An appeal to this Court was then preferred on several grounds, and amongst others, that a much larger sum was due to appellants on foot of their mortgage than the sum which had been declared by the decree to be due Pending this appeal the appellants drew out of Court the sum which had been deposited by the plaintiff, and delivered up their mortgage security and also possession of the mortgaged property

It is now contended on the part of the respondent that the defendants having drawn out of Court the money so deposited must be taken to have accepted it in full discharge of the amount due to them, and that they cannot consequently prosecute the appeal There is no answer, in our opinion, to this contention Except under the provisions of section 83 of the Transfer of Property Act, the appellants had no right whatever to obtain payment of the money which had been deposited under that section The money was deposited in Court "to the account of mortgagees," only, however, to be paid to them on their expressing their "willingness to accept the money so deposited in full discharge of the amount due to them Upon no other terms would the Court have been justified in passing an order for payment of it to them, unless at least such order had been passed with the consent of the plaintiff, and there is no suggestion here that any such [181] consent was given It has been argued on behalf of the appellants that inasmuch as in the plaint the plaintiff alleged that the appellants had in bad faith abstained from withdrawing the money so deposited, and the proceedings under section 83 had been struck off, the conditions contained in that section in regard to the receipt of the money no longer attached to it, and that the payment made to the appellants subsequently was a payment, not under the provisions of section 83 of

1902 DEC. 10.

APPELLATE CIVIL.

25 A. 187=23 A. W. N. 13.

but an opportunity should have been given to the appellants to serve a fresh notice.

Section 424 of the Code runs as follows:—" No suit shall be instituted against the Secretary of State in Council . . . until the expiration of two months next after notice in writing has been . . . delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District . . . stating the cause of action, and the name and place of abode of the intending plaintiff, and the relief which he claims; and the plaint must contain a statement that such notice has been so delivered or left." What the precise object of this section was we cannot say with certainty; but we may reasonably presume that the intention of the Legislature in passing the section was, that the Secretary of State should have an opportunity of investigating an alleged cause of complaint, and ascertaining whether there was any ground of complaint, and, if he thought fit, of making amends before he was impleaded in a suit. Whatever was the object of the section, we have to determine whether the direction contained in it is mandatory, rendering the giving of notice a condition precedent to the institution of a suit, and if so, whether the provisions of the section have been complied with. We must interpret the section according to the recognised rules for the interpretation of Acts of the Legislature. The section prescribes that "no suit shall be instituted" unless the provisions of the section have been complied with. No stronger words of prohibition than these could well have been used. They are not that no suit shall be proceeded with or maintained until the provisions of the section have been complied with, but "no suit shall be *instituted*." [191] An Act which deals with the procedure of Courts of Justice is, as a rule, construed strictly. If it be that the words "cause of action" as used in the section mean everything which a party must allege and prove in order that he may succeed in a suit, it is obvious that the notice which was given by Pirthi Pal Singh and Sitla Bakhsh Singh was a defective notice for a suit instituted by the appellants, inasmuch as it did not even mention the names of the appellants, much less state or show their title to the property in dispute. We are not, however, disposed to place too strict a construction on the words "cause of action," and on this ground would not be disposed to hold that the notice was a bad notice. The section, however, further requires that in the notice "*the name and place of abode of the intending plaintiff*" shall be stated. Neither the names nor places of abode of the appellants were mentioned in the notice of the 24th of January, 1896, nor was there any suggestion in that notice of any intention on the part of these appellants to institute any action, nor could there well be. The intending plaintiffs were Pirthi Pal Singh and Sitla Bakhsh Singh. Can it be said, then, that the requirements of the section have been complied with? Pandit *Sundar Lal* on behalf of the appellants strenuously contended that the suit should be regarded as a suit brought by the plaintiffs as representatives of Pirthi Pal Singh and Sitla Bakhsh Singh, and that the notice given by the latter is a valid notice in the case of a suit so instituted by the representatives. He has not referred us to any authority for this proposition. If we acceded to this contention, it appears to us that we should be adding words to section 424 which find no place in it. It would be necessary to add after the words "name and place of abode of the intending plaintiff" some such words as "or of the party through whom such intending plaintiff claims." This we are not at liberty to do. We

Mr *A E Ryves*, for the Secretary of State

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APPELLATE CIVIL

25 A 187=23 A W N 13

STANLEY, C J and BANERJI, J —The question for determination in this appeal is in regard to the sufficiency of a notice given under section 424 of the Civil Procedure Code The facts are shortly as follows —One Sheo Paras Singh was possessed of considerable immoveable property situate in the district of Allahabad He died on the 15th of September, 1859, without leaving any issue, but leaving his widow, Musammat Gend Kunwar, surviving him Upon his death Musammat Gend Kunwar succeeded to the property as a Hindu window, but being found in the year 1874 to be unfit for the management of it, the property was, under Act No XIX of 1873, placed under the [189] management of the Court of Wards Musammat Gend Kunwar died on the 10th of January, 1887, and upon her death the Collector of Allahabad took possession of the property on behalf of the Secretary of State for India in Council, who claimed it by way of escheat On the 24th of January, 1896, that is, upwards of nine years from the death of Musammat Gend Kunwar a notice, purporting to be under the provisions of section 424 of the Code of Civil Procedure, was given by one Pirthi Pal Singh and one Sitla Bakhsh Singh to the Chief Secretary of the Hon'ble the Lieutenant Governor of the North Western Provinces, claiming to be entitled to the property of Sheo Paras Singh as his reversionary heirs In reply to this notice Pirthi Pal and Sitla Bakhsh were informed that the Government could not grant their request, and that they were at liberty to take such legal proceedings as they might think proper This was on 27th July, 1896 No further step was taken in the matter by either Pirthi Pal or Sitla Bakhsh Sitla Bakhsh died on the 9th of December, 1897, and Pirthi Pal died on the 19th of October, 1898 On the 9th of January, 1899, that is twelve years all but one day from the death of Musammat Gend Kunwar, the present suit was instituted by Bachchu Singh, the son of Pirthi Pal Singh, and by Jai Narain Singh, a son of Sitla Bakhsh Singh, for recovery of the property of Sheo Paras Singh and for mesne profits The second defendant Bindesri Singh is a son of Sitla Bakhsh Singh The Secretary of State for India in Council pleaded among other defences to the suit, a defence in bar, namely, that previous to the institution of the suit the plaintiffs did not give the notice of their intention to bring the suit prescribed by section 424 of the Code of Civil Procedure The learned Subordinate Judge held that the notice which was given by Pirthi Pal Singh and Sitla Bakhsh Singh was not a good notice for the plaintiffs suit within the meaning of the section, and dismissed the suit From this decree the present appeal has been preferred

The main question for our determination then shortly is, whether or not a notice given under section 424 of the Code of Civil Procedure by parties who subsequently die without instituting a suit, can be availed of by their heirs and representatives [190] as a valid notice preliminary to a suit instituted by such heirs and representatives In other words, whether or not a notice given under the provisions of section 424 by a party who dies before any suit has been instituted by such party will enure for the benefit of his representatives, and entitle the representatives to maintain a suit without giving a fresh notice. A subsidiary point has been raised by the learned Advocate for the appellants, which is, that if it be held that the notice so given cannot be availed of by the representatives, the suit ought not to have been dismissed,

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hand." How different is the language of section 424 of the Code, *viz.*, "no suit *shall* be instituted," and "the plaint *must* contain a statement that such notice has been so delivered or left"? In the latter case words could not be found to express more clearly the duty of a plaintiff to give the notice prescribed by the section as a condition precedent to his instituting a suit. We are, for the foregoing reasons, of opinion that the provisions of section 424 of the Code have not been complied with by the plaintiffs, and that the plaint ought to have been rejected under the provisions of section 54 (*c*) of the Code. The appeal, therefore, fails, and is dismissed with costs.

Appeal dismissed.

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25 A. 194 (=23 A. W. N. 6.)

[194] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

BADAM (*Defendant*) *v.* NATHU SINGH (*Plaintiff*).*
[10th December, 1902.]

Civil Procedure Code, sections 157 *and* 158—*Non-appearance of plaintiff on adjourned date—Dismissal of suit for default—Remand for decision on the merits.*

On a date to which the hearing had been adjourned the plaintiff in a suit pending in the Court of a Munsif failed to appear when the case was called on, and the Munsif, acting apparently under section 102 read with section 157 of the Code of Civil Procedure, dismissed the suit "for default of prosecution." *Held*, that the appellate Court was right in remanding the suit to be disposed of under section 158 of the Code.

[**Ref.** 34 Cal. 235=5 C. L. J. 260; 14 I. C. 119=9 A. L J. 763; 7 I. C. 75=12 A. L. J. 368; 17 A. L. J. 849=51 I. C. 850=41 All. 663; 5 L. B R. 75; **Comm.** 19 M. L. J. 760=5 I. C. 23; **Diss.** 33 Mad. 241; **Dist.** 12 A. L. J. 911=24 I C. 480.]

IN this case the plaintiff in a suit pending in the Court of the first Additional Munsif of Meerut, produced his documentary evidence on the 17th of May, 1900, and examined one witness on the 23rd of November, 1900. He then got a commission issued to the amin to prepare a certain map in connection with the case, and the 18th of January, 1901, was fixed for the hearing of the case. Upon that date no appearance was made on behalf of the plaintiff. The Munsif thereupon passed the following order:—"It is nearly 1 o'clock, and neither the plaintiff nor his pleader is present. The Court is unable to wait any longer. Babu Raghubir Saran, plaintiff's pleader, is absent, as the chaprasi informs the Court, and Beni Prasad, mukhtar, has not yet done anything, though ordered by the Court to do so long ago. It is accordingly ordered that the plaintiff's suit be dismissed for default of prosecution by him, and that the defendants get their costs from the plaintiff."

Against this order the plaintiff appealed to the Additional District Judge of Meerut, who was of opinion that the lower Court should have proceeded to decide the suit under section 158 of the Code of Civil Procedure, and therefore remanded the suit for trial on the merits. Against this order of remand the defendants appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant.

Munshi *Govind Prasad*, for the respondent.

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* First Appeal No. 90 of 1902 from an order of Rai Kishan Lal, Additional District Judge of Meerut, dated the 23rd June 1902.

may observe, moreover, that there is nothing to show that Pirthi Pal Singh and Sitla Bakhsh Singh ever intended to institute a suit It is one thing to serve a notice under section 424, and another thing to institute a suit From the fact that no suit was instituted by them in their life time, the reasonable inference is, that if they ever really intended to do [192] so, they abandoned the idea The notice is dated so far back as the 24th of January, 1896, and Sitla Bakhsh Singh did not die until the 9th of December 1897, that is nearly two years after the date of the notice, while Pirthi Pal Singh did not die until the 18th of October, 1898, nearly a year later We do not think it necessary to discuss the case of the *Secretary of State* v *Piru Mall Pillai* (1), which was relied upon by the appellants, as the facts in it are unlike those in the present case For the foregoing reasons we have no hesitation in holding that no notice of the plaintiff's suit within the meaning of section 424 has been served

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It was, however, further contended on behalf of the appellants that if the notice in question was not a good notice, it was not right to dismiss the plaintiffs' suit without giving them an opportunity of serving a fresh notice Reliance was placed in support of this contention on the decision in the case of *Rendall* v *Blair* (2) In that case the master of a charity school founded under the statute 4 and 5 Vic, Cap XXXVIII, brought a suit in the Chancery Division against the managers of the school for an injunction to restrain them from dismissing him from his office The plaintiff had not obtained under section 17 of the Charitable Trusts Acts, 1853, the leave of the Charity Commissioners to bring the suit This section provides that "before any suit, petition or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order or direction concerning or relating to any charity, or the estate, funds property or income thereof shall be commenced, presented or taken by any person whomsoever, there shall be transmitted by such person to the said Board (*i e*, the Charity Commissioners) notice in writing of such proposed suit

The section goes on to provide that the Board may by order or certificate authorize a suit to be commenced, &c Then follows this provision —" and (save as herein otherwise provided), no suit, petition or other proceeding for obtaining any such relief shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and [193] in conformity with an order or certificate of the said Board It was held by Cotton, Bowen and Fry, L JJ, overruling Kay, J that if the consent of the Charity Commissioners was required, it was not necessary to obtain it before the commencement of the action, and that it would not be right to dismiss the action without giving the plaintiff the opportunity of ascertaining whether the Commissioners would give their consent Section 17 of the Charitable Trusts Act, we may observe, is differently drafted from section 424 of the Civil Procedure Code The section begins with the words —' Before any suit shall be commenced there shall be transmitted notice in writing to the Board It abstains from saying that the action is to be dismissed if no such notice is transmitted On the contrary as pointed out by Bowen, L J," it only indicates that, 'save as hereinbefore provided, no suit petition or other proceeding shall be entertained or proceeded with by the Court, that is to say, the enactment is directory It directs what ought to be done Unless the duty is complied with by the litigant, the Court must hold its

(1) (1900) I L R 24 Mad. 279 (2) (1890) 45 Ch D 139

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such an arrest as that which took place in this case was sufficient within the meaning of section 344 of the Code of Civil Procedure to warrant the Court in making an order declaring the applicant an insolvent.

Mr. *M. L. Agarwala*, for the appellant.

The respondent was not represented.

BURKITT and AIKMAN, JJ.—In this case the respondent, one Muhammad Kazim Ali, has been declared by the District Judge of Mirzapur, under section 351 of the Code of Civil Procedure, to be an insolvent. Against this order the present appeal has been instituted by one Jumai, who holds a decree against the respondent. The facts of the case appear to be that the respondent Kazim Ali was arrested in execution of the appellant's decree, but was released after few hours' detention owing to the appellant's failure to pay subsistence money. Some twenty days afterwards the respondent put in an application to the Court under section 344 of the Code of Civil Procedure, asking the Court to declare him an insolvent. That application has been granted. The question we have to decide is, whether the Court below was justified in its order. In our opinion it was not. The facts clearly show that at the time the respondent put in his application, he was not suffering under any duress of Court, nor had any order of attachment issued against his [206] property. The proceedings taken against him by way of arrest had dropped. We cannot believe that it was the intention of the Legislature that any judgment-debtor, who had once been arrested, or against whose property an order of attachment had once been made, could some years afterwards come into Court, and apply to it to declare him insolvent on the strength of a long-dropped proceeding by arrest or attachment. We think it is only a person against whom proceedings under section 344 are actually pending who is entitled to make the application permitted by that section. We must therefore allow the appeal. We set aside the order of the District Judge declaring the respondent to be insolvent. The appellant is entitled to his costs of this appeal. We may add that the respondent was not represented at the hearing of the appeal. The above order therefore is *ex parte*.

Appeal decreed.

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25 A. 206 (=23 A. W. N. 15.)

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

MEHDI HUSAIN (*Plaintiff*) *v.* SUGHRA BEGAM AND OTHERS (*Defendants*).* [11th December, 1902.]

Civil Procedure Code, sections 368, 588 (18)—Death of one of several defendants—Order declaring suit to have abated—Appeal.

Held that an order made under the penultimate clause of section 368 of the Code of Civil Procedure declaring a suit to have abated is appealable, not as a decree, but as an order under section 588 (18) of the Code.

Where a defendant to a suit for the recovery of a mortgage debt, who was on the record as a surety personally for the payment of the mortgage money, died, and the plaintiff declined to place on the record such defendant's legal

* First Appeal No. 96 of 1902, from an order of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Benares, dated the 14th July, 1902.

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AIKMAN, J (BURKITT, J concurring)—In our opinion this appeal must fail The only plea urged before us is that no appeal lay to the lower appellate Court It appears that the [195] plaintiff respondent instituted the suit on the 18th of April, 1900 Issues were framed on the 4th of June, 1900 The plaintiff put in all the evidence, oral and documentary, that he wished to adduce The hearing of the case was adjourned to the 18th of January, 1901 On that date neither the plaintiff nor his pleader being in attendance, the Additional Munsif passed an order dismissing the suit "for default of prosecution," as he called it On appeal the learned Additional District Judge pointed out that the lower Court ought to have proceeded to decide the suit under section 158 of the Code of Civil Procedure, and ought not to have dismissed it for default It was, of course, open to the Munsif, if he considered the evidence which the plaintiff had produced insufficient, to pass a decree dismissing the suit on that ground In that case it would have been a decree dismissing the suit on the merits, and therefore a decree from which an appeal would lie We consider the lower appellate Court was right in remanding the case to *the Court of first instance for trial on the merits We dismiss the* appeal The plaintiff respondent will have his costs of this appeal in any event

Appeal dismissed

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25 A 195 (=23 A W N 5)

APPELLATE CIVIL.

Before Mr Justice Knox and Mr Justice Blair

LACHMI NARAIN AND ANOTHER (*Plaintiffs*) v FATEH BAHADUR SINGH AND ANOTHER (*Defendants*) * [10th December, 1902]

Act ... *ards— taken*

... proprietor " in Oudh ... 1876, attempted to sell ... stern Provinces, which property had not been entered in any list of the property of the disqualified ... of the Court of Wards, and had ... of Wards, it was *held* that the ...

... ken over as part ... *Sottomayor* v *De* ... *Stuart* v *Bute* (4) referred to

IN the suit out of which this appeal arose the plaintiff alleged that one Chaudhri Fateh Bahadur Singh had agreed to sell to him a certain

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... of Babu Nilmadhab Rai, Judge ... vers of a Subordinate Judge of ... ing a decree of Pandit Kanhaya ... 24th December, 1899

(1) (1877) L R 3 P D 1
(2) (1887) 56 L J Ch 637
(3) (1888) L R 13 A C 88
(4) (1861) 9 H L C 440

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such an arrest as that which took place in this case was sufficient within the meaning of section 344 of the Code of Civil Procedure to warrant the Court in making an order declaring the applicant an insolvent.

Mr. *M. L. Agarwala*, for the appellant.

The respondent was not represented.

BURKITT and AIKMAN, JJ.—In this case the respondent, one Muhammad Kazim Ali, has been declared by the District Judge of Mirzapur, under section 351 of the Code of Civil Procedure, to be an insolvent. Against this order the present appeal has been instituted by one Jumai, who holds a decree against the respondent. The facts of the case appear to be that the respondent Kazim Ali was arrested in execution of the appellant's decree, but was released after few hours' detention owing to the appellant's failure to pay subsistence money. Some twenty days afterwards the respondent put in an application to the Court under section 344 of the Code of Civil Procedure, asking the Court to declare him an insolvent. That application has been granted. The question we have to decide is, whether the Court below was justified in its order. In our opinion it was not. The facts clearly show that at the time the respondent put in his application, he was not suffering under any duress of Court, nor had any order of attachment issued against his [206] property. The proceedings taken against him by way of arrest had dropped. We cannot believe that it was the intention of the Legislature that any judgment-debtor, who had once been arrested, or against whose property an order of attachment had once been made, could some years afterwards come into Court, and apply to it to declare him insolvent on the strength of a long-dropped proceeding by arrest or attachment. We think it is only a person against whom proceedings under section 344 are actually pending who is entitled to make the application permitted by that section. We must therefore allow the appeal. We set aside the order of the District Judge declaring the respondent to be insolvent. The appellant is entitled to his costs of this appeal. We may add that the respondent was not represented at the hearing of the appeal. The above order therefore is *ex parte*.

Appeal decreed.

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25 A. 206 (=23 A. W. N. 15.)

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

MEHDI HUSAIN (*Plaintiff*) *v.* SUGHRA BEGAM AND OTHERS (*Defendants*).* [11th December, 1902.]

Civil Procedure Code, sections 368, 588 (18)—*Death of one of several defendants—Order declaring suit to have abated—Appeal.*

Held that an order made under the penultimate clause of section 368 of the Code of Civil Procedure declaring a suit to have abated is appealable, not as a decree, but as an order under section 588 (18) of the Code.

Where a defendant to a suit for the recovery of a mortgage debt, who was on the record as a surety personally for the payment of the mortgage money, died, and the plaintiff declined to place on the record such defendant's legal

* First Appeal No. 96 of 1902, from an order of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Benares, dated the 14th July, 1902.

representative, it was held that this only amounted to a waiver of the plaintiff's rights as against the surety, and did not preclude him from continuing the suit against the mortgagor The suit did not abate

1902 Dec 11.

APPELLATE CIVIL.

25 A 206= 23 A. W N 15

[Ref 31 I C 822]

THE facts of this case sufficiently appear from the judgment of the Court

Babu *Satya Chandra Mukerji*, for the appellant

Mr *Abdul Raoof*, Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* and Babu *Sital Prasad Ghosh*, for the respondents

AIKMAN, J (BURKITT, J, concurring) —This is an appeal under clause (18) of section 588 of the Code of Civil Procedure [207] from an order passed by the Subordinate Judge of Benares declaring that the suit brought by the plaintiff appellant had abated The order is one under the penultimate clause of section 368 of the Code of Civil Procedure On behalf of the respondents a preliminary objection is taken to the effect that no appeal lies This objection is based upon the contention that an order declaring that a suit shall abate has the force of a decree We are unable to sustain this objection The clause under which the appeal is laid gives a right of appeal from orders under section 368 without any restriction whatever as to the nature of the order The provision in the same clause as regards appeals from orders under section 366 is significant Under the first clause of section 366 the order to be passed is that the suit shall abate But clause (18) of section 588 gives no appeal against such an order It restricts the right of appeal to the case of orders passed under paragraph 2 of section 366 We attach no weight to the argument that the penultimate clause of section 368 does not in so many words authorise the Court to do any thing, but simply says that the suit shall abate, as it were, automatically We consider that an order is necessary declaring that the suit has abated We therefore repel the preliminary objection

The plaintiff Mehdi Husain is a mortgagee under a deed, dated the 29th of March, 1890 It has been found that the property mortgaged belongs exclusively to Sughra Begam The second executant of the deed is one Agha Jan Nimazi, who was the second husband of Sughra Begam He, as executant, renders himself personally liable to the mortgagee for the payment of the debt incurred by Sughra Begam It is also recited that as between Sughra Begam and Agha Jan Nimazi he is merely a surety for the said Sughra Begam It appears that Agha Jan died on the 11th or 12th of January, 1901 The plaintiff intimated to the Court the death of Agha Jan on the 2nd of June, 1902 In his petition the plaintiff says —' As Agha Jan Nimazi, who was made a party to suit simply as a *pro formâ* defendant, made no defence in the suit, it seems unnecessary to the plaintiff to take proceedings against the heirs of the said defendant, even if there be any besides the [208] defendant No 1, as beyond expense and delay, no purpose can be served It is therefore prayed that the case be proceeded with as against the existing defendants This petition the Court ordered to be filed On the 11th of July, 1902, an application on behalf of one of the defendants, namely, Kashi Nath, a subsequent transferee from Sughra Begam of a part of the
nted, alleging that Agha Jan had died on
asking that, as the plaintiff had omitted
w to make any application to bring on the
record the legal representatives of the deceased, the suit should be struck

representative, it was held that this only amounted to a waiver of the plaintiff's rights as against the surety, and did not preclude him from continuing the suit against the mortgagor The suit did not abate

1902 DEC 11.

APPELLATE CIVIL

25 A 206= 23 A. W N 15

[Ref 34 I C 922]

THE facts of this case sufficiently appear from the judgment of the Court

Babu *Satya Chandra Mukerji*, for the appellant

Mr *Abdul Raoof*, Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* and Babu *Sital Prasad Ghosh*, for the respondents

AIKMAN, J (BURKITT, J, concurring) —This is an appeal under clause (18) of section 588 of the Code of Civil Procedure [207] from an order passed by the Subordinate Judge of Benares declaring that the suit brought by the plaintiff appellant had abated The order is one under the penultimate clause of section 368 of the Code of Civil Procedure On behalf of the respondents a preliminary objection is taken to the effect that no appeal lies This objection is based upon the contention that an order declaring that a suit shall abate has the force of a decree We are unable to sustain this objection The clause under which the appeal is laid gives a right of appeal from orders under section 368 without any restriction whatever as to the nature of the order The provision in the same clause as regards appeals from orders under section 366 is significant Under the first clause of section 366 the order to be passed is that the suit shall abate But clause (18) of section 588 gives no appeal against such an order It restricts the right of appeal to the case of orders passed under paragraph 2 of section 366 We attach no weight to the argument that the penultimate clause of section 368 does not in so many words authorise the Court to do any thing, but simply says that the suit shall abate, as it were, automatically We consider that an order is necessary declaring that the suit has abated We therefore repel the preliminary objection

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1902 DEC. 13.

FULL BENCH.

25 A. 214= 23 A. W. N. 21.

25 A. 214 (=23 A. W. N. 21.)

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Knox and Mr. Justice Banerji.

DEBI SINGH AND OTHERS (*Plaintiffs*) v. JIA RAM AND OTHERS (*Defendants*).* [13th December, 1902.]

Hindu Law—Mitakshara—Joint Hindu family—Mortgage of joint family property executed by the father—Decree and sale of mortgaged property—Suit by sons to recover their shares—Act No. IV of 1882 (Transfer of Property Act), section 85—Effect of sale.

Where property belonging to a joint Hindu family has been sold by auction in execution of a decree obtained upon a mortgage of such property executed by the father of the joint family, it is open to the sons to sue for the recovery of their shares in the property so sold, if they were not made parties to the suit in which the decree against their father was obtained, provided that the mortgagee had at the time of suit notice of their interests in the property. But their suit must be based upon some ground which under the Hindu law would free them from liability as sons in a Hindu joint family to pay their father's debts. A sale once having taken place, the sons cannot succeed in a suit to recover the property sold upon the sole ground that they were not made parties to the original suit. *Kaunsilla* v. *Chandar Sen* (1) overruled. *Hargu Lal Singh* v. *Gobind Rai* (2) and *Bhawani Prasad* v. *Kallu* (3) distinguished. *Rewa Mahton* v. *Ram Kishen Singh* (4), *Nanomi Babuasin* v. *Modhun Mohun* (5) *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (6), *Malkarjun* v. *Narhari* (7) and *Bhagbut Pershad Singh* v. *Girja Koer* (8) referred to.

[Fol. 28 All. 182=2 A. L. J. 647= A. W. N. 1905, 248 ; 12 Bom. L. R. 812 ; Dist, 28 All. 328=3 A. L. J. 81=A. W. N. 1906, 40; 30 All. 256=A. W. N. 1908, 106= 5 A. L. J. 267; Ref. 31 All. 599=6 A. L. J. 799= 6 M. L. T. 99=3 Ind. Cas. 24 ; 7 O. C. 137 ; 2 N. L. R. 90 ; 5 N. L. R. 117=3 Ind. Cas. 570 ; 34 All. 549; 36 All. 516 ; 7 A. L. J. 945= 33 All. 71 ; 8 A. L. J. 216=9 I. C. 476=33 All. 436 ; 8 A. L. J. 922 ; Not Fol. 7 A. L. J. 852 ; Expl. 9 A. L. J. 67=13 I. C. 951 ; Rel. 14 I. C. 333=16 C. W. N. 1019. 31 M. L. J. 222=(1916) 2 M. W. N. 233=35 I. C. 124 ; Ref. 56 I. C. 299 ; 12 A. L. J. 855=24 I. C. 612 ; 17 O. C. 318.]

JIA RAM and his three sons, Debi Singh, Balwant Singh and Dharam Singh, constituted a joint Hindu family governed by rules of the Mitakshara law. As such joint Hindu family Jia Ram and his sons owned a 10 biswansi share in a holding in [215] Kunjan Bazar, pargana Meerut. Jia Ram executed three mortgages of this share in favour of one Tulsi Ram, namely a mortgage of the 22nd of March, 1882, to secure a principal sum of Rs. 1,360 and interest: a mortgage of the 4th of December, 1886, to secure a principal sum of Rs. 850 and interest, and a mortgage of the 28th of April, 1887, to secure a principal sum of Rs. 300 and interest. On the two later mortgages Tulsi Ram instituted a suit against Jia Ram for sale of the mortgaged property, but he did not make Jia Ram's sons parties to that suit. A decree for sale was passed in that suit on the 10th of June, 1890, and on the 19th of January, 1891, an order absolute was made for sale of the mortgaged property, and the same was sold on the 20th of December, 1893, and purchased by two persons named Tara Singh and Nain Singh, subject, however, to the first mortgage of the 22nd of March, 1882. The names of the purchasers were subsequently recorded in the khewat as

* Appeal No. 55 of 1901, under section 10 of the Letters Patent.

(1) (1900) I. L. R. 22 All. 377.
(2) (1897) I. L. R. 19 All. 541.
(3) (1895) I. L. R. 17 All. 537.
(4) (1886) I. L. R. 14 Cal. 18.
(5) (1885) I. L. R. 13 Cal. 21.
(6) (1879) I. L. R. 6 I. A. 88.
(7) (1900) I. L. R. 25 Bom. 337.
(8) (1888) I. L. R. 15 Cal. 717.

BURKITT and AIKMAN, JJ —This is an appeal by a judgment debtor in an execution case On the 23rd of June, 1900, Musammat Rukia got a decree under section 88 of the Transfer of Property Act for sale of certain property mortgaged to her in default of payment of the mortgage money On the 26th of February, 1901, she got an order absolute under section 89 of that Act for sale of a portion of the mortgaged property, viz, a 5 biswa share in mauza Pipalgaon Thereafter she transferred her decree to the respondent Bohra Mithu Lal, who has been allowed under section 232 of the Code of Civil Procedure to proceed with the execution of the decree The assignee has now applied for an order absolute under section 89 for sale of [213] another portion of the mortgaged property The Court below has given the assignee the order he asked for The present appeal is brought against that order of the lower Court The grounds of appeal are not very artistically worded, but the learned vakil explains that he means by them to contend that the decree holder having obtained an order under section 89 for sale of a portion of the mortgaged property, any further application for an order under that section is barred, in other words, he contends that the making of the first order extinguished the power of the Court under section 89, and precludes it from passing any further order under that section So far as we know or can ascertain this question is entirely a novel one After giving the point our careful consideration, we have arrived at the conclusion that the decision of the Court below is right It is quite clear from the terms of section 89 that when an application is made for an order absolute under that section, the Court may pass an order that the mortgaged property, or a sufficient part thereof, be sold Assuming that an order has been obtained for sale of a part of the mortgaged property and that the proceeds of that sale prove insufficient to discharge the decretal amount, we cannot see anything in law to prevent the mortgagee decree holder from asking for a further order to sell another part of the mortgaged property, provided his application is within time It has been held by this Court that an application under section 89 is an application in execution There can be no doubt that successive applications for execution (say of a money decree) are admissible so long as the decree has not been fully satisfied, and execution of the decree has not become time barred We see no reason why a different principle should be applied to the case of a decree for money to be realized by sale of mortgaged property For these reasons we see no reason why a mortgagee who has obtained a decree under section 88 of the Transfer of Property Act for sale of several parcels of the property mortgaged to him, and who considers that the sale of one or more portions of those items will suffice to discharge the decretal amount should not be allowed to apply under section 89 for an order absolute for the sale of those parcels only If his expectation is not fulfilled, we cannot [214] see anything to preclude him from proceeding against other portions of the property, so long as he does so within the time allowed by law For these reasons we dismiss the appeal with costs

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APPELLATE CIVIL

25 A. 212=23 A W N 17

Appeal dismissed

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[217] under section 10 of the Letters Patent. The Judges before whom the appeal came having some doubts as to the correctness of the decision in the case which I have mentioned, referred the appeal to a larger Bench.

In the case of *Kaunsilla* v. *Chandar Sen* (1) the facts were shortly as follows :—One Jagannath owned 11¼ biswas in a particular mahal, which he mortgaged to Tulshi Ram by a simple mortgage, which was subsequently treated as an usufructuary mortgage, the mortgagee having been let into possession. Jagannath died, leaving three sons, namely Raghunath Das, Narain Das and Mul Chand, who is described as Mul Chand No. 1. On the 29th of October, 1881, Raghunath and Narain Das sold their two-third share, that is 7½ biswas of the property, to Tulshi Ram, who thus became owner of 7½ biswas, and continued to be mortgagee of the remaining 3¾ biswas of Mul Chand No. 1. Tulshi Ram, who owned another 5 biswas in the same mahal, died, leaving a son, Mul Chand No. 2, and this Mul Chand No. 2 mortgaged the entire 16¼ biswas as full owner on the 3rd of January, 1837, to Musammat Kaunsilla and Bishan Lal. These mortgagees brought a suit upon their mortgage against Mul Chand No. 2 only, and obtained a decree for sale, and in execution of that decree the entire 6¼ biswas were sold and purchased by Musammat Kaunsilla on the 20th of June, 1895. The sale was confirmed, and possession given, on the 24th of September, 1895. On the 22nd of February, 1897, Chandar Sen, who had, on the 24th of May, 1897, purchased the 3¾ biswas to which Mul Chand No. 1 was entitled, brought a suit to eject Musammat Kaunsilla. He was given an opportunity of redeeming the mortgage, but declined to accept it. The Court of first instance dismissed the claim, but the lower appellate Court reversed the decree of the Court of first instance, and decreed the plaintiff's claim. On second appeal a Bench of this High Court reversed the decree of the lower appellate Court, and restored that of the Court of first instance. In the course of their judgment the learned Judges observe that "it is not necessary, as has been observed by the Privy Council, for an intending purchaser at a sale under a decree, to go behind the decree to see whether the decree has been rightly made." [218] They then quote a part of the judgment of their Lordships of the Privy Council in the case of *Rewa Mahton* v. *Ram Kishen Singh* (2), which is as follows :—"To hold that a purchaser at a sale in execution is bound to inquire *into such matters*, would throw a great impediment in the way of purchasers under execution. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." The learned Judges then go on to observe :—"There seems to be no real distinction between a sale which takes place under a decree which directs a sale, as in the case of a mortgage, and a sale in execution held under an order made after a decree for money." Now I would first observe in regard to the case of *Rewa Mahton* v. *Ram Kishen Singh*, (2) that it was not the case of a sale of immoveable property, nor was the question dealt with in it one of title to any class of property. In that case the question was as to the construction of section 246 of the Civil Procedure Code which prescribes that if cross decrees between the same parties and for the payment of money are produced to the Court, execution shall be taken out only by the holder of the decree for the larger

(1) (1900) I. L. R. 22 All. 377. (2) (1886) I. L. R. 14 Cal. 18.

owners of the property Thereafter, on the 8th of September, 1896, the sons of Jia Ram instituted a suit for recovery of proprietary possession of their shares, amounting to seven and a half biswansis, in the property sold, on the ground that the decree and sale were illegal and void as against them The Court of first instance decreed the plaintiffs' claim, and this decree was upheld by the lower appellate Court on appeal But the defendants appealed to the High Court, and there the decision of the two lower Courts was reversed, and the suit was dismissed The single Judge who heard the appeal followed the decision in *Kaunsilla v Chandar Sen* (1) From this decision the plaintiffs preferred an appeal under section 10 of the Letters Patent of the Court, which, owing to doubts entertained by a Division Bench as to the correctness of the ruling referred to, was laid before a Bench of three Judges for disposal

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Munshi *Haribans Sahai*, for the appellants

Pandit *Moti Lal Nehru*, for the respondents

STANLEY, C J —This appeal has arisen out of a suit which was brought by Debi Singh Balwant Singh and Dharam Singh, the sons of one Jia Ram, for recovery of possession of 7½ biswansis of a 10 biswansi share in a holding in Kunjan Bazar, [216] pargana Meerut Jia Ram and his sons constituted a joint Hindu family at the date of the execution by Jia Ram of certain mortgages which I shall presently mention, and as such joint family were entitled to the share above specified in Kunjan Bazar Jia Ram executed three mortgages of this share in favour of Tulsi Ram, the father of the defendant Nanhe Mal, namely a mortgage of the 22nd of March, 1882, to secure a principal sum of Rs 1,360 and interest, a mortgage of the 4th of December, 1886, to secure a principal sum of Rs 850 and interest, and a mortgage of the 28th of April, 1887, to secure a principal sum of Rs 300 and interest On foot of the two last mentioned mortgages Tulsi Ram instituted a suit against Jia Ram for sale of the mortgaged property, but did not make the plaintiffs parties to the suit A decree for sale was passed in that suit on the 10th of June, 1890, and on the 19th January, 1891, an order absolute was made for sale of the mortgaged property, and the same was sold on the 20 of December, 1893, and purchased by the defendants, Tara Singh and Nain Singh, subject, however, to the mortgage of the 22nd of March, 1882 The names of the purchasers were subsequenly recorded in the khewat as owners of the property The plaintiffs instituted this suit on the 8th of September, 1896, and in it claimed to be entitled to proprietary possession of their share ofthe property, viz, a 7½ biswansi share out of 10 biswansis, on the ground that the decree and sale were void and illegal as against them The Court of first instance decreed the plaintiffs' claim, and this decree was upheld by the lower appellate Court on appeal but upon second appeal the decision of the two lower Courts was reversed and the suit was dismissed on the ground that the defendants were auction purchasers, and being such, "when bidding at an auction sale held under the orders of a competent Court, there was no duty imposed on them of inquiring whether the decree under which the sale was being made was a decree which the Court ought or ought not to have passed" The learned Judge who heard the appeal decided it in accordance with the rule laid down in the case of *Kaunsilla v Chandar Sen* (1) From this decision an appeal was preferred

(1) (1900) I L R 22 All. 377

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This view cannot, in my opinion, be supported. An auction purchaser at a sale in execution of a decree gets no better title and no greater interest than the title and interest which the judgment-debtor could convey. The Court gives no warranty of title, and the rule *caveat emptor* applies. If this were not so, we might have such a case as the following:—*A* brings a collusive suit against *B* upon a sham mortgage for the sale of the property of *C*, who has no knowledge of the proceedings; a decree is obtained, and a sale in execution is had, and the property is purchased by a stranger. Could it for a moment be contended that *C* is thereby deprived of his property? Clearly not. This is perhaps an extravagant illustration; it is not the less I think a legitimate test of the soundness of the rule laid down in the case of *Kaunsilla* v. *Chandar Sen* (1). For these reasons it appears to me that the ground upon which the appeal in this case was decided cannot be supported.

But there is another aspect of the case which has been laid before us in argument which must be dealt with. The plaintiffs and their father Jia Ram, the mortgagor, were members of a joint Hindu family when the mortgages in respect of which the suit by Tulsi Ram was brought were executed. The sole ground of their claim in this suit is *that they were not impleaded in the former suit.* They do not deny that the money expressed to be secured by the mortgages was lent to their father Jia Ram, nor do they allege that the debts so contracted were incurred for immoral or impious purposes. Unless the debts so incurred were tainted with immorality, the plaintiffs by reason of their pious duty as Hindu sons were liable to satisfy them out of the ancestral property in which they had an interest. In the case of *Nanomi Babuasin* v. *Modhun Mohun* (2), their Lordships of the Privy Council said:—"The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt *or against* [221] *the creditors' remedies for their debts if not tainted with immorality.* Again their Lordships observe:—" It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, *and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing the liability.* If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, *or the creditor might legally procure a sale of it by suit.* All the sons can claim is that not being parties to the sale or execution proceedings they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." It is indisputable that an alienation of ancestral property by a father in order to satisfy debts which are not tainted with immorality is binding on his sons; and it is also clear that what the father could himself have done the Court is empowered to do for him at the instance of a creditor, unless it be that the Transfer of Property Act has modified the operation of the ruling of their Lordships to which I have referred. Has this section of the Transfer of Property Act such a far-reaching effect? It provides that, subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage, must be joined as parties to any suit relating to such mortgage, provided that the plaintiff has notice of such interest. In this inquiry we are met at the outset with the decision of the majority of a

(1) (1900) I. L. R. 22 All. 377. (2) (1885) I. L. R. 13 Cal. 21.

sum, and only for the balance The facts were shortly as follows —Khub Lal took a lease of a village from Radheh Koeri, and paid her an advance as security for the rent Cross suits resulted, the lessor suing for two years' rent and the lessee for a refund of the advance The Munsif heard the suits together, recorded one judgment, but refused to set one sum off against the other before decree, and passed two decrees, one for Rs. 783 in favour of Radheh Koeri, and the other for Rs 661 in favour of Khub Lal Whilst proceedings in appeal were pending in regard to the execution of the decree obtained by Radheh Koeri, Khub Lal applied for the execution of his decree by the attachment and sale of Koeri's interest in a village The Court without applying section 246 to the case, made an order for the sale of such interest, and the appellant Rewa Mahton became the purchaser Radheh Koeri applied under section 311 of the Code to have the sale set aside, alleging that Khub Lal's decree ought not to have been executed, [219] inasmuch as she had a decree standing against him for a larger amount The application was rejected, and thereupon she brought a suit to have the sale set aside The Subordinate Judge dismissed the suit, but upon appeal to the High Court the decree of the Subordinate Judge was set aside, and the claim of the plaintiff decreed Their Lordships of the Privy Council on appeal to them set aside the judgment of the High Court, holding that where property sold in execution of a valid decree under the order of a competent Court was purchased *bona fide*, and for fair value, the mere existence of a cross decree for a higher amount in favour of the judgment debtor, without any question of fraud, would not support a suit by the latter against the purchaser to have the sale set aside Sir Barnes Peacock, in delivering the judgment of their Lordships, observed that "a purchaser under a sale in execution is not bound to enquire whether the judgment debtor had a cross judgment of a higher amount, any more than he would be bound in an ordinary case to enquire whether a judgment upon which an execution issues has been satisfied or not These are questions to be determined by the Court issuing the execution To hold that a purchaser at a sale in execution is bound to enquire *into such matters* would throw a great impediment in the way of purchases under executions" The facts of that case seem to me to bear little resemblance to the case before this High Court to which I have referred or to the case before us There was in it no question as to the title of Radheh Koeri to the property which was sold That property admittedly belonged to her What their Lordships determined was that a purchaser of property sold in execution of a decree was under no obligation to enquire whether the judgment debtor had a cross judgment of a higher amount than the amount of the judgment in execution of which sale was about to take place The learned Judges who decided the case of *Kaunsilla v Chandar Sen* (1) appear to me, with all deference to them, to have extended the operation of the ruling of their Lordships to a case outside and beyond its scope Following that ruling, the learned Judge who heard the appeal which is now under consideration held that there was no duty imposed on auction purchasers purchasing at a sale held under the orders [220] of a competent Court of enquiring whether the decree under which the sale was being made was a decree which the Court ought or ought not to have passed, and accordingly he dismissed the plaintiff's suit.

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FULL BENCH

25 A. 214= 23 A W N. 21.

(1) (1900) I L. R. 22 All. 377.

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death Hanmant Vithal, on the 22nd November, 1878, applied for execution of his decree "against defendant Nagappa, deceased, by his heir and nephew Ramalinga." Ramalinga informed the Court that he was not Nagappa's heir, but that the plaintiffs were Nagappa's heirs. Notwithstanding this notice, the Court decided that he was to be treated as such representative, and allowed the property to be attached and sold in execution of Hanmant Vithal's decree. At the sale the mortgagee purchased the property. In a suit by the plaintiffs for an account and redemption of the mortgage, it was held by their Lordships that the judicial sale was not a nullity, and could not be treated as invalid, notwithstanding the irregularity in not giving due notice of it to the legal representatives of the mortgagor, the jurisdiction of the Court to execute the decree having been complete throughout. The suit was accordingly dismissed. Their Lordships in their judgment observe: — "The real complaint here is, that the execution Court construed the Code (*i. e.* the Civil Procedure Code) erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice, that a purchaser cannot possibly judge of such matters, even if he knows the fact, and that if he is to be held

(1) (1895) I. L. R. 17 All. 537.

(2) (1900) I. L. R. 25 Bom. 337.

Full Bench of this Court in the case of *Bhawani Prasad* v *Kallu* (1) In that case it was held by Sir John Edge, C J, Knox, Blair, Burkitt and Aikman, JJ (Banerji, J, dissenting) that where a mortgagee instituted a suit for sale under section 88 of the Transfer of Property Act against his mortgagor, who was the father of sons in an undivided Hindu family governed by the Mitakshara law, without joining as parties to the suit such sons, although he had notice of their interest, and obtained a decree and an order for sale against the father only, the sons could successfully sue for a declaration that the mortgagee decree holder was not entitled to sell in [222] execution of his decree the interests of the sons in the mortgaged property, although the sole ground of their suit was that they were not impleaded in the suit by the mortgagees Now, whatever may be our individual views upon the correctness of this ruling, we are bound not merely to respect, but to follow it loyally in any case which comes within its operation On behalf of the plaintiffs it is contended that this ruling governs the present case, while on the part of the respondents the facts of the two cases are sought to be distinguished It has been strenuously argued on behalf of the respondents that the ruling does not govern a case in which a sale in execution of a mortgage decree has *actually taken place*, and that where such a sale has taken place the Court cannot treat the decree and sale in execution as mere nullities, and award proprietary possession to the appellants of the share in dispute upon the sole ground that they were not made parties to the suit by the mortgagees It is not suggested by the plaintiffs appellants that the debt of their father in respect of which the property in dispute has been sold, was tainted with immorality They merely rely on the fact that they were not impleaded in the suit brought by the respondent against their father In the case of *Suraj Bunsi Koer* v *Sheo Proshad Singh* (2) their Lordships of the Privy Council, referring to their decision in *Girdharee Lall* v *Kantoo Lall* (3), observe — 'This case, then, which is a decision of this tribunal, is undoubtedly an authority for these propositions—1st, where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father s debt, his sons, by reason of their duty to pay their father s debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted, and 2ndly, that the purchasers at an execution sale being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings It is thus [223] clear that before the passing of the Transfer of Property Act, the plaintiffs could not have set up their rights in the joint family property against their father s creditors' vendees for their debt, if not tainted with immorality But it is said that having regard to section 85 of the Transfer of Property Act, the mortgagees having failed to implead in their suit the appellants, of whose interests in the mortgaged property they had notice, could only obtain a decree for sale against the interest of Jia Ram, and that the decree passed and sale had in execution of that decree must be treated as having no effect upon the interest of the appellants, that the sale so far as regards the appellants

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25 A 215= 23 A W N 21

(1) (1895) I L R 17 All 537
(2) (1879) L R 6 I A 88
(3) (1874) L R 1 I A 321

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interest was in fact a nullity and must be treated as such. If this argument be well founded there can be no question but that the rulings of their Lordships of the Privy Council to which I have referred met with scant approval from the framers of the Transfer of Property Act. If the appellants had interposed before a sale had taken place., and established that the mortgagees had notice of their interests, they could no doubt, under the ruling in *Bhawani Prasad* v. *Kallu*, (1) have obtained a declaration from the Court that the decree-holders were not entitled to sell in execution of their decree the appellants' interests in the mortgaged property. They have not done so however, but have wittingly or unwittingly allowed the joint property to be sold by the Court to strangers whom they now seek to oust from the property with the assistance of the Court. If the purchasers at the sale in execution had purchased the property from Jia Ram and not through the Court, it is clear that the appellants could not upset the sale unless they were in a position to prove that the debt in respect of which the sale was effected was a debt tainted with immorality. The Court has done only what Jia Ram could himself have done. Are the purchasers under the judicial sale to be in a worse position than that which they would have occupied if they had purchased the property from Jia Ram? I think not. It would be a matter for regret if such were the legal effect of section 85 of the Act to which I have referred. In this connection I may allude to some observations of their Lordships of the Privy Council in the case of *Malkarjun* v. [224] *Narhari* (2). In that case the plaintiffs were the daughters of one Nagappa, who had mortgaged certain property to the defendant's father on the 28th of March, 1877. Subsequently, on the 27th of June, 1877, one Hanmant Vithal obtained a money decree against Nagappa, but before it was executed Nagappa died, having by his will bequeathed all his property to the plaintiffs. After Nagappa's death Hanmant Vithal, on the 22nd November, 1878, applied for execution of his decree "against defendant Nagappa, deceased, by his heir and nephew Ramalinga." Ramalinga informed the Court that he was not Nagappa's heir, but that the plaintiffs were Nagappa's heirs. Notwithstanding this notice, the Court decided that he was to be treated as such representative, and allowed the property to be attached and sold in execution of Hanmant Vithal's decree. At the sale the mortgagee purchased the property. In a suit by the plaintiffs for an account and redemption of the mortgage, it was held by their Lordships that the judicial sale was not a nullity, and could not be treated as invalid, notwithstanding the irregularity in not giving due notice of it to the legal representatives of the mortgagor, the jurisdiction of the Court to execute the decree having been complete throughout. The suit was accordingly dismissed. Their Lordships in their judgment observe: — "The real complaint here is, that the execution Court construed the Code (*i. e.* the Civil Procedure Code) erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice, that a purchaser cannot possibly judge of such matters, even if he knows the fact, and that if he is to be held

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sold to an innocent purchaser, justice seems to me to re
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tion before they can call upon the Court to declare a
d as against them For these reasons I am of opinion
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have had the opportunity of reading the judgment of
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and would dismiss the appeal

—I have arrived at the same conclusion as the learned
e suit was brought by Hindu sons governed by the
recover possession of their share of certain joint ances-

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tral property which had been sold by auction in execution of a decree obtained against their father under a mortgage-deed executed by him. The only ground of their claim was, that they had not been made parties to the suit in which the decree was obtained. They did not allege that the debt had not been contracted by their father, or that the nature of the debt was such that it was not their pious duty as Hindu sons to pay it. The learned single Judge of this Court before whom the case came in second appeal dismissed the suit on the ground that as the purchasers were not the mortgagees, but third parties, "there was no duty imposed on them of enquiring whether the decree under which the sale was being made was a decree which the Court ought or ought not to have passed," and that consequently the suit was not maintainable against them. In so holding he followed the ruling in *Kaunsilla* v. *Chandar Sen* (1). With great deference I am unable to agree with that ruling, and my reasons are the same as those set forth in his judgment by the learned Chief Justice. It is needless to point out that no title is guaranteed to an auction [227] purchaser except this that he should have all the rights and interests of the judgment-debtor in the property sold, whatever they might be. An auction sale cannot affect the rights of persons who were not parties to the suit or the execution proceeding which resulted in the sale. Therefore in the case of Hindu sons who were not parties to the proceedings under which the sale took place, the mere fact of the sale having been held and confirmed does not preclude them from questioning the validity of it upon grounds which under the Hindu law would relieve them of the obligation which that law imposes on them to pay their father's debts. In this connection I may refer to the following observations of their Lordships of the Privy Council in the well known case of *Nanomi Babuasin* v. *Modhun Mohun* (2):—"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing the liability. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All that the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be d[illegible]red from trying the fact or the nature of the debt in a suit of th[illegible]." The same view was held by their Lordships in the [illegible] case [illegible] *ut Pershad Singh* v. *Girja Koer* (3). These pronounce[illegible]ts of t[illegible] of the Privy Council are clear authority for holding even [illegible] has taken place it is competent to the sons to bring [illegible] chaser to recover their share of the property sold. [illegible] ider whether the sons are entitled to succeed in [illegible] e ground that the mortgagee at whose instance [illegible] ad notice of their interests, and had omitted to [illegible] the suit brought by him under his mortgage. [illegible] ed by the decision of the majority of the Full [illegible] *ani Prasad* v. *Kallu* (4). [228] All that was [illegible] before a sale has actually taken place the [illegible] their interests on the ground mentioned

(3) (1888) I. L. R. 15 Cal. 717.
(4) (1895) I. L. R. 17 All. 537.

bound to enquire into the accuracy of the Court's conduct of its own business no purchaser at a Court sale would be safe Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do' Their Lordships [225] further observe in the course of their judgment that it was "necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage There can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the plaintiffs to vitiate the sale But there may be defences to such a proceeding, and justice cannot be done unless these defences are examined by legal method" It seems to me not inappropriate to quote these weighty observations of their Lordships, even though it may be held that the case before them was not in its facts similar to that before us It may be argued that in that case the Court had jurisdiction to pass the decree which it did, establishing the debtor's liability, and that therefore the irregularity in working out that decree against the debtor's estate did not vitiate the judicial sale ultimately held, but that the Court, by reason of section 85 of the Transfer of Property Act had not jurisdiction to sell the interests in the property of the appellants, and so the sale in process of execution of such interests had nothing to rest upon and was void An answer to such an argument, if it was put forward, is that the Court had in a suit properly framed jurisdiction to sell the interest of the appellants, except in the single case that the debt of Jia Ram, for the payment of which the sale was ordered by the Court, was a debt tainted with immorality, and that this the appellants have not attempted to show It seems to me that to hold that the sons of a Hindu father constituting with such father a joint family could impeach a judicial sale made to an innocent stranger (there is no suggestion that the purchasers in this case had any notice of any flaw in the proceedings), merely on the ground that they had not been impleaded in the suit, would be fraught with grave inconvenience and injustice If such were the law, one can well imagine cases in which the sons would stand by until the sale had been completed, and the moneys of the purchaser had been applied in payment of the father's debt, and in case of their own liability, and afterwards put forward their claim and deprive the purchaser of the full benefit of his purchase Section 85 of the Transfer of Property Act was never, I am satisfied, intended to so [226] operate So long as a sale has not been carried out in favour of a stranger it may not be unreasonable to allow the sons under such circumstances to impeach the proceedings, and obtain from the Court a declaration that their interests are not saleable in execution but so soon as the property of the joint family has been sold to an innocent purchaser, justice seems to me to require that the sons shall be called upon to satisfy the Court that their interests in the purchased property were not in any event liable to be sold in execution before they can call upon the Court to declare a sale null and void as against them For these reasons I am of opinion that the appeal cannot be supported I would therefore dismiss it

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KNOX, J —I have had the opportunity of reading the judgment of the learned Chief Justice I have nothing further to add to what has been said therein, and would dismiss the appeal

BANERJI, J —I have arrived at the same conclusion as the learned Chief Justice The suit was brought by Hindu sons governed by the Mitakshara law to recover possession of their share of certain joint ances-

1903 JAN. 15. — APPELLATE CIVIL. — 25 A. 229= 23 A. W. N. 19.

The Court of first instance (Subordinate Judge of Cawnpore) accepted this contention, and accordingly gave the plaintiffs a decree upon one only of the two mortgages in suit, dismissing the suit so far as the other mortgage was concerned. From this decree the plaintiffs appealed to the High Court, urging that the lower Court was wrong in considering section 44 of the Code of Civil Procedure to be applicable to the suit, and that in any case, if the section was applicable, the Court ought not to have dismissed part of the suit, but ought to have returned the plaint for amendment.

Mr. *E. A. Howard*, for the appellants.

Munshi *Jang Bahadur Lal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The plaintiffs in this suit held from the predecessor in title of the defendants a mortgage by way of conditional sale, dated the 4th April, 1883, of a zamindari share in certain villages and also of *khudkasht* [230] lands. They likewise, under a similar mortgage by way of conditional sale of the same date, held certain *sir* land from the same party. In the suit out of which this appeal has arisen the plaintiffs sought to realize the amount of the two mortgages by foreclosure of the mortgaged properties. An objection was taken in the Court below to the joining of the two causes of action arising upon the two mortgage-deeds in the same suit, and the learned Subordinate Judge acceded to the objection, holding that it was well-founded under section 44 of the Code of Civil Procedure. The plaintiffs' claim accordingly was decreed in respect of one of the mortgage deeds, but as regards the other it was dismissed. From this decree plaintiffs have preferred this appeal. It appears to us that the Subordinate Judge was in error in applying to the case the provisions of section 44, inasmuch as the suit which was instituted by the plaintiffs was a suit for the recovery of moneys due on foot of the respective mortgage-deeds, and in default of payment of the amounts which should be found to be due thereunder for foreclosure of the mortgaged property. If the suit be regarded as a suit for the recovery of money, then clearly section 44 has no application. If, on the other hand, it be regarded as a suit for the recovery of immoveable property, section 44 would likewise have no application, inasmuch as no cause of action other than the causes of action in respect of which the suit for the recovery of immoveable property was brought, was joined with the suit. A similar question came before the Madras High Court in the case of *Chidambara Pillai* v. *Ramasami Pillai* (1). The learned Judges there held that "section 44 prohibits, not the joinder of several causes of action entitling a plaintiff to the recovery of immoveable property, but a joinder with such causes of action of causes of action of a different character, except as excepted in the section." Likewise in the case in this High Court of *Ambica Dat* v. *Ram Udit Pande* (2), it was held that "where a zamindari share and *sir* land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, a suit to pre-empt both the zamindari share and the *sir* land was not liable to be defeated on the [231] ground of misjoinder of causes of action." In his judgment, Aikman, J., observes :—"I find myself unable to hold that the terms of section 44 apply to this case." He then refers to the case in the Madras High Court to which we have referred, and concurs in the interpretation there put upon the provisions of section 44. We also think that this

(1) (1882) I. L. R. 5 Mad. 161. (2) (1895) I. L. R. 17 All. 274.

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25 A 214= 23 A W N 21

above The question is therefore *res integra*, and must be decided upon general principles On this point also I am in full accord with the learned Chief Justice It is not disputed that if the father had sold the family property, including the interests of the sons, for the payment of the amount of the decree obtained by the mortgagee, the sons could not have recovered from the purchaser their shares in the property unless they were able to show that the debt was tainted with immorality The Court in selling the property at auction does that which the judgment debtor himself might or ought to have done Therefore after auction sale the sons of the judgment debtor cannot, any more than in the case of a private sale by their father, avoid the operation of that sale upon their interests otherwise than by proving that the debt was not of such a nature as to justify a sale of those interests also A Hindu son stands on a different footing from other persons and this circumstance distinguishes the present case from that of *Hargu Lal Singh* v *Gobind Rai* (1) to which the learned vakil for the appellants referred As in the present case the plaintiffs do not even allege that the debt incurred by their father was tainted with immorality, the sale which has been held for the realization of that debt is binding on them, and they are not entitled to recover their share of the property comprised in the sale Their suit has therefore been rightly dismissed, and this appeal must be dismissed with costs In this view it is not necessary to consider the question of limitation raised on behalf of the respondents

BY THE COURT —The order of the Court is, for the reasons stated in the judgments, that the appeal be dismissed with costs

Appeal dismissed

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25 A 229 (=23 A W N 19)

[229] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

RAGHUBAR DAYAL AND ANOTHER (*Plaintiffs*) v JWALA SINGH AND OTHERS (*Defendants*) * [15th January, 1903]

Civil Procedure Code section 44—Misjoinder of causes of action—Suit including claims under two separate mortgage-deeds

Held, that section 44 of the Code of Civil Procedure has no application to the case of a plaintiff who, holding two mortgage deeds over separate properties, joins both in one suit for sale or foreclosure *Chidambara Pillai* v *Ramasami Pillai* (2) and *Ambika Dat* v *Rai Udit Pande* (3) referred to

[Ref 3 A L J 123=1906 A W N 51 Cited 6 A. L J 926]

THIS was a suit for recovery of money, or in default of payment for foreclosure, based upon two mortgages by conditional sale, both executed on the same date, but relating to different properties and for different amounts The defendants were the representatives in interest of the original mortgagor Amongst other pleas the defendants objected that in view of section 44 of the Code of Civil Procedure there was a misjoinder of causes of action which was not permissible except by leave of the Court, and such leave not having been obtained, the suit must fail

*First Appeal No 223 of 1900 from a decree of Munshi Sheo Sahai, Officiating Subordinate Judge of Cawnpore, dated the 6th day of August, 1900

(1) (1897) I L R 19 All 541
(2) (1882) I L. R. 5 Mad. 161
(3) (1895) I L R 17 All 274

1903 JAN. 16. — APPELLATE CIVIL. — 25 A. 231= 23 A. W. N. 20.

had been put into possession of the property mentioned in the decree on the 1st of September, 1896. On the 8th of February, 1899, the decree-holder applied for mutation of names upon the allegation that he had been a long time in possession of the property under a purchase made at auction, and ignoring entirely his true title to the property. On this false application the decree-holder obtained mutation of names on the 17th of March, 1899, the names of the judgment-debtors being expunged. On the 6th of February, 1901, the judgment-debtors paid into Court the principal amount declared to be due under the mortgage and prayed to be allowed to redeem the property, basing their application on the ground that the decree-holder had never obtained from the Court an order absolute under section 87 of the Transfer of Property Act.

The Court of first instance (Munsif of Farrukhabad) dismissed the judgment-debtors' application. On appeal the lower appellate Court (Subordinate Judge of Farrukhabad) reversed the Munsif's decision and declared the judgment-debtors entitled to redeem. From this order the decree-holder appealed to the High Court.

[233] Babu *Jogindro Nath Chaudhri* and Munshi *Gulzari Lal*, for the appellant.

Mr. *Ishaq Khan* and Maulvi *Muhammad Ishak*, for the respondents.

BLAIR, J.—This is a case in which a mortgagee having obtained a decree which is in effect a decree *nisi* under section 86 of the Transfer of Property Act, and the mortgagor having failed to pay the money within the time limited by that decree, he having deposited the money in Court at a later period than that fixed, the mortgagee in appeal now claims that the rights of the mortgagor to redeem have been absolutely determined. The facts upon which he relies for his contention are, that an application was made by the mortgagee that he should be put into possession of the mortgaged property, and that he had obtained an order to that effect. He argued that such application was, in substance and effect, an application under section 87 of the Transfer of Property Act, and I think it may be reasonably inferred that he intended to argue that from the fact that possession was given to the plaintiff it might be reasonably inferred that the right to redeem had been foreclosed by the Court granting such application. Unfortunately for him this contention has been already disposed of. The general proposition that the right of the mortgagor to redeem is not concluded otherwise than by an order made under section 87 of the Transfer of Property Act, has been laid down in several cases in this Court; and the fact that possession has been obtained by the plaintiff has been held in substance not to better the position of the mortgagee, if the mortgagor pays in the mortgage money before an order under section 87 is obtained. In a case to which I was a party, namely *Nihali* v. *Mittar Sen* (1) possession had already been obtained, and I find that in a recent case—*Somesh* v. *Ram Krishna Chowdhry* (2)—the Calcutta Court has ruled to the same effect. In the absence of authority to the contrary—and none has been cited—I abide by the ruling reported in I. L. R. 20 All. p. 446, and dismiss this appeal with costs.

Appeal dismissed.

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(1) (1898) I. L. R. 20 All. 446. (2) (1900) I. L. R. 27 Cal. 705.

s not come within the provisions of section 44, and that the ...nate Judge was in error We must allow the appeal and remand ...o under the provisions of section 562 of the Code of Civil Proce... ...or trial as regards the mortgage by conditional sale of the sir lands ...ay observe that if the Subordinate Judge had considered it inadvi... ...to try the two causes of action arising under the two mortgages in ...same suit, it was open to him under the provisions of section 45 to ...r separate trials He did not, however, do so, labouring under the ...take that section 44, and not section 45, applied to the case

The appellants will be entitled in any event to the costs of this ...ppeal

Appeal decreed and cause remanded

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25 A 231 (=23 A W N 20)

APPELLATE CIVIL

Before Mr Justice Blair

SALIG RAM (*Decree holder*) v MURADAN AND OTHERS (*Judgment debtors*) * [16th January, 1903]

Act No IV of 1882 (Transfer of Property Act), sections 86 and 87—Mortgage—Redemption—Redemption possible at any time until an order absolute under section 87 has been made

A mortgagor who has obtained a decree for redemption may pay in the decretal amount, and obtain redemption at any time up to the making of an order absolute under section 87 of the Transfer of Property Act, 1882 Nor is the mortgagor deprived of his right to redeem by the fact that under an order of Court, not being an order under section 87, the mortgagee has been put into possession of the mortgaged property *Nihals* v *Millar Sen* (1) and *Somesh* v *Ram Krishna Chaudhry* (2) followed.

[Ref 2 N L R 137 , Fol. 7 I C 50=7 A L J 553]

THIS was an appeal arising out of proceedings in execution of a decree for foreclosure of a mortgage The decree holder [232] held a usufructuary mortgage over certain zamindari property of the judgment-debtors, and had obtained a decree under section 86 of the Transfer of Property Act on the 7th of July, 1893 The mortgagee being in possession in lieu of interest, the decree provided that the mortgagors should pay the principal sum due under the mortgage by the 7th of January, 1894 The mortgage money was not paid within the period fixed by the decree, but the decree holder never applied for an order under section 87 of the Transfer of Property Act He, however, on the 6th of July, 1896, presented an application for execution of the decree, alleging that as the judgment debtors had not paid the amount due under the decree within the period fixed by the Court, the decree holder should be put into possession of the mortgaged property, and this notwithstanding the fact that he was already in possession The Court executing the decree issued an order to the amin directing him to put the decree holder into possession, and the decree holder executed a dakhal ramah acknowledging that he

* Second Appeal No 541 of 1901, from an order of Maulvi Syed Tasadduq Husain, Subordinate Judge of Farrukhabad, dated the 1sb day of August, 1901 reversing the decree of Babu Hari Mohan Banerji, Munsif of Fatehgarh, dated the 23rd day of May 1901.

(1) (1893) I L R 20 All 110.

(2) (1900) I L R 27 Cal 705.

25 A 234 (=23 A W N 31)

1903 JAN 23.

REVISIONAL CRIMINAL

25 A 234= 23 A W N 31

[234] REVISIONAL CRIMINAL

Before Mr Justice Blair

HASAN SHAH AND GANGA PRASAD v HARDEO SAHAI *

[23rd January, 1903]

Criminal Procedure Code, sections 195, 476—Sanction to prosecute—Order directing prosecution—Order framed in the alternative held to be bad—Revision

A District Magistrate having before him an application for the grant of sanction to prosecute a certain person for perjuries alleged by the applicants to have been committed by that person in the Court of the District Magistrate passed an order in the following form —" I District Magistrate, Bulandshahr, hereby charge you that you on the 21st day of June, 1902, at Bulandshahr, in the course of the hearing of the appeal, *Shib Dayal* v *K E*, stated in evidence before this Court, etc, etc (here follow the specific assignments) " *or* I sanction proceedings against you under section 182, Indian Pen etc " I make the case over . . . . . will furnish P R in Rs 500, . called on

Held that this order being framed in the alternative, was a bad order, and could not be acted upon

[Fol 12 Bom L R 811]

THE facts of this case sufficiently appear from the order of the Court

Mr *W K Porter*, for the applicants

Mr *C C Dillon* and Mr *Udai Vir Singh Raghubansi*, for the opposite party

BLAIR, J —This is an application in revision made on behalf of certain gentlemen who are Honorary Magistrates of the city of Bulandshahr, and it is an application asking this Court to reverse the decision of an Additional Sessions Judge passed in revision whereby a certain sanction was revoked The sanction revoked was one purporting to have been given by the District Magistrate of Bulandshahr The order of the Magistrate was in the following form —" I, George Bower, District Magistrate of Bulandshahr, hereby charge you Hardeo Sahai, Barrister at Law, that you on the 21st day of June, 1902, at Bulandshahr, in the course of the hearing of the appeal, *Shib Dayal* v *K E*, stated in evidence before this Court that Shib Dayal was not examined in my presence by the Honorary Magistrate Agha Hasan Shah—(1) '*but when I reached his* [235] *Court the Agha read over to me Shib Dayal's statement* The following sentence was not read over at the time by the Agha, (2) '*inhonne mujhse kaha tum jakar sarhe satrah ser tel ka rawanna karlao*' *This was added afterwards or changed*, (3) '*I remember that the following sentence was read to me —Mujhse shikram walane sarhe satrah ser tel bat laya,*' which statement (as italicized above and between the inverted commas) you either knew or believed to be false, or did not believe to be true, and thereby committed an offence under section 193 of the Indian Penal Code, or I sanction proceedings against you under section 182, Indian Penal Code, with giving false information in respect of the very same sentences on the same date, and at the same time and place (italicized and between the inverted commas above) to a public servant, *viz*

* Criminal Revision No 730 of 1902

1903 JAN. 23. — REVISIONAL CRIMINAL. — 25 A. 234=23 A. W. N. 31.

the District Magistrate, with a view to cause him to use his lawful power to the injury or annoyance of M. Ganga Prasad and Agha Hasan Shah, or to do something which such public servant would not have done if the true state of facts concerning which the above information was given were known by him. I make the case over to B. Dip Chand for disposal. B. Hardeo Sahai will furnish P. R. in Rs. 500 and one surety in like amount to appear when called on." The first part of the order, it is argued, if it is an order at all, was probably an order made under section 476 of the Code of Criminal Procedure. The second part of that order, if it is an order at all, was made under section 195 of the Code of Criminal Procedure. In the former case it was for the Magistrate to order the case to be put for disposal before some Magistrate having jurisdiction. As to the latter part of the order, it would be for the parties who had obtained the sanction to prosecute to pursue their own course for that purpose. It would seem somewhat extraordinary that an order should be made by the Court for the disposal of certain cases, and that alongside of that order another should have been drawn up dealing with the same facts, but simply looking upon them as falling within some other section, and thereby, had this been a double order, prescribing two concurrent remedies for that which is substantially the same offence. However, I hold that there were not two [236] orders at all, and that the directions given by the District Magistrate amounted not to an order, but to an option. He says, to put it briefly "I charge you with perjury, and I make this case over to a certain competent Magistrate, or in the alternative, I sanction the prosecution for an offence under section 182, Indian Penal Code, by the person asking for that sanction." I hold as a matter of law, that an option of that kind is not an order at all, and, as such, is absolutely invalid. I therefore set it aside, and leave the parties, if they be so advised, to take up the matter again, as a matter upon which no adjudication has been passed. The application in revision is dismissed.

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25 A. 236 (=30 I. A. 94=7 C. W. N. 465=5 Bom. L. R. 410=8 Sar. 397.)

PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bonser.

BAQAR ALI KHAN (*Defendant*) v. ANJUMAN ARA BEGAM AND ANOTHER (*Plaintiffs*) AND SADIQ ALI KHAN (*Defendant*) v. ANJUMAN ARA BEGAM AND ANOTHER (*Plaintiffs*).

[11th, 12th and 13th November, 1902 and 4th March, 1903.]

Two appeals consolidated.

[*On appeal from the Court of the Judicial Commissioner of Oudh*].

Muhammadan law—Endowment—Power of Shia to create valid waqf by will—Admissibility of evidence—Statements as to heirs made in accordance with practice of public office—Proof of legitimacy of heirs named in such statements.

By the law of the Shia sect of Muhammadans, as well as by that of the Sunni sect, a valid waqf can be created by will. *Agha Ali Khan v. Altaf Hasan Khan* (1) dissented from.

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(1) (1892) I. L. R. 14 All. 429.

A series of statements, extending from 1860 to 1890 by a wasiqadar, made in accordance with the practice of the wasiqa office, a department under Government, as to who were her heirs, and made at a time when no controversy on the subject was in contemplation, and letters written by her, in reply to inquiries by the wasiqa officer, explaining and confirming such statements, was held to be admissible in evidence in support of the legitimacy of such heirs, and, under the circumstances, to be conclusive in their favour

1902 NOV 11, 12 & 13 1903 MARCH 4

PRIVY COUNCIL

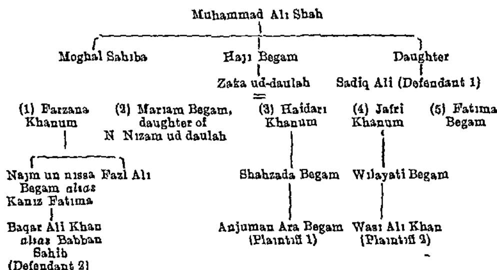
25 A. 236= 30 I A 94= 7 C W N 465=5 Bom L R 410= 8 Sar 397.

[Ref 2 A L J 519, 33 Cal 853, 36 All 431 2 N L R 158, Disc 28 All 633= 1906 A W N 146=3 A L J 387 Ref 4 L B R 154=35 Cal 1=4 A L J 572=11 C W N 973=9 Bom L R 872=17 M L J 408=6 C L J 495=2 M L T 479, 31 M L J 607]

CONSOLIDATED appeals from a judgment and decree (24th February 1899) of the Court of the Judicial Commissioner of Oudh reversing a decree (15th July 1897) of the Additional Civil Judge of Lucknow, by which the respondents' suit had been dismissed

[237] The suit was brought by Anjuman Ara Begam, and Wasi Ali Khan, as grandchildren of one Zaka-ud daulah and heirs of Haji Begam his mother, to recover two thirds of the property left by Haji Begam and to declare the invalidity of a document said to have been executed by Haji Begam on 10th of July 1890 The parties were of the Shia sect of Muhammadans

The following pedigree shows the relationship of the litigants —



Haji Begam survived her husband Ikhtidar ud daulah, his wives, and their children, and died on the 19th of January 1894, leaving as her nearest of kin his three grandchildren, who, if connected with her by legitimate descent, would be admittedly entitled to inherit her property in equal shares

On the 18th of July 1890 Haji Begam had executed the document which it was sought to set aside in this litigation, by which she professed to dispose by will of a third of her property for religious and charitable purposes, and set aside for those purposes Rs 54,100 for the expenses of an imambara and appointed Sadiq Ali Khan and Baqar Ali Khan as executors and superintendents with perpetual succession from generation to generation The material portions of this document are set out in their Lordships' judgment

1902 Nov. 11, 12 & 13. 1903 March 4. — Privy Council. — 25 A. 236=30 I. A. 94=7 C. W. N. 465=5 Bom. L. R. 410=8 Sar. 397.

On the 21st of December 1894 probate of this will was granted to Sadiq Ali alone, Baqar Ali being a minor, the plaintiffs opposing the grant.

[238] On the 8th of July 1895 the plaintiffs filed their suit in the Court of the Additional Civil Judge of Lucknow against Sadiq Ali Khan and Baqar Ali Khan, praying that the will might be set aside on the grounds of the mental incapacity of Haji Begam, fraud and undue influence on the part of Sadiq Ali, and its invalidity as being a *waqf-bil-wasiat*, or endowment by will. They sought for a decree for two-thirds of the entire property of Haji Begam.

The written statement of Sadiq Ali Khan asserted that the will was valid as it did not dispose of more than one-third of the property of the deceased.

Baqar Ali Khan in his written statement alleged that the plaintiffs were not the legitimate descendants of Haji Begam; that their grandmothers Haidari Khanum and Jafri Khanum were slave girls of Haji Begam, and that Zaka-ud-daulah had contracted no form of marriage with either of them. He also alleged that Haidari Khanum and Jafri Khanum were sisters of Farzana Khanum who was the first wife of Zaka-ud-daulah. He also maintained the validity of the will.

The plaintiffs filed replications to the written statements in which they denied that Farzana Khanum, Haidari Khanum, and Jafri Khanum were sisters and slave girls, and pleaded that all three women were married to Zaka-ud-daulah by the *mutai* form of marriage.

Issues were settled, of which the following only are now material:

First.—Are the plaintiffs heirs of Haji Begam, deceased? Or is the defendant No. 2 the only heir?

Sixth.—Is the will, dated the 10th of July 1890, invalid for the reasons given in the plaint?

The evidence as to the first issue showed that Haji Begam, as daughter of the King of Oudh, and apparently as being interested in one of the various loans made to the East India Company by that dynasty, was a wasiqadar or holder of a pension from the Government and that it was the practice of the wasiqa officer at Lucknow to require wasiqadars to file in his office from time to time declarations (called wirasatnamas) stating the names of the persons who were their heirs. The plaintiffs [239] produced documents purporting to be such declarations by Haji Begam and extending from the 13th of August 1860 to the 3rd of February 1890, and letters sent by Haji Begam to the wasiqa officer during that period. In the wirasatnama of earliest date (Exhibit A. 34) she mentioned as daughters born of mutai wives of Zaka-ud-daulah, Kaniz Fatima, *alias* Biggan Sahiba, aged 10 years, and Shahzada Begam aged one year. In the next dated the 1st of April 1863 (Exhibit A. 3) she said that she had the following heirs, one grandson and three granddaughters, "and excepting them none is my lawful heir." She set out their names as Fazl Ali, Najm-un-nissa, Shahzada, and Wilayati, the last having been born the year after the declaration of 1860. Zaka-ud-daulah was not mentioned in this document, though he had been in the declaration of 1860. In the next wirasatnama, dated the 22nd of December 1873 (Exhibit A. 4), Haji Begam declared she had only the following "heirs," and no others "excluded or not excluded, lawful or not lawful": Fazl Ali her grandson, Najm-un-nissa her granddaughter, Shahzada Begam, daughter of Zaka-ud-daulah, and Wilayati Begam,

A series of statements, extending from 1860 to 1890 by a wasiqadar, made in accordance with the practice of the wasiqa office, a department under Government, as to who were her heirs, and made at a time when no controversy on the subject was in contemplation, and letters written by her in [illegible]

[Ref 2 A. L J 519, 33 Cal 853, 36 All 431 2 N L R 159 Diss 28 All. 633=1903 A W N 146=3 A L J 387 Ref 4 L B R 154=35 Cal 1=4 A L J 572=11 C W N 973=9 Bom L R. 872=17 M L J 403=6 C L J 495=2 M L T 473 31 M L J 607]

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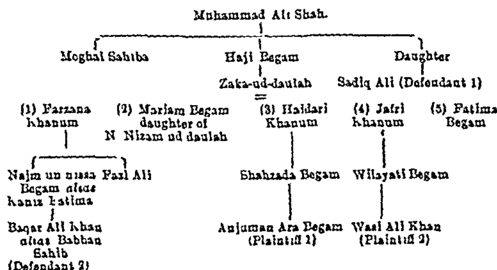
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CONSOLIDATED appeals from a judgment and decree (24th February 1899) of the Court of the Judicial Commissioner of Oudh reversing a decree (15th July 1897) of the Additional Civil Judge of Lucknow, by which the respondents' suit had been dismissed

[237] The suit was brought by Anjuman Ara Begam, and Wasi Ali Khan, as grandchildren of one Zaka ud daulah and heirs of Haji Begam his mother, to recover two-thirds of the property left by Haji Begam and to declare the invalidity of a document said to have been executed by Haji Begam on 10th of July 1890 The parties were of the Shia sect of Muhammadans

The following pedigree shows the relationship of the litigants —



Haji Begam survived her husband Ikhtidar ud daulah, his wives, and their children, and died on the 19th of January 1894, leaving as her nearest of kin his three grandchildren, who if connected with her by legitimate descent, would be admittedly entitled to inherit her property in equal shares

On the 18th of July 1890 Haji Begam had executed the document which it was sought to set aside in this litigation, by which she professed to dispose by will of a third of her property for religious and charitable purposes, and set aside for those purposes Rs. 54,100 for the expenses of an imambara and appointed Sadiq Ali Khan and Baqar Ali Khan as executors and superintendents with perpetual succession from generation to generation The material portions of this document are set out in their Lordships' judgment

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that respect valid. He was, however, of opinion that the document in question was not a will, properly speaking, but a document by which Haji Begam created a waqf to take effect after her death, and being thus a waqf-bil-wasiat (*i.e.*, the creation of a waqf by means of a will) it was invalid.

In the result he dismissed the suit with costs.

The plaintiffs appealed to the Court of the Judicial Commissioner of Oudh, and the defendants filed objections to the decree under section 561 of the Civil Procedure Code. The material portion of the judgment of the Judicial Commissioners on the first issue was as follows:—

"It seems to me that the declarations of Haji Begam that Haidari Khanum, the mother of Shahzada Begam, and Jafri Khanum, the mother of Wilayati Begam, were the *mamtua* wives of her son Zaka-ud-daulah, and that Shahzada Begam and Wilayati Begam were her granddaughters, coupled with the declaration and admissions of Fazl Ali, the declarations of Ikhtidar-ud-daulah, and Sajjad Husain Khan, and the treatment of Shahzada Begam and Wilayati Begam are, quite sufficient, apart from the question whether, under Shia law, the child of a *muta* marriage can only be deemed to be legitimate if its father has acknowledged it, to raise the presumption that Shahzada Begam and Wilayati Begam were the legitimate issue of Zaka-ud-daulah, and to throw on the defendants the burden of proving that Haidari Khanum and Jafri Khanum were sisters of Farzana Khanum, and Zaka-ud-daulah's intercourse with them was illicit.

"The Additional Judge thought that the evidence produced by the defendant Baqar Ali Khan, to prove that Farzana Khanum, Haidari Khanum and Jafri Khanum were sisters was worthless, and I agree with him on this point. The story as to illicit intercourse between Zaka-ud-daulah and Haidari Khanum and Jafri Khanum therefore breaks down.

"Unless, therefore, the Shia law requires, in order to establish the legitimacy of a child of a *muta* marriage, an acknowledgment of it by the father, I am of opinion that the legitimacy of Shahzada Begam and Wilayati Begam is established.

"It was contended for the defendant Baqar Ali Khan that, according to Shia doctrines, it is only in the case of a permanent marriage that the woman is *firash*, that is to say, it is only in the case of such a marriage that the child of the woman born under the contract is affiliated to the man, and that in case of a *muta* marriage or servile marriage, the child does not belong to the man unless he acknowledges it. We have been supplied with a number of translations from Arabic authorities. I have examined all these carefully in conjunction with Mr. Baillie's Digest of Moohummudan Law (Imameea), and the conclusion I come to is this: that, according to Shia law, whether the marriage is a permanent one, or a temporary or servile one, the child is affiliated to [242] the man, provided that there has been coition, and the lapse of not less than six months, and not more than ten months, from the time of the coition to the birth of the child; and that the only distinction, in the matter of the affiliation of the child to the man, between a permanent marriage and a *muta* or servile marriage is that in the case of a permanent marriage the child cannot be repudiated by the man otherwise than by *liaan* or imprecation; whereas, in the case of a *muta* or a servile marriage, if the man repudiates the child (not having previously acknowledged it), such repudiation is sufficient without *liaan*. The contention for the defendant Baqar Ali Khan, that as there is no evidence that Zaka-ud-daulah acknowledged Shahzada Begam and Wilayati Begam as his daughters, they cannot be deemed to be legitimate, therefore fails."

As to the will the Judicial Commissioners held as follows:—

"According to the law governing the Shia sect of Muhammadans, to bequeath is to confer a right to the substance or the usufruct of a thing after death.' Baillie's Imameea Law, 229. Ameer Ali's Muhammadan Law, Vol. I, page 460. A will 'may be constituted by the use of any expression that sufficiently indicates the intention of the testator; so long as it is apparent that the intention of the testator is to make a disposition operative on his death, it will be regarded as a *wasiat*. The devise may be either to the legatee beneficially or in trust for some purpose or object.' Ameer Ali's Muhammadan Law, Vol. I, page 460.

"It appears, therefore, that to constitute a will there must be a devise to some person either beneficially or in trust for some purpose or object.

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daughter of Zaka ud daulah She was called upon by the wasiqa officer to explain why she had omitted to include the name of her husband Ikhtidar ud daulah among her heirs, and she did so in a letter of the 19th of January 1874 (Exhibit A 5), stating that she was virtually divorced from him, and protesting against being compelled to include him among her heirs, to the injury of her "rightful heirs"· and she ended her letter by stating again "by way of precaution" the names of her heirs, naming as before the issue of her son Zaka ud daulah, namely, Fazl Ali, Najm un nissa, Shahzada and Wilayati In a letter of the 8th of June 1874 the wasiqa officer asked Haji Begam·—"How many children of Zaka ud daulah are there, and who are their mothers respectively, and which of the wives is alive?' Haji Begam replied as follows in a letter (Exhibit A 37) of the 29th of July 1874 —"There are four children of the deceased Zaka ud daulah (1) Fazl Ali, son, (2) Najm un nissa Begam, daughter, known also as Kaniz Fatima or Biggan Sahiba, these two are by the deceased Farzana Khanum, (3) Shahzada Begam, daughter, by the deceased Haidari Khanum, (4) Wilayati Begam by Jafri Khanum, Jafri [240] Khanum, mutai wife, is still alive" The next wirasatnama was dated the 21st of June 1881 (Exhibit A 6) and in that document Haji Begam named the same heirs In another dated the 3rd of October 1885 (Exhibit A 7) she declared she had no heirs under the Muhammadan law "or otherwise" except Fazl Ali, Shahzada Begam, Baqar Ali, son of Najm un nissa, granddaughter, and Wasi Ali, son of Wilayati Begam granddaughter In the last wirasatnama, dated the 3rd of February 1890 (Exhibit A 8) Haji Begam only inserted the names of Abbasi Begam, widow of Fazl Ali, and Baqar Ali Khan, and on being called upon by the wasiqa officer to explain why she had not included Wasi Ali and Anjuman Ara Begam, daughter of Shahzada Begam, she replied —"As to Wasi Ali Khan and the daughter of Shahzada Begam, deceased, they have nothing to do with me According to Muhammadan law all of them are reckoned as *mahub* (excluded heirs) I have therefore not entered their names in the said deed· the Court has further powers" By order of the wasiqa officer of the 7th of June 1890, the names of Anjuman Ara Begam and Wasi Ali (the present plaintiffs) were added to the other names of the heirs Letters written to the wasika office in reply to inquiries made by the superintendent of the office from persons connected with the family, for information as to the heirs of Ikhtidar ud daulah, were also produced on behalf of the plaintiff; and also a petition from Fazl Ali, Shahzada and Wilayati (Exhibit A 28) dated the 7th of January 1884, after the death of Ikhtidar ud daulah, in which they prayed that after due inquiry and proof the pension allowed to him should be allotted to them, this being relied on as a recognition by Fazl Ali, against his own interests, of the claims of Shahzada and Wilayati

The finding of the Additional Civil Judge on the first issue was summed up as follows —

Jafri [illegible]
poin [illegible]
raised a presumption of marriage and legitimacy do not have the same force and effect here There is no proof of the treatment or acknowledgment by the father'

On the sixth issue, as to the will, the Additional Civil Judge held that it was not executed under undue influence, and that it [241] disposed of less than one third of Haji Begam's estate and was in

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Wilson's Muhammadan Law, 269, para. 319; and *Agha Ali Khan* v. *Altaf Hasan Khan* (1), were also referred to. Both the lower Courts, it was submitted, had erred in deciding that a waqf could not under the Shia law be created by will; and also had wrongly held that the document of the 10th of July 1890, was a waqf-bil-wasiat.

It was also contended that the respondents had not been proved to be the legitimate descendants of Zaka-ud-daulah, there being not sufficient evidence to show that any marriage had taken place between Zaka-ud-daulah and Haidari Khanum and Jafri Khanum. The documents purporting to be the declarations of Haji Begam as to her heirs, even if genuine, were not admissible in evidence. Other documents containing statements as to who were the heirs of Haji Begam were, it was submitted, not sufficiently proved. There was no express acknowledgment by the father and it was not even proved that Haji Begam and other members of the family treated Shahzada Begam and Wilayati Begam, the mothers of the respondents, as being legitimate. The Evidence Act (I of 1872) section 32, clause 5, as to the admissibility of the statements of deceased persons as to legitimacy was referred to.

Mr. *Mayne* for the respondents contended that the Courts below were right in holding that the deed of the 10th of July 1890, was invalid, because by the Shia law a waqf could not be created by will. The laws of the Sunnis and the Shias were different as to waqfs and the modes in which they might be created, the latter being much more strict than the former. There were four essentials to the validity of a waqf. First, it must be perpetual; secondly, it must be absolute and unconditional; thirdly, possession must be given of the mauquf, or thing appropriated; and fourthly, the thing appropriated must be entirely taken away from the waqif or appropriator himself. Baillie's Moohummudan Law, 212, 213, 218 and Ameer Ali's Muhammadan Law, 409, 410, were referred to. If there is any reservation of interest made, the waqf is invalid. By clause 10 of the deed under consideration in this case such a reservation has [245] been made : under that clause it is stipulated that the property is to remain in the proprietorship of Haji Begam ; the waqf, it was submitted, was therefore invalid. *Agha Ali Khan* v. *Altaf Hasan Khan* (2) was referred to. This deed is an attempt to create a waqf *in præsenti*, and is ineffectual because Haji Begam reserved the proprietorship in the property in herself until her death.

On the question of the legitimacy of Shahzada Begam and Wilayati Begam it was contended that the series of documents emanating from Haji Begam taken together showed that she intended them to be her heirs and therefore thought them legitimate. *Fuzeelan Beebee* v. *Omdah Beebee* (3) was cited to show that it had been held by Sir Barnes Peacock that "issue" meant legitimate issue.

Mr. *De Gruyther* replied.

1903 : *March*, 4.—The judgment of their Lordships was delivered by SIR A. WILSON :—

The suit out of which these consolidated appeals arise relates to the devolution of a part of the property of Haji Begam, a Muhammadan lady who died at a very advanced age on the 19th of January 1894. She was a daughter of a former King of Oudh, and the family to which she belonged are Shias and governed by the Shia law.

(1) (1892) I. L. R. 14 All. 429 (446). (468).
(2) (1892) I. L. R. 14 All. 429 (463) (3) (1868) 10 W. R. 469.

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"It is contended for the plaintiffs that the deed contains bequests for religious and meritorious purposes

"It seems to me that there is no *devise* of any property by the deed The executant does not devise the Government Promissory Notes to Sadiq Ali Khan and Baqar Ali Khan in trust to pay the expenses of the imambara out of the interest She 'sets apart' and 'appropriates for ever the notes for the expenses of the imambara, and 'places the imambara under the superintendentship of Sadiq Ali Khan and Baqar Ali Khan

"*Waqf*, according to the Shia doctrines, is a religious act the effect of which is to tie up the *corpus* or substance of a thing, and to leave its usufruct free' Ameer Ali's Muhammadan Law, Vol I, page 390 According to the Jawahir ul Kalam, the object of a *waqf* is the continuance in perpetuity of a benefaction in the service of the deity, and it is an act of worship The express word by which it may be created is *waqaf to*, *i e*, 'I have dedicated' Ameer Ali s Muhammadan Law, Vol I, page 390

"It is contended for the defendants, with reference to the case of *Agha Ali Khan* ... ial technical expressions is an essen ... stablished. In that case the Jami ul ... n It is apparently based upon the Sharaya-ul Islam But the opinion expressed in the Sharaya is explained in Jawair ul Kalam According to that work [243] which is an authoritative commentary on the Sharaya, there is nothing in the law to debar the creation of a *waqf* by the use of any other expression besides *waqafto*, that is to say, when the intention of the grantor is clearly to create a *waqf* whatever expression he may have used, the declaration will take effect, but where the term *waqf* itself is used, the dedication will take effect as such without question (Ameer Ali's Muhammadan Law, Vol I, page 393 and pages 394 395)

"The intention of Haji Begam was clearly to set apart the notes for pious purposes If a man were to say, 'I have tied up this property and given its profits in the way of God,' it would be a *waqf* (Ameer Ali s Muhammadan Law, Vol I, page 390) This is what Haji Begam has done as to the notes She has disposed of them, according to her own words, 'in the way of God for ever, and 'appropriated' them 'for ever' for the expenses of the imambara It seems to me that there was a valid dedication of the property

"I am of opinion that the deed is not a *wasiat* or will but a *waqf bil-wasiat* and that it is, therefore, invalid"

On these appeals—

Mr *De Gruyther* for the appellants contended that a valid waqf could be created by will under the Shia school of Muhammadan law It could be created by will according to the Sunni school of law *Wasiq Ali Khan* v *The Government* (2), and it was submitted there was no such difference between the Shia and Sunni laws as to render a Shia incapable of doing the same A Shia could create a waqf otherwise than by will, he could make a gift, he could fulfil all the conditions required by the Muhammadan law to create a waqf just as well as a Sunni, and it has been held by the Allahabad High Court that a Shia could create a waqf indirectly by will *Agha Ali Khan* v *Altaf Hasan Khan* (1) The Muhammadan law, moreover, distinctly recognized perpetuities Baillie's Moohummudan Law, 211, 217, 228, 231 As to what were lawful purposes for a *waqf*, Ameer Ali's Muhammadan Law, 483, 534 and 566, and Baillie's Moohummudan Law, Imameea, 247, 566, were referred to As to the conditions required by Muhammadan law for the creation of a waqf, reference was made to Baillie's Moohummudan Law, *Imameea*, 213 Baillie's Moohummudan Law, Imameea, 601, Baillie s Moohummudan Law, Hanifeea, 559, 565, 568, Ameer Ali's Muhammadan Law, 395, 407, 409, *Muhammad Aziz ud din Ahmed Khan* v *Legal Remembrancer to Government* (3), [244] Macnaghten's Muhammadan Law, 416, 417,

(1) (1892) I L. R. 14 All 429

(2) (1835) 6 S. D A (Bengal), 110.

(3) (1893) I L R. 15 All 321.

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Haidari nor Jafri was married to Zaka-ud-daulah, that they were mere slave girls, and that their children by Zaka-ud-daulah were the fruit of illicit intercourse with him. The issue thus raised, which is one purely of fact, is the one upon which the Courts in India have differed.

There is no direct evidence of either marriage, a point upon which the Courts in India have not laid much stress, and under the circumstances their Lordships think rightly. There is no evidence of acknowledgment of the children by their father; a point which is of less importance than it might otherwise have been by reason of the fact that, when he died, the two children whose status might have been affected were very young.

But marriage and legitimacy may of course be proved in such cases by other means. In the present case the most important evidence in favour of legitimacy consists of a series of statements made by Haji Begam herself, which were admitted as evidence by the Courts in India, and their Lordships think rightly. It appears that Haji Begam was in receipt of a pension from Government known as a "wasiqa"; and according to the practice in force such pensioners were from time to time called upon to make statements to the wasiqa office, a department under Government, as to who were their heirs. A series of such statements by Haji Begam extending from 1860 to 1890 is in evidence. It also appears that from time to time Haji Begam was asked by the wasiqa officers to furnish explanations of the statements submitted by her, and several letters in reply to such inquiries have been produced. In these documents, beginning with that of 1860 down to and including [248] that of 1885, Haji Begam speaks of the line of Haidari and that of Jafri as heirs, in exactly the same terms as of the line of Farzana, whose legitimacy is not questioned; she speaks of Shahzada and Wilayati as her granddaughters, and as daughters of Zaka-ud-daulah; she speaks of Shahzada, at a time before Wilayati was born, as daughter of a *mutai* wife, coupling her as such with Najm-un-nissa; and she speaks of Jafri as a *mutai* wife still alive. In her statement of 1890, it is true, she omitted the respondents from her list of heirs. In her letter of explanation she gave her reasons for this, which do not seem to be inconsistent with her previous statements of fact, but which were not accepted as satisfactory.

Their Lordships think that the Appellate Court was right in giving great weight to these documents. They come from a public office and bear endorsements which exclude all doubt of their genuineness; they contain the statements of one who had the best means of knowledge, made at times when no such controversy as the present can well have been in contemplation; and the statements are such that, if true, they seem to conclude this part of the case.

Ikhtidar-ud-daulah, Haji Begam's husband, who died in 1883, also appears to have been in receipt of a wasiqa, and when he died a question arose as to who should succeed to it. A petition was presented jointly by Fazl Ali, Shahzada and Wilayati, describing the deceased as their grandfather, and asking that his pension should be allotted to them. This petition their Lordships think has been duly proved, and it seems to be by necessary inference a statement by Fazl Ali, and a statement against his own interest, that the title of his two cousins was as good as his own. And so far it confirms the far more important statements of their grandmother.

Haji Begam was married to Ikhtidar ud daulah, who died in 1883, and the issue of that marriage was a son Zaka ud daulah, who died about 40 years ago, leaving issue, by three different mothers, Farzana Haidari, and Jafri By Farzana he left a son Fazl Ali, who is dead without issue, and a daughter Najm un nissa, who died leaving a son Baqar Ali, the first appellant By Haidari Zaka ud daulah left a daughter, Shahzada, since deceased, whose daughter is the first respondent By Jafri he had a daughter Wilayati, who died leaving a son, the second respondent

On the 10th of July 1890 Haji Begam executed a document, the legal effect of which is in controversy, under which it is contended by the appellants that certain portions of Haji Begam s estate have become waqf devoted to religious purposes [246] Under this document Sadiq Ali, the second, and Baqar Ali, the first appellant, were to be executors and mutawallis, and on the 21st of January 1895 Sadiq Ali alone obtained probate of the document as a will, Baqar Ali being a minor

On the 8th of June 1895 the now respondents filed the present suit against the appellants in the Court of the Additional Civil Judge of Lucknow They alleged that they were entitled as heirs of Haji Begam to two thirds of the property which should pass to her heirs, while they admitted that the other third passed to the first appellant, Baqar Ali, as their co heir And they claimed to have it established that the alleged will of the 10th of July 1890 was invalid as against them as heirs, and to recover two thirds of the property affected by it

The Additional Civil Judge who heard the case held that the plaintiffs, the now respondents, had failed to prove that they were heirs of Haji Begam As to the second question, he held that the will was not valid against heirs, but as he had found that the respondents were not heirs, he dismissed their suit with costs Against this decision an appeal was brought to the Court of the Judicial Commissioner of Oudh The two Additional Judicial Commissioners who heard the appeal differed from the First Court on the first question and held that the now respondents were heirs of Haji Begam, while they agreed with the First Court as to the effect of the will, and they accordingly reversed the decree of the First Court and made a decree in favour of the now respondents on all points Against that decree the present appeals have been brought

With regard to the question whether the respondents are heirs of Haji Begam, their case is that their mothers Shahzada and Wilayati were the legitimate children of Zaka ud daulah, inasmuch as the respective mothers of those ladies Haidari and Jafri, were his wives, married to him in the *mutai* or temporary form, which is accepted as valid by the Shia law

On the other side it was alleged that Haidari and Jafri were both sisters of Farzana, the first wife of Zaka ud daulah, and that Farzana was living at the time of the supposed marriages with them Both Courts in India have found that the facts necessary to support this contention are not proved, and their Lordships were not asked to review these findings so that there could have [247] been no lawful marriages with Haidari and Jafri,

It was also urged in India as matter of law that a child of a *mutai* marriage is not legitimate without proof of acknowledgment by the father, but this contention was abandoned before their Lordships

The case that remains on behalf of the appellants is that neither

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family to which Haji Begam belonged a testamentary waqf was created and apparently went unquestioned.

On the other hand the only support for the doctrine that a Shia cannot directly make a waqf by will is to be found, not in any positive statement by any of the recognised authorities on Shia law, but in the reasoning of Mahmood, J. upon a number of more or less ambiguous texts, which their Lordships have considered with all the respect due both to the opinion of so eminent a Muhammadan lawyer, and to the concurrence of his colleagues in the Full Bench in his views.

In the earlier and more important part of his judgment, the learned Judge deals with texts, many of them of undoubted authority, which purport to lay down the essentials of a waqf under Shia law, namely, that a waqf is by definition a contract involving offer and acceptance, that as essential conditions there must be delivery of seisin, that the gift must be unconditional, and that nothing must be reserved for the settlor.

The last two conditions may, their Lordships think, be disregarded for the present purpose. If a waqf may be made by will speaking from the death, there is no condition and no reservation in such a case as the present. Mahmood, J.'s reasoning [254] turns on the definition and the first condition; he thinks his conclusion necessarily follows from them, and this is the really important part of his reasoning, on which the whole depends. The argument of the learned Counsel for the respondents was the same; he contended that if you accept the texts, as you must do, you are bound to accept their logical consequences.

In *Abul Fata Mahomed Ishak* v. *Russomoye Dhur Chowdhry* (1), in the judgment of this Committee delivered by Lord Hobhouse, the danger was pointed out of relying upon ancient texts of the Muhammadan law and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice. That danger is equally great whether reliance be placed upon fresh texts newly brought to light, or upon fresh logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.

There are, moreover, special difficulties in the way of accepting the inference drawn by Mahmood, J. from the definition and conditions of a waqf as laid down in the ancient Shia texts. The more important of those texts have long been accessible to all lawyers. In none of them does the author himself draw the conclusion that the creation of a waqf by will is excluded. Nor has that conclusion been drawn by any of the modern writers who have collected and translated such texts, though in other respects the difference between the Shia and the Sunni law of waqf has been pointed out.

And beyond these negative indications their Lordships find an important guide for determining the light in which the definition and condition in question should be regarded, as bearing upon the testamentary creation of a waqf, in the closely analogous case of a gift. A gift like a waqf is defined as a contract requiring offer and acceptance, and delivery of seisin [255] is a condition of the validity of a gift as of a waqf. Yet from the time

(1) (1894) L. R. 22 I. A. 76 (86, 87); I. L. R. 22 Cal. 619 (631, 632.)

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On the same occasion inquiry was made from the wasiqa office of a number of persons as to the heirs of the deceased man, and the answers then obtained from them with the evidence of the same persons at the trial have been received This evidence, however, is of very inferior value to that previously referred to, for it consists at best of hearsay reports of statements said to have been made by members of the family [249] The learned Judges who heard the appeal in India do not appear to have attributed much importance to it, and their Lordships do not rely upon it for the conclusions at which they have arrived

In support of the respondents' case reliance was further placed upon the treatment of Haidari Jafri, and the descendants of each in Haji Begam's family, which, it was argued, was inconsistent with illegitimacy In dealing with this branch of evidence their Lordships will only notice those matters as to which there is no controversy of fact

Haidari and Jafri and their children and grandchildren were always treated as members of Haji Begam's family Haji Begam made an allowance to each of those ladies for the maintenance of herself and her children Haji Begam provided for the marriages of the children, and such marriages took place with members of the family, thus the second respondent, Wasi Ali, is married to the daughter of the second appellant Sadiq Ali, who is himself a sister's son of Haji Begam Lastly in the will of Haji Begam, the effect of which will have to be considered in another connection, when making provision for the anniversary religious ceremonies in commemoration of the deaths of certain ladies, the testatrix places Shahzada in the same list, not only with Najm un nissa, but with the testatrix herself and her mother, and provides alike for all

To meet the case of the respondents reliance has been placed upon two lines of defence First, the learned counsel for the appellants has sought to impugn each piece of evidence in detail and in particular has examined and criticised every document relied upon with the object of shaking its credit and minimising its effect Their Lordships have given full weight to these criticisms, but they have failed to create any doubt in their Lordships' minds as to the trustworthiness, or as to the meaning and effect of the documents to which, as already indicated, they attach importance

The appellants relied, secondly, upon evidence given at the trial, by witnesses of each side, the effect of which is said to have been to show that in the family to which Haji Begam belonged very lax views as to sexual relations prevailed, and [250] that for social purposes at least, legitimate and illegitimate children were treated alike This evidence seems to have had great weight with the Court of first instance

It is unnecessary to consider what effect ought to have been given to this evidence if the case of the respondents had rested only on evidence of treatment in the family, for this is not the case The statements and letters of Haji Begam and the petition to which Fazl Ali was a party related, not to social status or family recognition, but to rights of inheritance And the evidence in question can have no bearing upon statements on that subject Certainly too it can have no tendency to neutralize the express assertions of Haji Begam that Shahzada was the daughter of a *mutai* wife, and that Jafri was a *mutai* wife

For these reasons their Lordships are of opinion that the Additional Judicial Commissioners were right in holding that the respondents are

1902 Dec. 19.

FULL BENCH.

25 A. 256= 23 A. W. N. 18.

it is to be observed that the plaintiff here sued, not in respect of any subsisting tenancy, nor did he sue for arrears of rent. His allegation is, that whatever the nature of the occupation of the premises by the defendant was, her right of occupancy had determined prior to the institution of the suit. The case, as we have pointed out, as set up by the defendant, was a denial of the proprietary title of the plaintiff, and the setting up of an adverse title in the defendant under the Statute of Limitation. This Court, having regard to the dismissal of the claim by the lower appellate Court upon the ground to which we have referred, considered it necessary to refer certain issues to that Court for determination. These issues are—(i) What was the nature of the occupation of the house in dispute by the defendant? (ii) Was the defendant's possession adverse or permissive? If adverse, for how long did the defendant hold such possession?

The learned Subordinate Judge has found upon the first issue that the plaintiff is the owner of the house, and that the defendant occupied the house as a friend with the permission of the plaintiff. Upon the second issue his finding is that the defendant never before this asserted her title to the house in suit, and that her possession was permissive. It is now contended before us by the learned vakil for the respondent, notwithstanding these findings, that inasmuch as the plaintiff did not [260] establish the case which he set up, namely, that there had previously been a subsisting tenancy, his suit must fail. We cannot accede to this contention. It is clear that the defendant was not taken by surprise. She clearly understood the case which she had to meet, namely, the case set up by the plaintiff that he was the owner of the house. In the case relied upon by the lower appellate Court, one of the claims made by the plaintiff was to recover arrears of rent in respect of the property in dispute. That case was based upon the existence of a tenancy, and therefore is different from the present case, for here there is no claim for rent. The claim is confined to the recovery of possession of the property and damages. This is sufficient to differentiate the two cases. We may observe as regards the case in this Court, which was also relied upon in argument, namely, the case of *Balmakund* v. *Dalu* (1), that in that case the only issue which was framed by the Court of first instance was—"Did the plaintiff let part of the property in dispute to the defendant at the rent of four annas a month?" The only issue framed was as to the existence of a tenancy. That is not the present case. Cases of this kind must be decided according to the circumstances of each particular case. We think that there was nothing in the claim and in the issues which were raised which could possibly have taken the defendant by surprise, and now that the true facts have been ascertained by the Court, the technical difficulty which has been relied upon cannot, we think, be allowed to defeat the plaintiff's claim. We therefore think that the decision of the Court of first instance was correct, and that the decree of the lower appellate Court cannot stand. We allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance. The defendant must pay the costs of this appeal, and also the cost in the lower appellate Court.

[See also *Haji Khan* v. *Baldeo Das* (2).—ED.]

Appeal decreed.

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(1) Weekly Notes, 1901, p. 157. (2) Weekly Notes, 1901, p. 188.

of the earliest Shia authorities until now it has always been clear that a Shia can make a gift by will The most authoritative work of that school (the one translated by Baillie) contains a chapter on Wills This Committee in *Amin ood Dowlah* v *Roshun Ali Khan* (1) affirmed their validity And the distinction drawn by Mahmood, J is itself based on the legal efficacy of a gift by will Their Lordships think that, in applying the same definition and condition to the case of a *waqf* it is safer to follow this analogy than to draw the logical conclusions which may seem to an acute modern dialectician to follow from the words of the old texts

Another part of the judgment of Mahmood, J deals with texts which seem to have little bearing upon the present question They discuss the consequences of the death of a settlor before delivery of seisin, and they relate apparently, not to wills, but to cases in which a man has made a deed of waqf intended to operate *inter vivos* but has died before he could complete the transaction by delivery

The last part of the judgment of the learned Judge cites texts bearing somewhat more closely upon the present question But there is no unanimity among them, the learned Judge has to choose between texts which he thinks are of various degrees of authority, and it is to reconcile those which he accepts that he adopts his distinction between the direct and indirect creation of a waqf by will Their Lordships doubt whether the learned Judge would himself have relied upon such texts as sufficient to support his conclusion, had he not already been satisfied of its correctness by the reasoning of the earlier part of his judgment, in which their Lordships are unable to concur

For the foregoing reasons their Lordships are of opinion that the rule of law laid down by the Allahabad High Court and followed by both the Courts in India in the present case, to the effect that a Shia cannot create a waqf by will, is unsound

Their Lordships thus differ from the First Court upon both the broad issues raised in the case, while they agree with [256] the Appellate Court upon the first and differ upon the second But the result is that the suit of the plaintiffs, the present respondents, fails and was rightly dismissed by the First Court, though not upon the right grounds

Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioner s Court should be set aside with costs, and that of the Additional Civil Judge of Lucknow affirmed The respondents will pay the costs of these appeals

Appeals allowed

Solicitors for the appellants —Messrs *Watkins & Lempriere*

Solicitors for the respondent —Messrs *T L Wilson & Co*

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(1) (1851) 5 Moore s I A 199

1903
JAN. 24.

REVISIONAL CRIMINAL.

25 A. 262=
23 A. W. N. 29.

25 A. 262 (=23 A. W. N. 29.)

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

EMPEROR *v.* GAJADHAR.* [24th January, 1903.]

Act No. I of 1878 (Opium Act), section 9—Possession of illicit opium—Custody of a locked box containing opium lawfully belonging to the owner of the box.

A locked box containing the stock of opium and books of a licensed vendor of opium, the key of which was kept by the owner, was found in the house of a person who lived next door to the shop of the opium vendor, and it appeared that the opium vendor, instead of taking his box home with him at night, was in that habit of leaving it with his neighbour for safe custody. *Held,* that the custodian of the box could not be properly convicted of the offence of unlawful possession of opium, inasmuch as the possession of the opium was not his, but that of the legitimate owner.

[Rel. 11 Cr. L. J. 55=4 Ind. Cas. 823=U. B. R. 1909, 1; Ref. 2 L. B. R. 136.]

ONE Gajadhar was convicted by a Magistrate of the first class of an offence under section 9 of Act No. I of 1878 (The Opium Act) and fined Rs. 30. Gajadhar applied in revision to the District Magistrate. The facts of the case as set forth in the District Magistrate's order were as follows:—"Applicant Gajadhar is a shop-keeper, a neighbour of Bhairon, a licensed opium seller. It appears from the evidence that as Bhairon did not sleep in his shop it was his custom when he went home [263] to put the opium, with his books and license, in a box and make it over to Gajadhar for safe custody during the night. Gajadhar used to keep the box for the night in his shop, and one evening it was found in his possession by the Police Superintendent, who, acting on information received, had obtained a search warrant. The box was always locked by Bhairon, who kept the key, and when found in Gajadhar's shop was so locked." The District Magistrate accordingly reported the case to the High Court for orders under section 438 of the Code of Criminal Procedure.

The Assistant Government Advocate (Mr. *W. K. Porter*) in support of the reference.

The following order was passed:—

BANERJI, J.—In my judgment the conviction of Gajadhar under section 9 of the Opium Act, No. I of 1878, was illegal. The facts as found are these:—Gajadhar is a shopkeeper and a neighbour of Bhairon, a licensed opium seller. Bhairon was not in the habit of sleeping in his shop. It was therefore his custom when he went home to put the opium with the books and license in a box, which he locked himself, and of which he kept the key, and to make it over to Gajadhar for safe custody during the night. Such custody certainly did not amount to possession by Gajadhar of the opium which was locked up in the box. He cannot, therefore, be held to be guilty of having opium in his possession in contravention of the Opium Act and the rules made under that Act. I set aside the conviction, and direct that the fine imposed on him, if paid, be refunded.

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* Criminal Reference No. 845 of 1902.

25 A. 261 (=23 A W N 29)

[261] REVISIONAL CRIMINAL

Before Mr Justice Blair

1903 JAN 23

REVISIONAL CRIMINAL

25 A. 261= 23 A W N 29

EMPEROR v HUSAIN BAKHSH AND OTHERS * [23rd January, 1903]

Act No XLV of 1860 (*Indian Penal Code*), *section* 216*B—Definition—Meaning of term* "*harbouring*"

Held, with regard to the definition contained in section 216B of the Indian Penal Code, that the words "assisting a person in any way to evade apprehension" are meant to point out to some method *ejusdem generis* with those specified in the earlier portion of the section They will not include the assisting of an accused person to escape by merely telling lies to the police as to his whereabouts

[Ref 40 I C 731=26 C L J 141=21 C W N 1062=18 Cr L J 731]

IN this case a warrant of arrest was out against one Subha on a charge of dacoity It was discovered that Subha visited Husain Bakhsh and others, and the Police, on receipt of information that on a particular occasion Subha was with them, went to seize him When the Police party came Subha, Husain Bakhsh and others were sitting near a well They saw the Police coming, and Subha therefore left the others and hid in an adjoining sugarcane field The Police surrounded the field They then went up to the men at the well and questioned them These men said that the person who had left them and gone into the field was not known to them and was certainly not Subha, who was well known to them as a dacoit The men took oaths to this effect Meanwhile reinforcements arrived and Subha was captured On these facts Husain Bakhsh and others were convicted by a Magistrate of "harbouring" Subha, under section 216B of the Indian Penal Code They applied in revision to the Sessions Judge, who, being of opinion that the facts found did not constitute the offence defined by section 216B, reported the case to the High Court for orders

BLAIR, J —The Sessions Judge of Cawnpore suggests that the eight men, Husain Bakhsh, Gulab, Khuda Bakhsh, Kadir Bakhsh, Ilahi Bakhsh, Ghafur, Maula Bakhsh, and Fakir Bakhsh, who have been convicted of harbouring one Subha under section 216 of the Indian Penal Code, have been wrongfully convicted On the facts stated by the Sessions Judge there is no record which shows what was stated by each [262] individual party There is a further difficulty that nobody did anything but speak Apparently those persons told lies, and their object in telling lies was to induce the police to desist in their pursuit—a very futile attempt But I am in grave doubt whether section 216B of the Indian Penal Code includes in the definition of harbouring mere lies The section runs thus —"The word 'harbour' includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension" Now, reading the section in the light of general principles, the words at the end, "or assisting a person in any way to evade apprehension," must be meant to point to some method *ejusdem generis* with those that have been specified above In my opinion a bare lie does not fall within that category I therefore set aside these convictions, and order that the above mentioned eight men be at once discharged

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* Criminal Reference No. 760 of 1902

1903 JAN. 27.

APPELLATE CIVIL.

25 A. 264= 23 A. W. N. 30.

absolute to enable them to sell for that amount as well as for the original debt, and for that purpose they applied for sale, not only of that part of the mortgaged property for the sale of which they had previously obtained an order, but of the whole property. It is that order which is complained of here by the judgment-debtors. In our opinion the complaint is without substance. If the part ordered to be sold under the original order proved to be insufficient to meet the plaintiffs' claim, a further order would have to be applied for for the sale of the other part of the mortgaged property. The order now in question practically does nothing more than this. It is true that in terms it is an order for the sale of the whole property, and it may well be that the sale of the whole property may turn out to be unnecessary in order to satisfy the plaintiffs' claim. But that order does not compel the executing Court to sell the whole of the property; and whether such sale be necessary to satisfy the demand of the decree-holders or not, an executing Court has in this matter a discretion which, as far as we know, it always exercises, that is, to sell only so much of the mortgaged property as is necessary to satisfy the decree, and no more. [266] Under these circumstances we think Mr. *Moti Lal's* clients have been in no way prejudiced by the order complained of. We dismiss the appeal with costs.

Appeal dismissed.

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25 A. 266 (=23 A. W. N. 34.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Blair.

DALEL KUNWAR AND ANOTHER (*Objectors*) v. AMBIKA PARTAP SINGH (*Decree-holder*).* [27th January, 1903.]

Hindu Law—Hindu widow—Widow in possession of deceased husband's property ousted by adopted son—Mesne profits—Maintenance—Set-off—Sums expended on funeral ceremonies of late owner.

A Hindu widow who had been for some years in possession of the immoveable property of her deceased husband was ousted by a claimant who proved his title as adopted son of the said deceased husband, and a decree for mesne profits was given against the widow. *Held* on appeal in execution of the decree for mesne profits—(1) that in the absence of evidence of negligence the decree-holder was entitled only to the rents actually collected; (2) that the widow was entitled to set off her claim for maintenance, which was to be fixed with due regard to the extent of the property and the social position of the widow; and (3) that the widow was entitled to set off such reasonable amounts as might have been expended by her on the funeral ceremonies of her late husband, which the adopted son would otherwise have been bound to perform.

What was a reasonable maintenance and what sum should be allowed in respect of the funeral ceremonies under the circumstances considered. *Sreemutty Nittokissoree Dossee* v. *Jogendro Nauth Mullick* (1) referred to.

[Ref. 35 Mad. 728; 1 N. L. R. 33.]

THE facts out of which this appeal arose are the following:—Chaudhri Gandharp Singh died possessed of considerable property, the annual nett income of his immoveable property amounting to about Rs. 8,000 a year. Upon his death his widow Thakurain Dalel Kunwar took possession of his estate, believing that she was entitled to do so as

*First Appeal No. 229 of 1901, from a decree of Pandit Rajnath Saheb, Subordinate Judge of Mainpuri, dated the 4th of June, 1901.

(1) (1878) L. R. 5 I. A. 55.

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APPELLATE CIVIL

25 A 264= 23 A W N 30

25 A 264 (=23 A W N 30.)

[264] APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Banerji

SAT NARAIN AND OTHERS (*Judgment debtors*) v RADHA KISHAN AND OTHERS (*decree holders*) * [27th January, 1903]

Act No IV of 1882 (Transfer of Property Act) sections 88, 89—Mortgage—Order absolute for sale of part of property mortgaged—Appeal from decree—Application for further order for sale of entire property for an amount including interest accrued pending the appeal

Certain mortgagees in whose favour a decree for sale of the mortgaged property had been passed obtained an order absolute for sale of a portion of the mortgaged property The judgment-debtors appealed from the decree for sale, and pending the appeal the amount realizable by sale of the mortgaged property was increased by the accrual of interest The judgment-debtors appeal was dismissed *Held* that under these circumstances there was no objection to the decree holders after the dismissal of the judgment debtors' appeal, applying for and obtaining a further order absolute for sale of the whole of the mortgaged property for an amount including the interest accrued due subsequently to the passing of the first order

THIS appeal arose out of an application for a decree absolute for sale under section 89 of the Transfer of Property Act The decree-holders obtained a decree for sale under section 88 of the Transfer of Property Act on the 22nd of July, 1899 On the 14th of November, 1899, the judgment debtors appealed against that decree to the High Court On the 9th of August, 1900 the decree holders applied for an order absolute for sale, but asking for sale of a part only of the mortgaged property The decree holders obtained an order for sale, but apparently, owing to the record being in the High Court no sale actually took place On the 9th of April, 1902 the High Court dismissed the appeal of the judgment debtors and affirmed the decree of the 22nd of July, 1899 Thereafter the decree holders made a fresh application for an order absolute for sale to the Court executing the decree, and therein asked for the sale of the entire mortgaged property for an amount which included interest accrued during the pendency of the appeal in the High Court The executing Court granted this application, and thereupon the judgment debtors appealed to the High Court

[265] Pandit *Moti Lal Nehru* for the appellants

Mr *A E Ryves* for the respondents

BLAIR and BANERJI, JJ —The appellants judgment debtors in this case are persons against whom a decree has been passed upon a mortgage under section 88 of the Transfer of Property Act, and that decree has been followed in ordinary course by an order absolute for the sale of such part of the mortgaged property as may be necessary to satisfy the liability as it stood at the time when such order was passed The decree for sale under section 88 became the subject of an appeal to the High Court, and after the usual lapse of time that appeal was disposed of by a decree dismissing the appeal and affirming the decree of the lowe Court Thereupon the decree holders, realizing that from the date o the order absolute to the date of the decree of this Court, which is th only decree to be acted upon, there had been an increase in the amou of interest due, applied to the executing Court for a supplementary or

* First Appeal (execution) No 226 of 1902, from an order of Rai Anant B Subordinate Judge of Ghazipur, dated the 6th September 1902

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APPELLATE CIVIL.

25 A. 266= 23 A. W. N. 34.

The present appellant is conversant with the proceedings taken in execution of the decree so obtained by the respondent. He claimed mesne profits in respect of the property for the period during which the appellant held possession against him. The appellant produced evidence to show the amount of the rents and profits which were actually collected by her during the period in question. The aggregate amount so collected was a sum of Rs. 92,765-1-3, whilst the admitted gross rental of the property only amounted Rs. 97,648-15-6. It will thus be seen that only the small sum of Rs. 4,883-14-3 of this large rental had the appellant failed to collect during the period of her possession of the property. The learned Subordinate Judge has come to the conclusion that the appellant was, upon a claim for mesne rents and profits, chargeable with the entire gross rental of the property, in the absence of specific evidence on her part in regard to each item of the uncollected rent that with ordinary diligence she could not have received more than she did actually collect, relying upon the explanation appended to section 112 of the Code of Civil Procedure. This appeal has been preferred against the decision of the lower Court. The appellant during the time she was so in possession expended large sums of money in the performance of the funeral ceremonies and rites of her deceased husband, and in respect of the sum so expended she claimed to be entitled to a set-off. This claim the lower Court has entirely disallowed. Again the appellant claimed in the [269] Court below to be entitled to a set-off of a reasonable allowance year by year for her maintenance. The lower Court has allowed her a sum of Rs. 100 per month for maintenance.

The appeal has been pressed before us upon three grounds, the first being that there was no evidence of a want of ordinary diligence on the part of the appellant in the collection of rents, and that the mesne profits ought to have been calculated on the basis of the actual receipts, and not on the basis of the gross rental of the property. The second ground of appeal is, that the maintenance allowed to the appellant is entirely inadequate; and the third ground is that the funeral expenses which the appellant paid in respect of the funeral rites of her deceased husband should have been set off against any sum which might be found to be recoverable from her for mesne profits.

Now, as regards the first question, the figures themselves afford an impressive piece of evidence on the question of the exercise of ordinary diligence in the collection of rents. It seems to us that the collection of so large a sum as was admittedly collected furnishes some evidence that there was no want of diligence on the part of the appellant in making the collections. There has not been a particle of evidence to point to any negligence on her part, nor do we find that the evidence of the witnesses who were examined and cross-examined leads to any reasonable inference that there was any such negligence. Unless the appellant failed to use ordinary diligence in the collection of rents, it is clear upon the authorities that she is only chargeable with the sums which she actually received. The small balance which has not been collected, so far as we know, may have been collected since by the respondent, in whole or in part. We are satisfied upon the evidence that the appellant exercised ordinary diligence in the collection of the rents, and that she is only chargeable with the amount actually collected, namely, Rs. 92,765-1-3. The appeal must therefore be allowed in this respect.

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s widow, he having died childless She had remained in possession r some years when one Ambika Partap Singh instituted a suit to eject er from the property, alleging that he was the adopted son of Chaudhri Gandharp Singh The Court of first instance came to the conclusion that the plaintiff had proved the fact of his adoption and passed a decree in his favour for possession and mesne profits On appeal this decree was upheld, though with some hesitation, by [267] the High Court In execution of the decree, so far as it related to mesne profits, the Court of first instance (Subordinate Judge of Mainpuri) came to the conclusion that the judgment debtor was chargeable with the entire gross rental of the property in the absence of specific evidence on her part with regard to each item of the uncollected rent, that with ordinary diligence she could not have received more than she did actually collect The widow also during the time she was in possession expended large sums of money in the performance of the funeral ceremonies and rites of her deceased husband, and in respect of the sums so expended she claimed to be entitled to a set off This claim was entirely disallowed by the Court of first instance Again the widow claimed to be entitled to a set off of a reasonable allowance year by year for her maintenance The Court of first instance allowed her the sum of Rs 100 a month for maintenance In respect of these three matters the defendant judgment debtor appealed to the High Court

Pandit *Sundar Lal*, Munshi *Gobind Prasad* and Munshi *Gulzari Lal*, for the appellants

Mr *S S Singh* and Munshi *Ratan Chand*, for the respondent.

STANLEY, C J, and BLAIR, J —This appeal has arisen out of proceedings taken in execution of a decree obtained by the respondent Ambika Partap Singh, against his adoptive mother Thakurain Dalel Kunwar It appears that the husband of the appellant, Thakurain Dalel Kunwar, namely, Chaudhri Gandharp Singh, died possessed of considerable property, the annual nett income of his immoveable property amounting to about Rs 8,000 a year Upon his death his widow, Thakurain Dalel Kunwar, took possession of his estate, believing that she was entitled to do so as his widow, he having died childless She remained in possession for a number of years, when the respondent, Ambika Partap Singh, instituted a suit to eject her from the property, alleging that he was the adopted son of Chaudhri Gandharp Singh. The Court of first instance, on the evidence adduced before it, came to the conclusion that the plaintiff had proved the fact of his adoption, and gave a decree in his favour An appeal was preferred to this High Court, when, after lengthened argument and most careful consideration of the facts [268] by the learned Judges who tried the appeal, they came to the conclusion with great doubt that the appeal could not be allowed In the course of their observations in delivering judgment they observe to the effect that if the case had come before them in the first instance, they possibly might have arrived at the conclusion that the adoption had not been proved; but inasmuch as the Court of first instance had found the adoption to be proved, the *onus* of showing that the Court was wrong in this conclusion lay upon the appellant, and the appellant had not satisfied that *onus* The facts stated in the judgment of the High Court are sufficient to show that the present appellant entered into, and remained in possession of the property of her deceased husband in the *bona fide* belief that she was entitled to it

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estimating, however, the monthly payments to which we think the widow is entitled in this case, we may observe that we have not made any allowance in respect of the expenses incurred by her in the performance of these ceremonies. The sum which she claims for the ceremonies, up to and including the *barsi*, amounts to no less than Rs. 8,000 odd. This is considerably more than the annual income of the estate. No criterion for estimating the proper sum to be allowed for funeral expenses has been laid down by any Court so far as we are aware, and the parties to this appeal have given us but little assistance upon the question. The appellant's advocate has contended that the sums which she actually expended are not unreasonable and should be allowed. The learned counsel for the respondent, on the other hand, has submitted that the widow is not entitled to any portion of these expenses, inasmuch as he contends they were defrayed by her purely as a volunteer. We can therefore but roughly estimate the amount which under the circumstances may reasonably be allowed. We think that the claim is extravagant, except in respect of the expenses of the *shradh* ceremony for eight years, the expenditure on which amounts to a sum of Rs. 400 per annum. We do not think that the claim in that respect is excessive, and we shall allow it. In regard to the ceremonies from [272] the date of death to the eleventh day of funeral ceremony, we think that a sum of Rs. 1,000 is ample. In respect of the thirteenth day funeral ceremony, a ceremony at which the expenses are larger than on the funeral ceremony of the eleventh day, a sum of Rs. 1,500 will, we think, be sufficient. We do not disturb the sum of Rs. 500 which was expended by the appellant at the time of putting off bangles. The claim of Rs. 2,800 in respect of the *barsi* we think should be reduced to Rs. 1,000, and the claim in respect of the *chaubarsi* to Rs. 1,600. These bring the entire sums allowed up to Rs. 8,200; to that extent, and to that extent alone, we think that the appellant is entitled to be recouped by the respondent. The result then is that we allow the appeal, set aside the order of the Subordinate Judge, and direct that the appellant shall only be charged for mesne profits to the extent of the sums actually collected by her; that she shall be entitled to credit against the sums found to be due on this head for the amount of maintenance estimated at Rs. 150 per mensem, and that she shall also be entitled to a set-off, in respect of the funeral ceremonies, of a sum Rs. 8,200. The parties will pay and receive the costs of this appeal proportionate to failure and success.

Decree modified.

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25 A. 272 (=23 A. W. N. 36.)

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

EMPEROR *v.* TOTA.* [6th February, 1903.]

Criminal Procedure Code, sections 110, 118—Security for good behaviour—Inquiry into sufficiency of security delegated to Tahsildar—Practice.

Held that it is not competent to a Magistrate who has passed an order under section 118 of the Code of Criminal Procedure to delegate to another officer the inquiry into the sufficiency of the security tendered, but such inquiry

* Criminal Reference No. 4 of 1903.

question for our determination is the fair and reasonable should be allowed to the appellant in respect of The rental of the property is admittedly about Rs 8,000 estimating the maintenance [270] of a Hindu widow the nd to look at the value of the estate, the position and status sed husband and to her position, and award such reasonable ay consider proper, having regard to these matters We do not the lower Court has been sufficiently liberal in estimating nce under the circumstances of this case With a rental of a year we think that Rs 100 per mensem or Rs 1,200 a year ent Coming to the best conclusion we can as to what a fair sonable sum should be, we think that the maintenance will not ravagant if we fix it at a sum of Rs 150 per mensem The enance will therefore be allowed at this rate, and be set off against um which may be found due by her

The third question is in respect of the funeral expenses It has proved that from the date of the death of her husband the appel- spent up to the eighth year *shradh* sums amounting in the aggregate Rs. 12,875 4 0 The lower Court has entirely disallowed this claim is it appears to us is most unreasonable If the appellant was not able to pay the expenses of the funeral ceremonies of her husband, nquestionably the adoptive son was liable The claim for mesne profits is founded upon a wrong inflicted upon the plaintiff The plaintiff can show no such wrong by the fact that a person, though wrongly in possession, had merely made payments which the plaintiff himself would have had to meet If the defendant, the present appellant, was not under an obligation to perform the funeral ceremonies of her deceased husband, the plaintiff, as we have said, was so liable, and he will not be damnified by an allowance to the appellant of the payments which he was bound to make, and would presumably have made if he had been in possession of the property This being so, whether the appellant is entitled to be recouped the money so expended as coming under the head of maintenance or as payments which the respondent was bound to make, in either case, the respondent ought, in our opinion, to make a recoupment of so much as was reasonably expended by the appellant upon these funeral rites and ceremonies Their Lordships of the Privy Council in the case of *Sreemutty Nittokissoree Dossee* v *Jogendro Nauth Mullick* (1) observe in reference to the [271] question of a widow's maintenance as follows — "Their Lordships think that another element to be considered is the position and status of the deceased husband and of the widow The main subject of inquiry would be the value of the estate, and the question for the Master, and ultimately for the Court, to consider would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, *but that which she might reasonably expend for religious and other duties* incident to the station in life which she might occupy" It is immaterial for us to consider whether the expenditure which the appellant has reasonably incurred in respect of the funeral ceremonies of her husband should be properly included under the head of maintenance, or whether they should be awarded to her as expenses which the respondent was liable to defray, and which under the circumstances she is entitled to be recouped In

(1) (1878) L. R. 5 I. A. 55

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REVISIONAL CRIMINAL.

25 A. 273= 23 A. W. N. 36.

[274] BANERJI, J.—This is an application praying that the order of the District Magistrate, confirming an order of a Magistrate of the 1st class passed under section 107 of the Code of Criminal Procedure by which he directed the applicant to furnish security to keep the peace, be set aside. In my judgment the application must prevail. It appears that Lachman Prasad, a forest guard, was beaten in the village, but no one could be punished, as the evidence which was forthcoming was insufficient for the identification of his assailants. The applicant, who is the headman of the village, was then called upon to furnish security to keep the peace. No order under section 107 could be made against him unless it was established that he was likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that might probably occasion a breach of the peace or disturb the public tranquillity. The evidence against him consists of the statements of three witnesses. The first witness, Lachman Prasad, is the forest guard who appears to have been assaulted. He says, no doubt, that the applicant instigated the assault on him; but the reason he assigns for making that statement is, that the applicant had not helped him in arresting offenders in a case of the theft of timber. He says:—"From this fact I conclude that the accused was at the bottom of this case." His evidence is therefore of no value. The next witness Mahbub Khan makes only hearsay statements. The third witness is Mr. Phelps, the Joint Magistrate, who tried the assault case of Lachman Prasad. He says that he made certain inquiries from villagers, with the result that he came to the conclusion that the applicant, Bidhyapati, was at the bottom of the assault on the forest guard. Mr. Phelps had no personal knowledge of the matter, and the persons upon whose statements he came to the conclusion mentioned by him were not examined in the case. An inquiry in a case of this kind must be made in the same way as in a trial in a summons case. The findings in such a case must be based on what is legal evidence. It is only in the case of a person who is an habitual offender and is called upon to furnish security for good behaviour that the fact of his being an habitual offender may be proved by evidence of general repute. This cannot be done [275] in a case where a person is called upon to furnish security to keep the peace. As shown above, there is absolutely no legal evidence to justify the conclusion that the applicant Bidhyapati, who appears to be an old man of 80, is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. The order directing him to furnish security was not therefore justified. I accordingly allow the application, and set aside the order complained of.

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must be made by the Court by which the original order was passed *Queen Empress* v *Pirthi Pal Singh*, (1) followed 1903 FEB 6

[Fol 27 All 293=1 A L J 601=1904 A W N 231 5 Cr L J 148=14 P L R 1907=18 P R 1906=5 P W R 1907, 10 Cr L J 225=2 S L R 11 Ref 26 All 371] REVISIONAL CRIMINAL

IN this case one Tota was called upon by a Magistrate of the 1st class to furnish security, namely, two sureties in Rs 300 each and his personal bond for Rs 300, to be of good behaviour for a period of one year The order was confirmed [273] on appeal by the District Magistrate Tota applied in revision to the Sessions Judge, who dismissed the application so far as the merits were concerned. But it appeared that when Tota offered the security demanded the Magistrate concerned had called for a report as to its sufficiency from the Tahsildar, and on the Tahsildar's reporting that the sureties proposed were unable to exercise any effective control over the accused, had rejected them The Sessions Judge accordingly, in view of the ruling of the High Court in *Queen Empress* v *Pirthi Pal Singh* (1), reported the case to the High Court for orders under section 438 of the Code of Criminal Procedure 25 A 272= 23 A W N 36

The following order was passed —

BLAIR, J —This case has been referred by the Sessions Judge of Saharanpur with the recommendation that an order made by a Magistrate be set aside as being founded upon no evidence I find that this case does fall within the ruling reported in the Weekly Notes for 1898, at p 154 I accordingly set aside the order of the Magistrate, and direct him to dispose of the matter before him according to law

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25 A. 273 (=23 A W. N 36)

REVISIONAL CRIMINAL

Before Mr Justice Banerji

EMPEROR *v* BIDHYAPATI * [9th February, 1903]

Criminal Procedure Code, sections 107, 117—Security for keeping the peace—Evidence—Evidence of general repute not available in such cases

It is only in the case of a person who is an habitual offender, and is called upon to furnish security for good behaviour, that the fact of his being an habitual offender may be proved by evidence of general repute Where a person is called upon to furn
repute cannot be made use
breach of the peace or distur
act that may probably occ
tranquillity

[Ref 34 Mad. 255=11 Cr L J 663=8 Ind Cas 493=21 M L J 488=8 M L T 347=(1911) 1 M W N 34, (Evidence of general repute inadmissible to prove charge)]

THE facts of this case sufficiently appear from the order of the Court

Mr. *S B Sarbadhicary*, for the applicant.

The Assistant Government Advocate (Mr *W K Porter*), for the Crown

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* Criminal Revision No 849 of 1902

(1) Weekly Notes, 1898, p 154.

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different sets of defendants. So far the appeal is decreed, and the decree of the lower Court is varied. The case will go back under section 562 of the Code of Civil Procedure to be decided according to law. The costs of this appeal will follow the event.

Appeal decreed and cause remanded.

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25 A. 277 (=23 A. W. N. 73.)

[277] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

SHEO SINGH (*Appellant*) *v.* BALDEO SINGH AND OTHERS (*Objectors*).* [13th February, 1903.]

Act No. XII of 1887 (*Bengal, N. W. P. and Assam Civil Courts, Act*), *section* 21—*Act No. XIX of* 1873 (*N. W. P. Land Revenue Act*). *sections* 113, 114—*Partition—Determination by Revenue Court of question of title—Appeal—Jurisdiction.*

Held that section 21 of the Bengal, North-Western Provinces and Assam Civil Courts' Act, 1887, applies to partition cases in which under section 113 of the North-Western Provinces Land Revenue Act, 1873, a Court of Revenue has determined a question of title, and that "the value of the original suit," if not the value of the entire property sought to be partitioned, is at any rate the value of the share which the applicant for partition seeks to have divided off.

THE facts of this case are as follows:—

One Sheo Singh, a recorded co-sharer in the village of Lalipur, applied to the Revenue Court under section 108 of Act No. XIX of 1873, for perfect partition of his share. Sheo Singh's case was that he owned a one-fourth share of a joint share of 15 biswas, 16 biswansis and 16½ kachwansis in the village. Notices were issued to the other co-sharers calling upon them to appear and state what objections they had, if any, to the partition. Thereupon Baldeo Singh, a nephew of Sheo Singh, appeared and put in an objection contending that out of the share set forth, he, the objector, was the sole proprietor of a 2 biswa share, and that the applicant for partition was only entitled to a one-fourth share of the remaining 13 biswas odd. The Assistant Collector before whom the proceedings for partition had come dealt with this objection under section 113 of the North-Western Provinces Land Revenue Act and himself made an inquiry, and after recording evidence decided, as between the objector Baldeo Singh and the other co-sharers of the village, that Baldeo Singh was the sole proprietor of the 2 biswa share which he claimed. Against this decision Sheo Singh appealed to the High Court. Of the respondents co-sharers Baldeo Singh alone appeared to oppose the appeal, and on his behalf a preliminary objection was raised to the effect that the appeal lay not to the High Court but to the Court of the District Judge.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant.

[278] Babu *Jogindro Nath Chaudhri* and Munshi *Gokul Prasad*, for the respondent Baldeo Singh.

KNOX and AIKMAN, JJ.—The appellant Sheo Singh is a recorded co-sharer in the village of Lalipur. Under section 108 of Act No. XIX of 1873 he applied to the Revenue Court for perfect partition of his share. The appellant's case was that he owned a one-fourth share of a

* First Appeal No. 308 of 1900, from a decision of Babu Shibban Lal, Assistant Collector of Meerut, dated the 10th of November 1900.

25 A 275 (=23 A W N 42)

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APPELLATE CIVIL

APPELLATE CIVIL

25 A 275=23 A W N 42.

Before Mr Justice Blair and Mr Justice Banerji

NARPAT SINGH AND OTHERS (*Decree holders*) v HAR GAYAN (*Judgment debtor*) * [12th February, 1903]

Execution of decree—Mesne profits—Interest on mesne profits—Date from which such interest accrues

Held that the term mesne profits includes interest on such mesne profits and that the interest accrues from the date upon which each instalment of the mesne profits may become due *Grish Chunder Lahiri* v *Shoshi Shikhareswar Roy* (1) followed

[Ref 6 A L J 327 Fol 20 A L J 348]

THIS was an appeal arising out of the execution of a decree for possession and mesne profits The decree was against numerous defendants, and it was provided that each defendant was to be liable only for the amount proved to be due from him for the time he held possession, the actual amount being determinable in execution of the decree Interest upon the mesne profits was provided for by the decree In execution of this decree accounts were made up, and the liability of each defendant for mesne profits ascertained On an application for execution of this decree for mesne profits and interest thereon, the District Judge of Saharanpur had found that interest on the mesne profits would run only from the time when the account as to the mesne profits was made up Against this order the decree holders appealed to the High Court, urging, amongst [276] other pleas, that the lower Court was wrong in its decision as to the time from which interest on the mesne profits should be held to accrue

Mr *Abdul Raoof*, for the appellants

Babu *Ratan Chand*, for the respondent

BLAIR and BANERJI, JJ —This is an appeal of the plaintiffs decree holders against an order made in execution As to the first point raised, namely the question of the liability of the defendants in respect of the costs of the suit, the order of the Court passing the decree against the defendant, who had wrongfully transferred certain property, was an order limiting the costs payable by the co-defendant transferee to the extent of his defence That appears to be a perfectly sound order and open to no objection The second question deals with the principle upon which interest upon mesne profits should be calculated The learned Judge has ordered that interest should run only from the date on which accounts are made up The mesne profits are due from the moment of possession wrongfully held by the defendant, and interest upon such mesne profits from the day on which each instalment became due The Privy Council has ruled in the case of *Grish Chunder Lahiri* v *Shoshi Shikhareswar Roy* (1) that the term mesne profits includes interest on mesne profits The decree in this case in decreeing the mesne profits imposed no limit upon the period from which interest should be calculated That being so, the ordinary law prevails The amount will be ascertained according to the respective liabilities of the

*Second Appeal No 68 of 1901, from an order of E J Kitts, Esq District Judge of Saharanpur dated the 20th of September 1900, confirming an order of Rai Shankar Lal, Subordinate Judge of Saharanpur dated the 13th of December, 1897

(1) (1900) I L R 27 Cal 951

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[The remainder of this judgment, which deals solely with the facts of the case is not reported. With reference to the preliminary objection as to jurisdiction see also *Wajih-ud-din* v. *Waliullah*, I. L. R. 24 All. 381.—ED.]

25 A. 280 (=23 A. W. N. 39).

[280] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

TASADDUQ HUSAIN (*Plaintiff*) *v.* HAYAT-UN-NISSA (*Defendant*).*
[14th February, 1903.]

Civil Procedure Code, sections 588, 591—*Appeal—Order setting aside an* ex parte *decree—Order not "affecting the decision of the case."*

Held that an order under section 108 of the Code of Civil Procedure setting aside a decree passed *ex parte*, is not an order "affecting the decision of the case," that is, affecting the decision of the case upon the merits. The alleged wrongfulness of such an order cannot, therefore, be urged as a ground of objection in an appeal from the decree in the suit, under the provisions of section 591 of the Code. *Chintamony Dassi* v. *Raghoonath Sahoo* (1), and *Gulab Kunwar* v. *Thakur Das* (2) followed.

[Fol. 9 C. W. N. 584; 1905 A. W. N. 274=1 M. L. T. 52=3 A. L. J. 30; 8 C L. J. 308; 2 N. L. R. 179; Ref. 29 I. C. 1004; 31 I. C. 914=40 P. R. 1916; 157 P. L. R. 1914=23 I. C. 919.]

THE suit out of which this appeal arose was a suit for sale upon a mortgage dated the 7th of August 1890, brought by Tasadduq Husain against one Zia-ul-haq and his wife Musammat Hayat-un-nissa. The suit was decreed *ex parte* as against both defendants on the 15th of March 1898, but upon the application of Musammat Hayat-un-nissa, the *ex parte* decree was set aside as against her on the 12th of June, 1899. The mortgage upon which the suit was based had been executed by Zia-ul-haq for himself and on behalf of his wife as her general attorney under a power-of-attorney dated the 1st of November 1886. On the retrial of the suit as between the mortgagee and Musammat Hayat-un-nissa the defence raised was that Zia-ul-haq had no authority from the defendant to execute the mortgage, that she did not receive any part of the consideration for it, and that the condition in the bond with regard to interest was penal. The lower Court (Subordinate Judge of Allahabad) found that, although Zia-ul-haq had authority to execute the mortgage on behalf of his wife, the plaintiff was bound to prove that the amount of the loan was received and appropriated by Hayat-un-nissa, and that he had failed to do so. The suit was accordingly dismissed. From that decree the plaintiff appealed to the High Court, and the first contention raised was that the order setting aside the *ex parte* decree was illegal and was passed upon insufficient grounds.

Babu *Jogindro Nath. Chaudhri* and Maulvi *Ghulam Mujtaba*, for the appellant.

[281] Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J. and BANERJI, J.—This appeal arises in a suit brought by the appellant against one Zia-ul-Haq and his wife, Musammat Hayat-un-nissa, for sale under a mortgage, dated the 7th of August

* First Appeal No. 173 of 1900 from a decree of H. David, Esq., Subordinate Judge of Allahabad, dated the 22nd of March 1900.

(1) (1895) I. L. R. 22 Cal. 981. (2) (1902) I. L. R. 24 All. 464.

joint share of 15 biswas 16 biswansis and 16¼ kachwansis of the village A notice having been issued calling on the other recorded co sharers in the mahal to appear and state any objection they had to the partition, the respondent Baldeo Singh, nephew of the appellant Sheo Singh, appeared and put in an objection contending that out of the share set forth above, he, the objector, was the sole proprietor of a 2 biswa share, and that the applicant was only entitled to a one fourth share of the remaining 13 biswas odd The objection raised a question of title which had already been determined by a Court of competent jurisdiction The Assistant Collector, who was dealing with the partition, had two alternatives under section 113 of the North Western Provinces Land Revenue Act, 1873 He could either stay proceedings in the partition until the question in dispute had been determined by a competent Court, or he could himself proceed to inquire into the merits of the objection The Assistant Collector adopted the latter course, and after making an inquiry and recording evidence he decided, as between the objector Baldeo Singh and the other co sharers of the village, that Baldeo Singh was the sole proprietor of the 2 biswa share which he claimed From this decision the applicant Sheo Singh filed the present appeal under section 114 of the Act Of the respondent co sharers the only one who appeared to oppose the appeal is the objector Baldeo Singh On his behalf the preliminary objection was raised to the effect that the appeal lay to the District Judge and not to this Court This objection was based on the plea that the value of the appellant's one fourth of the 2 biswas was less than five thousand rupees We are of opinion that this objection cannot be sustained The learned advocate for the respondent admitted that if the decision had been different and an appeal had been brought by his client Baldeo Singh, that appeal would [279] have lain to this Court The law which regulates the jurisdiction of the Courts to hear appeals in proceedings of this kind is the same as that which regulates appeals in ordinary civil suits It is to be found in section 21 of the Bengal, North Western Provinces and Assam Civil Courts' Act of 1887 By its provisions where the value of the original suit in which, or in any proceeding arising out of which the order or decree appealed from was made, does not exceed five thousand rupees, the appeal lies to the District Judge In every other case it lies to this Court While it is true that partition proceedings are *not*, strictly speaking, suits, it is obvious that section 113 of the North Western Provinces Land Revenue Act, 1873, lays down that the procedure to be observed by the Court which tries cases in which a question of title is raised by way of objection to the partition, is to be that laid down in the Code of Civil Procedure for the trial of original suits The orders and decisions passed declaring the rights of parties are, under section 114, held to be decisions of a Court of civil judicature of first instance, and are open to appeals to the District Judge or this Court under the rules applicable to regular appeals to those Courts It seems to be abundantly clear that the intention of the Legislature was that for purposes of appeal the value of the subject matter, if not the value of the property under partition, is at any rate the value of the share which the applicant wishes to be divided off, and that in the present case admittedly exceeds five thousand rupees It may also be mentioned as a further argument that the decision of the Assistant Collector on the matter in dispute is binding, not only upon the objector but upon all the other co sharers

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23 A W N
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APPELLATE
CIVIL.

25 A. 282=
23 A. W. N.
41.

25 A. 282 (=23 A. W. N. 41).

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

JAFAR KHAN (*Plaintiff*) *v.* GHULAM MUHAMMAD (*Defendant*).*
[16th February, 1903.]

Act No. XII of 1881 (*N. W. P. Rent Act*), *section* 43—*Landholder and tenant—Suit to recover rent in kind—Duty of officer appointed to divide produce or appraise standing crops—Res judicata.*

Where under section 43 of the N.-W. P. Rent Act, 1881, an officer is appointed to divide produce, or estimate or appraise a standing crop as between a landholder and his alleged tenant, such officer is not empowered to come to any decision as to the liability of the tenant to pay rent, if such liability is denied. If, therefore, an officer appointed for the purposes of section 43 should take upon himself to determine any question as to the liability of the tenant to pay rent, his decision will not in any subsequent suit between the parties be *res judicata*. *Harnarain Singh* v. *Ram Nihora Lal*, (1) followed.

THE facts of this case are thus stated in the judgment of the lower appellate Court:—"This is a suit to obtain a declaration that the plaintiff is the owner of the land in dispute. The name of the plaintiff was not recorded in the khewat. In the time of recent settlement the defendant got his name recorded [283] in the khewat in respect of the land in dispute, and the plaintiff's objection to the entry of his name was disallowed. The defendant then applied under section 43 of the Rent Act for the appraisement of the crop standing on the land. The Revenue Court ordered a valuation of the crop to be made and on the 23rd of September 1899 ordered that the plaintiff (defendant in the Revenue Court) should pay Rs. 2-8-0 to the defendant on account of the latter's share in the produce. The plaintiff therefore brought this suit in the Court of the Munsif of Shahjahanpur. The claim was decreed by the learned Munsif, hence this appeal by the defendant."

In this appeal the defendant-appellant raised orally an objection that the suit was barred as *res judicata* by reason of the decision of the Revenue Court on the defendant's application under section 43 of the Rent Act. The lower appellate Court (Subordinate Judge of Shahjahanpur) accepted this contention and decreeing the appeal dismissed the plaintiff's suit. From this decree the plaintiff appealed to the High Court.

Mr. *Abdul Raoof* and Maulvi *Muhammad Ishaq* for the appellant.

Munshi *Gobind Prasad* for the respondent.

BLAIR and BANERJI, JJ.—This appeal arises out of a suit for a declaration of right to immoveable property. The Court of first instance decreed the plaintiff's claim, and the Court of first appeal has reversed that decree on the point raised by the defendant that the question of title had been decided within the meaning of section 13 of the Code of Civil Procedure, by certain proceedings which have taken place in the Revenue Court upon an application for appraisement of crops under section 43 of Act No. XII of 1881. It is manifest that the official who had dealt with that application did not enter upon, or address himself to, the

* Second Appeal No. 65 of 1901, from a decree of Babu Nihal Chandar, Subordinate Judge of Shahjahanpur, dated the 26th of September 1900, reversing a decree of Babu Banke Behari Lal, Munsif of Shahjahanpur, dated 5th of June 1900.

(1) Weekly Notes, 1903, page 10.

1890. The suit was decreed *ex parte* against both the defendants on the 15th of March 1898, but upon the application of Musammat Hayat un-nissa, the *ex parte* decree was set aside as against her on the 12th of June 1899

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25 A 280= 23 A W N 39

The mortgage was executed by Zia ul Haq for himself, and on behalf of his wife as her general attorney, under a power of attorney, dated the 1st of November 1886. The amount secured by the deed was Rs 4,000, which Zia-ul Huq received in the presence of the Sub Registrar, and property belonging to both himself and to his wife was hypothecated Zia ul Haq himself did not dispute the claim, and he has submitted to the *ex parte* decree, in execution of which his property has been sold by auction

The defence raised on behalf of Musammat Hayat un nissa was that Zia-ul Haq had no authority from her to execute the mortgage, that she did not receive any part of the consideration for it, and that the condition in the bond in regard to interest was penal

The lower Court has found that Zia ul Haq had authority from his wife to borrow money for her by mortgaging her property The learned Subordinate Judge was, however, of opinion that the plaintiff was bound to prove that the amount of the loan was received and appropriated by Hayat un nissa, and that he had failed to do so On this ground the learned Judge has dismissed the claim against Hayat un-nissa From this decree of dismissal the present appeal has been preferred by the plaintiff.

The first contention raised on behalf of the appellant is that the order setting aside the *ex parte* decree is illegal, and was passed upon insufficient grounds We are unable to entertain this contention Section 588 of the Code of Civil Procedure, whilst allowing an appeal from an order under section 108, refusing to set aside an *ex parte* decree, does not allow an appeal from an order setting aside an *ex parte* decree From this [282] we infer that it was the intention of the Legislature that an order setting aside an *ex parte* decree should be final The learned advocate for the appellant referred to section 591 of the Code, which provides that if any decree be appealed against, any error, defect or irregularity in any order, not otherwise appealable, "affecting the decision of the case," may be set forth as a ground of objection in the memorandum of appeal We agree with the rulings in *Chintamony Dassi* v *Raghoonath Sahoo* (1) and *Gulab Kunwar* v *Thakur Das* (2), and hold that the words "affecting the decision of the case" in section 591 must mean affecting the decision of the case on its merits, and that consequently an order setting aside an *ex parte* decree does not come within the purview of the section

[The remainder of the judgment, dealing with the facts and merits of the case, is not reported —ED]

(1) (1895) I L. R 22 Cal 981 (2) (1902) I L R 24 All. 464

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APPELLATE CIVIL.

29 A. 284= 23 A. W. N. 44.

there was no consideration for the bond, and that it was procured from him when he was in a state of intoxication and by fraud and undue influence. The Court of first instance (Additional Subordinate Judge of Moradabad) found against the principal defendant on these pleas, but that Court was of opinion that the bond itself amounted to an unconscionable bargain, against which a Court of Equity would give relief. The Court accordingly, while decreeing the plaintiffs' claim generally, allowed only simple interest at the rate of 2 per cent. per mensem instead of the compound interest stipulated for in the bond. Against this disallowance of interest the plaintiffs appealed to the High Court.

Munshi *Gokul Prasad*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The only ground for this appeal is that the lower Court was not justified in reducing the amount of interest fixed by the mortgage bond given to them by the first defendant, Sami-ud-din Ahmad Khan. The suit was brought to recover the amount of that bond, which was executed on the 10th of November 1892, to secure a principal sum of Rs. 900, and compound interest at the rate of 2 per cent. per mensem and monthly rests. The defence set up by the principal defendant was, that there was no consideration for the bond, and that it was procured from him when he was in a state of intoxication and by fraud and undue influence. The learned Subordinate Judge found against the principal defendant on these pleas, but he was of opinion that the bond itself amounted to an unconscionable bargain against which a Court of Equity would give relief It appears from the evidence that Sami-ud-din Ahmad Khan was, at the time the bond was executed, a youth of about 18 years of age, and also a spendthrift and drunkard. The instrument itself bears upon its face the impress of unconscionable dealing, the rate of interest charged being so exorbitant. This alone was sufficient in our opinion to justify the refusal of the learned Subordinate Judge [286] to give the exorbitant rate of interest stipulated for. If it were necessary to refer to any authorities upon the subject, we would point to a decision of the Master of the Rolls in *Beynon* v. *Cook* (1), which was affirmed by the Court of appeal. In that case the borrower was a reversioner, and the plaintiff was a money-lender, who took as security from the borrower a promissory note for a hundred pounds, for which he was charged £15 discount for six months, and also a mortgage of his reversionary interest with interest at the rate of 5 per cent. per month. The principle laid down by the Master of the Rolls in that case was adopted and quoted by their Lordships of Privy Council in the case of *Kamini Sundarai Chaodhrani* v. *Kali Prossunno Ghose* (2). Their Lordships quoted the following portion of the judgment of the Master of the Rolls :—"The point to be considered is, was that a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many Judges." These words seem to us to be applicable to the present case, and as an authority to have fully justified the decision at which the learned Subordinate Judge arrived. This is the view which has been accepted in this Court in two

(1) (1875) 10 Ch. App. 391. (2) (1885) I. L. R. 12 Cal. 225.

question of title The present plaintiff, who was defendant in that application, appeared and appointed an assessor, but at the same time protested that he was not a person against whom such an application could be entertained, that is to say, he denied the relation of landlord and tenant The Court declined to adjudicate upon that matter and proceeded to deal with the application In our opinion the [284] Revenue Court had no power to entertain or decide the question of title, and we therein follow the judgment of our brother Aikman in S A No 861 of 1900, so far unreported In that case he held, as we do, that it was not within the power of the revenue authority to decide this question of title, and therefore nothing said or done by the Revenue Court would operate as *res judicata* so as to bar the plaintiff from his remedy by suit Under these circumstances we must set aside the decree of the Court below, allow the appeal, and remand the case to that Court under section 562 of the Code of Civil Procedure to be dealt with according to law The appellant is entitled to his costs of this appeal Other costs will follow the event

1903 FEB 16. — APPELLATE CIVIL — 25 A 282= 23 A W N 41

Appeal decreed and cause remanded

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25 A 284 (=23 A W N 44)

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Burkitt

KIRPA RAM AND OTHERS (*Plaintiffs*) v SAMI UD DIN AHMAD KHAN AND OTHERS (*Defendants*) *

[18th February 1903]

Bond—Compound interest—Unconscionable bargain

One Sami ud-din Ahmad Khan, on the 10th of November 1892, borrowed from Kirpa Ram and Ghasi Ram Rs 900, for which he gave a bond bearing compound interest at Rs 2 per cent per mensem, with monthly rests, and mortgaging a 10 biswa share in a village and half a pacca house in Moradabad The obligor was at the time of the execution of this bond, a young man of 18 years of age, a spendthrift and a drunkard On the 13th of June 1900, the mortgagees sued on the bond to recover Rs 5,330-9-0 from the surplus proceeds of the sale of the mortgaged share which had taken place in execu- [illegible] instance gave the [illegible] ate stipulated for [illegible] Court's order as [illegible] scionable bargain [illegible] endant mortgagor [illegible] ossunna Ghose (2), Lall v Ram Prasad (3) and Madho Singh v Kali Ram (4) referred to

[Dist 35 I C 111, 25 I C 560, Ref 9 Bom L R 1236=32 Bom 208, 32 All 589, 4 A L J 222=29 All 303=A W N 1907, 55]

THIS was a suit to recover money on a mortgage bond executed on the 10th of November 1892 The bond was for a sum of Rs 900 payable on demand, with compound interest at the rate of 2 per cent per mensem with monthly rests. The suit was [285] filed on the 13th of June 1900, and the amount then claimed was Rs 5,330 9 3 The defence set up by the principal defendant, Sami ud din Ahmad Khan, was that

* First Appeal No 50 of 1901 from a decree of Babu Achal Behari, Subordinate Judge of Moradabad, dated the 30th November 1900

(1) (1875) 10 Ch. App. 391

(2) (1885) I L. R. 12 Cal 225

(3) (1886) I L R 9 All 74

(4) (1887) I L R 9 All. 223.

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25 A. 287= 7 C.W.N. 514 =30 I. A. 66 =8 Sar. 447.

interest due to them under the bonds at the rate of thirteen annas four pies per cent., and that the receipt for this amount and their own receipt for the amount of this instrument shall be given to us, the mortgagors. If the interest due to the said Lalas could not be paid out of the balance of the surplus profits, we, the mortgagors, shall pay it out of our pocket: the mortgagee shall have nothing to do with it. If any surplus remains after payment of the interest to the said Lalas, it will also be paid to the said Lalas, and shall be applied towards the discharge of the principal amount. We, the mortgagors, shall be liable for the increase or the decrease in the Government revenue. After the expiration of the term we shall get the mortgage redeemed on payment of the entire amount of the mortgage, that is, after the expiration of seven years, we, the mortgagors, shall have a right to redeem; and after that term, if the mortgagors and the mortgagee so wish, the mortgagee shall remain in possession and enjoyment of the land for the space of five years over and above the aforementioned term. We shall have no objection to this. The mortgagee also shall have power to recover his money on the expiry of the term. He shall have no power to cut the dry or growing trees of any description. But he shall have power to cut, or cause to be cut, the trees for the tenants' instruments of husbandry, as well as for his own use in the village, but he shall not interfere with the *shisham* trees in the said villages, and the trees of any description standing on the road. We shall have power to cut (the trees) in time of need. He or the tenants shall have no power to plant, or cause to be planted, any grove, nor shall the mortgagee have power to reduce the amount of the rent-roll. The arrears in the villages for the last year, &c., with reference to the *wasilbaqi* statement prepared by the patwari, shall be realized by the mortgagee, and credit shall be allowed to us for the same at the end of the year. We, the mortgagors, shall realize the arrears that shall be due at the time of redemption, to the mortgagee by the tenants in the villages with reference to the account, and shall pay them off within a year to the mortgagee. If we do not pay them off, the mortgagee may realize the same from us. In future when we effect the redemption, we shall give notice in the month of Baisakh, pay the whole of the amount of this instrument in Asadh, and redeem the mortgaged villages. This mortgaged property has in no way been charged or transferred to any person, except under these instruments, *viz.*, (1st) document, dated the 20th of April, 1880. executed in favour of Makund Prasad; (2nd) document, dated the 13th of July, 1882, executed in favour of Lala Gobind Prasad and Lala Fakir Chand, and (3rd) document, dated the 25th of January, 1884, executed in favour of Lala Gobind Prasad *alias* Gabbhi Mal aforesaid; nor shall we transfer or charge it in future. If any-one will come forward as a partner or a sharer, or a dispute of any kind will arise, we shall be responsible for the defence. The mortgagee shall have [239] nothing to do with it. Under these circumstances he can recover his money within the prescribed period without any reference to the term. If the amount be not recovered from the mortgaged property, it may be recovered from the other moveable or immoveable property. We shall have no objection to this. A shop, situate in muhalla Chaudhri, adjoining the dwelling house facing the west, bounded as below, is hypothecated in the bond. The rights and interests in the town of Shahi Rustamnagar, pargana Mirganj, together with the income arising from the market, have been mortgaged with possession. After collecting the rent with reference to the rent-roll, of the aforesaid villages, the Government revenue, cesses and subscription shall be paid first of all, and out of the balance, after appropriating the money himself, according to the above-mentioned provisions, the aforesaid Sahus shall be paid. We shall be responsible for the surplus or the deficit, the mortgagee shall have nothing to do with this.

"Having agreed to all these particulars we have executed this deed of mortgage with possession, that it may serve as an authority. The conditions entered in this instrument shall hold good and remain in full force until the payment of the whole amount. The mortgagee shall have power like us to enhance the rent. He shall also have power to recover the money from us and the mortgaged and hypothecated property."

suit was instituted on the 6th of April, 1895, the plaintiffs
at the mortgage-money had been wholly paid off in the first
y e profits of the property of which the defendant had
b sion, and praying that they might be declared entitled
to mortgaged property without payment; that the
def ordered to render accounts of the receipts and dis-
burs mortgaged property from the date of his possession to

cases, namely, the case of *Lalli* v. *Ram Prasad* and the case of *Madho Singh* v. *Kashi Ram*, reported in the Indian Law Reports, 9 Allahabad, at pages 74 and 228 respectively The bargain in this case was unquestionably an unconscionable one, and one in respect of which Courts of Equity ought to give relief We accordingly dismiss the appeal with costs

1903 FEB. 18.

APPELLATE CIVIL

25 A 234= 23 A. W N. 44.

Appeal dismissed.

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25 A 287 (=7 C W. N 514=30 I A. 66=8 Sar 447)

[287] PRIVY COUNCIL.

PRESENT

Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser

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BANARSI PRASAD (*Defendant*) v RAM NARAIN AND OTHERS (*Representatives of the Plaintiffs*) [6th February and 25th March, 1903]

[*On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad*]

Mort ... *mortgage* ... *for gross*

In a suit for the redemption of a mortgage with possession as having been paid off by the usufruct, where the mortgage deed was found to partake of the ... well as of a usufructuary mort... er the deed the mortgagor was ... accounts of receipts and pay... of the High Court) that on the ... not responsible for the ... but only for such sums ... d for such sums, if any, as might have been received by him but for his own neglect or fault

[Ref 8 O. C 193]

APPEAL from a judgment and decree (23rd November, 1899) of the High Court at Allahabad, which reversed a decree (29th March, 1897) of the District Judge of Bareilly, and restored a decree (11th June, 1896) of the Subordinate Judge of Bareilly in favour of the plaintiffs

The suit was brought by one Hulas Singh and another against Banarsi Prasad, the present appellant, for the redemption of a mortgage made by the plaintiffs in the defendant's favour on the ground that the mortgage money had been paid off out of the income of the property mortgaged while it was in the possession of the mortgagee The proper construction to be placed on this mortgage deed was the only question in this appeal The material portions of the deed, which was dated the 8th September, 1884, were as follows —

After describing the property mortgaged and stating that it was mortgaged to Banarsi Prasad for the period of five years for Rs 2,551, the deed continued —

... and (b) ...

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paid off. The mortgage remains in force until all the money secured on it is repaid to the mortgagee, and if the words 'ta ada-i-kul rupiya' merely mean, as I think they do mean, 'so long as the mortgage subsists,' then this clause, although unnecessary, has a perfectly natural and intelligible meaning, and is not inconsistent with the rest of the deed. . . . . It was further contemplated between the parties that, whenever the property became liable to redemption, *i.e.*, at the end of the original or extended term or thereafter, the mortgagors, if they wish to redeem, should signify their intention in the month of Baisakh and should close the account and redeem two months later. If this is the correct construction of the deed, it is hardly necessary to consider the circumstances of the parties or other extrinsic evidence. This also, however, seems to me to support the construction which I have placed upon the clause, regarding the meaning of which I differ from the Subordinate Judge. The annual *rent-roll of mortgaged* property was about Rs 8,900 and the Government revenue was over Rs. 4,800, leaving a gross profit of about four thousand rupees. The mortgagors owed to the bankers named in the mortgage-deed Rs. 32,000, carrying an annual interest of Rs. 3,200, so that the payment of this interest and of Rs. 800 to the mortgagee himself would ordinarily absorb all the profits; but if there were any surplus, it was to be paid to the bankers in diminution of the Rs. 32,000. So long, therefore, as the bankers remained unpaid from some other source than the rents and profits of the mortgaged property, there was no chance of the mortgage coming to an end by reason of there being sufficient profits to pay off the mortgage money, and hence the parties did not contemplate, and made no provision for, the mortgagee paying himself the mortgage money from the rent and profits of the property. . . . . As the deed has been construed by the Subordinate Judge, it appears to me to involve conditions which no sane man of business would accept. I hold that when this suit was instituted, the usufructuary mortgagee was holding under an unexpired term and that the mortgagors were bound to give notice of their intention to redeem before they can redeem. I therefore find both points for the mortgagee, defendant appellant.

"It is unnecessary for me to record a finding upon the third point."

The District Judge therefore allowed the appeal and dismissed the suit with costs.

The plaintiffs appealed to the High Court. The appeal was heard by a Division Bench (Blair and Burkitt, JJ.), who [292] decreed the appeal and restored the decree of the Subordinate Judge. Their judgment was as follows:—

"This is a suit for redemption by the plaintiffs, who went into Court upon the allegation that their mortgagee, who was an usufructuary mortgagee, had already repaid himself out of the usufruct the whole of the mortgage-money due. The Court of first instance found that that was the fact, and it did so upon a construction of the mortgage-deed, holding that the mortgagee was to be taken to have collected the jamabandi rent from the tenants and was not answerable only for the sums which he had actually collected. The figures upon that construction are perfectly plain and show that the mortgagee has far more than paid himself the amount due upon his mortgage. It was contended for the mortgagee that he was only answerable in account to the mortgagors for the sums actually collected by him from the tenants, and further, that the sums which he had so collected tallied to a rupee with the amount of the payments which he had to make for the Government revenue, the village expenses, his own interest, and the interest of certain prior mortgagees which he undertook to pay. He had also undertaken to pay towards the principal sum of such last-mentioned debts any residue which might remain after satisfaction of the charges and interest mentioned above. He does not allege that he has paid any part of such principal. The lower appellate Court does not seem to have dealt at all, or at least to have dealt properly, with the real question raised. It deals with the question of what ought to have been done had everybody strictly complied with *the provisions of the mortgage-deed. It does not,* at all events explicitly, put upon the mortgage deed a construction conflicting with that of the Court of first instance, but it dismisses the suit of the plaintiffs upon the ground that the defendant mortgagee was entitled to notice of plaintiffs' intention to redeem. The Court below has failed entirely to find whether the mortgagee had or had not in fact paid himself out of the usufruct, in other words, whether he had or had not received and appropriated any sum beyond the charges to be paid by him, the interest of himself and the interest to be paid by him to the prior incumbrancers. Upon the *construction of the document*

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the filing of the suit, and that the defendant might be ordered to reconvey the mortgaged property to the plaintiffs and put them in possession thereof on a date to be fixed by the Court

The defendant in his written statement alleged that on the expiration of the original term of 7 years he had by consent and in accordance with the conditions of the mortgage deed, entered upon a further term of 5 years which had not expired when the suit was brought, and the suit was therefore premature, that under the mortgage deed the mortgagors were bound to give notice of their intention to redeem on a certain date, and to pay off the mortgage money and redeem the mortgage at a certain date thereafter, and *they could not redeem without such notice*, that under the terms of the mortgage deed the defendant had paid himself Rs 800 a year and had paid the [290] balance to the native bankers, and that the allegation of the plaintiffs that the whole of the mortgage money had been realized in the first year was wholly wrong, that the arrears of rent outstanding at the rate of the mortgage had been realized and credited as agreed upon, that the suit for balance of profits, for interest and for an account was wholly wrong, inasmuch as the defendant had never refused to render accounts, and that the suit for redemption without payment of the balance due of the mortgage money was improperly brought

The Subordinate Judge was of opinion that the conditions in the mortgage deed as to the length of the term and the giving of the notice by the mortgagors of their intention to redeem were subject to and overruled by the condition at the end of the deed which provided that the condition entered in the deed should "hold good and remain *in full force* until payment of the whole amount He further held that under the mortgage, the mortgagee was liable not merely for actual collections but for the sums shown in the gross rent roll of the mortgaged property, and on that assumption he came to the conclusion that the mortgage money had been paid off.

The Subordinate Judge therefore gave the plaintiffs a decree with costs

On appeal by the defendant the District Judge was of opinion that there were three points for decision (*a*) Is the suit premature because the term of the mortgage is unexpired? (*b*) Is the suit for redemption bad because the mortgagor was bound to give notice? (*c*) Should accounts be made up on the basis of actual profits or upon the basis of the gross rent roll? As to these he said —

"Then comes . .
decreed the suit, . . .
all the mortgage . . . .
the preceding con . . . .
and if so, the cla . . .
clause was inten...
condition should at any time be introduced into the mortgage The Subordinate Judge appears to think that this clause enables the mortgagors at any time to call for accounts, and in the event of the account showing that the surplus profits equal the amount of the mortgage money, to demand reconveyance This does not seem to me to [291] be the primary meaning of the wor . .
that it was not contemplated by the parti . . .
the mortgage money from the rents and . . .
the Government revenue the Rs 800 and the interest due to the bankers, there remained any surplus, then that surplus was to be paid in diminution of the principal debts due by the mortgagors to the said bankers. There is no express provision as to what was to be done with the surplus if or when the bankers were

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"It is unnecessary for me to record a finding upon the third point."

The District Judge therefore allowed the appeal and dismissed the suit with costs.

The plaintiffs appealed to the High Court. The appeal was heard by a Division Bench (Blair and Burkitt, JJ.), who [292] decreed the appeal and restored the decree of the Subordinate Judge. Their judgment was as follows :—

"This is a suit for redemption by the plaintiffs, who went into Court upon the allegation that their mortgagee, who was an usufructuary mortgagee, had already repaid himself out of the usufruct the whole of the mortgage-money due. The Court of first instance found that that was the fact, and it did so upon a construction of the mortgage-deed, holding that the mortgagee was to be taken to have collected the jamabandi rent from the tenants and was not answerable only for the sums which he had actually collected. The figures upon that construction are perfectly plain and show that the mortgagee has far more than paid himself the amount due upon his mortgage. It was contended for the mortgagee that he was only answerable in account to the mortgagors for the sums actually collected by him from the tenants, and further, that the sums which he had so collected tallied to a rupee with the amount of the payments which he had to make for the Government revenue, the village expenses, his own interest, and the interest of certain prior mortgagees which he undertook to pay. He had also undertaken to pay towards the principal sum of such last-mentioned debts any residue which might remain after satisfaction of the charges and interest mentioned above. He does not allege that he has paid any part of such principal. The lower appellate Court does not seem to have dealt at all, or at least to have dealt properly, with the real question raised. It deals with the question of what ought to have been done had everybody strictly complied with the provisions of the mortgage-deed. It does not, at all events explicitly, put upon the mortgage deed a construction conflicting with that of the Court of first instance, but it dismisses the suit of the plaintiffs upon the ground that the defendant mortgagee was entitled to notice of plaintiffs' intention to redeem. The Court below has failed entirely to find whether the mortgagee had or had not in fact paid himself out of the usufruct, in other words, whether he had or had not received and appropriated any sum beyond the charges to be paid by him, the interest of himself and the interest to be paid by him to the prior incumbrancers. Upon the construction of the document

which commends itself to our judgment, the mortgagee is responsible for the rents of the tenants as they are to be found in the jamabandi He cannot cover himself by denying that he had actually collected the whole amount He was bound to give the mortgagors credit for the gross rents as they appear in the jamabandi Upon this construction of the deed it is clear from the judgment of the Court of first instance that the mortgagee had long ago paid himself, and it does not lie in his mouth to claim the advantage of notice of redemption '

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On this appeal, which was heard *ex parte*, Mr *G E A Ross*, for the appellant contended that the suit was premature inas much as under the clause in the mortgage deed allowing a further term of five years, the period for which the appellant was entitled to be in possession had not expired at the institution [293] of the suit Moreover, the respondents were not entitled to redeem without payment of the mortgage money and were bound under the terms of the mortgage deed to give notice of their intention to redeem before bringing their suit this they had not done It was also contended that the High Court was wrong in construing the deed in such a way as to make the appellant liable to account for the rents of the mortgaged property as they appeared in the rent roll, and without reference to whether he realized them or not he was only liable to account for rents which he actually collected As to the accounts in such a case, *Shah Mukhun Lall* v *Baboo Sree Kishen Singh* (1) was referred to, and it was submitted that the suit should be remanded for proper accounts to be taken

1903, *March* 25 —The judgment of their Lordships was delivered by LORD MACNAGHTEN —

This is an appeal *ex parte* from a decree of the High Court at Allahabad reversing a decree of the District Judge of Bareilly and restoring the decree of the Subordinate Judge

The plaintiffs, who are now represented by the respondents, claimed to redeem without payment a mortgage held by the appellant over certain villages and a shop which belonged to them

The mortgage was dated the 8th of September, 1884 It was expressed to be for a term of seven years, with an extension of five years more if both parties agreed On the execution of the mortgage the mortgagee entered into possession of the mortgaged premises, and continued in possession until apparently a receiver was appointed in the suit The mortgage deed is a very obscure document, confused throughout and in places contradictory It partakes of the character of an agency or receivership deed as well as of the character of a usufructuary mortgage The two purposes of the deed are so mixed up together that it is difficult, if not impossible, to determine the rights of the parties with anything like certainty The Subordinate Judge and the High Court both came to the conclusion that the meaning of the deed was that the amount of the gross rental as shown in the jamabandi or rent roll, whether actually [294] realized or not, was to be taken as the income for which the mortgagee in possession was to be responsible

This view does not seem to have been presented by the plaintiffs themselves Indeed, the point was not taken in the pleadings at all It appears to have been an inference drawn by the Subordinate Judge from certain expressions found in the mortgage deed, which are by no means clear On this footing the Subordinate Judge determined that the mortgage had been discharged and gave the plaintiffs a decree without deter

(1) (1863) 12 Moo I A. 157, 2 B L. R. P C. 44

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mining the issues raised in the suit. The District Judge, on the other hand, thought that was not the meaning of the document, and went so far as to say that no sane man of business would have assented to such an arrangement. He dismissed the plaint with costs on the ground that the mortgagee was entitled to hold the mortgaged property for the extended term under an agreement alleged, but not proved, and the subject of one of the issues on which no finding was pronounced. He further held that during that extended term the mortgagors were not entitled to any accounts.

Their Lordships are unable to agree either with the District Judge or the High Court. They do not think that the mortgagee was intended to be responsible for the rent-roll in the jamabandi under all circumstances. On the other hand, they cannot doubt that under such a deed as that on which the suit is founded the principal must be entitled to call upon his agent to furnish accounts of receipts and payments.

Possibly if the evidence which appears to have been before the Subordinate Judge had been available on the appeal, their Lordships might have been able to arrive at a decision on the merits. As it is, there is no evidence before their Lordships on which it is possible to come to any conclusion—all their Lordships can do is to express their dissent from the judgment of the High Court as well as from the judgment of the District Judge and to remit the case to the Subordinate Judge with such directions as seem to them to be necessary under the circumstances.

In their Lordships' opinion the proper order will be as follows:—

[295] Order the appellant to bear his own costs of this appeal.

Discharge the decrees of the High Court and of the District Judge without costs.

Discharge the decree of the Subordinate Judge, the costs of the hearing before him to be costs in the cause.

Remit the suit to the Subordinate Judge.

Declare that according to the true construction of the mortgage deed of the 8th of September, 1884, the defendant, the mortgagee, is not responsible for the amount of the gross rental as shown in the jamabandi, but only for such sums as were actually received by him or on his behalf, and such sums, if any, as might have been received by him but for his own neglect or fault.

Take an account of the defendant's receipts and payments under the said mortgage-deed, and let the ultimate balance due to or from the defendant be certified.

Enquire what, if anything, was due to or from the defendant in respect of said mortgage at the date of the commencement of the suit, and what was the amount, if any, in the hands of the defendant at that time.

Let the ultimate balance be paid to the party to whom it shall appear to be due within such time as the Judge shall direct, and let the costs of the suit be borne and paid by the defendant if it shall appear that nothing was due to him in respect of the said mortgage at the date of the commencement of the said suit, but if it shall appear that at that time anything was due to the defendant in respect of the said mortgage let the costs of the suit be borne and paid by the respondents.

Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed: case remanded.

Solicitors for the appellant—Messrs. *Barrow, Rogers, and Nevill.*

which commends itself to our judgment, the mortgagee is responsible for the rents of the tenants as they are to be found in the jamabandi He cannot cover himself by denying that he had actually collected the whole amount He was bound to give the mortgagors credit for the gross rents as they appear in the jamabandi Upon this construction of the deed, it is clear from the judgment of the Court of first instance that the mortgagee had long ago paid himself, and it does not lie in his mouth to claim the advantage of notice of redemption

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25 A 287=7 C W N 514=30 I A. 66=8 Sar 447

On this appeal, which was heard *ex parte*, Mr *G E A Ross*, for the appellant contended that the suit was premature inasmuch as under the clause in the mortgage deed allowing a further term of five years, the period for which the appellant was entitled to be in possession had not expired at the institution [293] of the suit Moreover, the respondents were not entitled to redeem without payment of the mortgage money, and were bound under the terms of the mortgage deed to give notice of their intention to redeem before bringing their suit this they had not done It was also contended that the High Court was wrong in construing the deed in such a way as to make the appellant liable to account for the rents of the mortgaged property as they appeared in the rent roll, and without reference to whether he realized them or not he was only liable to account for rents which he actually collected As to the accounts in such a case, *Shah Mukhun Lall* v *Baboo Sree Kishen Singh* (1) was referred to, and it was submitted that the suit should be remanded for proper accounts to be taken

1903, *March* 25 —The judgment of their Lordships was delivered by LORD MACNAGHTEN —

This is an appeal *ex parte* from a decree of the *High Court* at Allahabad reversing a decree of the District Judge of Bareilly and restoring the decree of the Subordinate Judge

The plaintiffs, who are now represented by the respondents, claimed to redeem without payment a mortgage held by the appellant over certain villages and a shop which belonged to them

The mortgage was dated the 8th of September, 1884 It was expressed to be for a term of seven years, with an extension of five years more if both parties agreed On the execution of the mortgage the mortgagee entered into possession of the mortgaged premises, and continued in possession until apparently a receiver was appointed in the suit The mortgage deed is a very obscure document, confused throughout and in places contradictory It partakes of the character of an agency or receivership deed as well as of the character of a usufructuary mortgage The two purposes of the deed are so mixed up together that it is difficult, if not impossible, to determine the rights of the parties with anything like certainty The Subordinate Judge and the High Court both came to the conclusion that the meaning of the deed was that the amount of the gross rental as shown in the jamabandi or rent roll, whether actually [294] realized or not, was to be taken as the income for which the mortgagee in possession was to be responsible

This view does not seem to have been presented by the plaintiffs themselves Indeed, the point was not taken in the pleadings at all It appears to have been an inference drawn by the Subordinate Judge from certain expressions found in the mortgage deed, which are by no means clear On this footing the Subordinate Judge determined that the mortgage had been discharged and gave the plaintiffs a decree without deter

(1) (1869) 12 Moo I A. 157, 2 B L R. P C. 44

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The main defences raised by the defendant were that he did not execute the promissory notes in the capacity of Mahant of the gaddi of Baba Baghambri; that the consideration for the notes did not pass to the gaddi; that the defendant had no authority to raise loans on behalf of the gaddi, and that no decree, other than a decree against the defendant personally, could be passed.

The Court of first instance (Subordinate Judge of Allahabad) decided against the defendant upon the issues raised on these pleas and passed a decree against the defendant as Mahant gaddi-nashin for the payment of Rs. 29,000 odd and costs, but directed by the decree that the last remedy to which the plaintiff should have recourse for realizing the amount of the decree should be by absolute sale of the immoveable property of the gaddi, and that execution proceedings, so far as might be, should be taken subject to the provisions of section 323 of the Code of Civil Procedure.

Against this decree the defendant appealed to the High Court.

The Hon'ble Mr. *Conlan*, Messrs. *A. E. Ryves*, and *R. K. Sorabji* and Babu *Durga Charan Banerji*, for the appellant.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondent.

STANLEY, C. J. and BANERJI, J.—The suit out of which this appeal has arisen was brought by Mahant Dat Gir Thanapati at the Sadar Station, Allahabad, of the Panchayati Akhara Maha Nirbani of the Goshains of the Naga sect, as such [298] Thanapati against Mahant Parsotam Gir, the Mahant gaddi-nashin of the gaddi of Baba Baghambri, for recovery of the amounts alleged to be due on foot of two promissory notes, made by him in favour of the plaintiff, dated the 22nd of September, 1898, for principal sums of Rs. 25,000 and Rs. 3,000, respectively, and interest thereon. The consideration for the notes, according to the plaintiff's claim, was loans contracted by Mahant Naipal Gir, the guru of Mahant Parsotam Gir, and by Mahant Parsotam Gir himself, as Mahants of the gaddi of Baba Baghambri, for the purposes of the gaddi. The main defences raised by the defendant were that he did not execute the promissory notes in the capacity of Mahant of the gaddi of Baba Baghambri; that the consideration for the notes did not pass to the gaddi; that the defendant had no authority to raise loans on behalf of the gaddi, and that no decree, other than a decree against the defendant personally, could be passed. The lower Court decided against the defendant upon the issues raised on these pleas, and passed a decree against the defendant as Mahant gaddi-nashin for the payment of Rs. 29,000 odd and costs, but directed by the decree that the last remedy to which the plaintiff should have recourse for realizing the amount of the decree should be by absolute sale of the immoveable property of the gaddi, and that execution proceedings, so far as might be, should be taken subject to the provisions of section 323 of the Code of Civil Procedure. Against this decree the present appeal has been preferred by the defendant, the grounds of appeal relied upon being that—

(1) it had been proved by the evidence in the case that the Akhara Panchayati Maha Nirbani had been informed through its agent before the principal moneys sought to be recovered were advanced to the defendant that the defendant could not pledge the credit of the gaddi of Baba Baghambri for such advances;

(2) because, in fact, the defendant did not pledge the credit of the gaddi, but borrowed the money claimed on his own personal credit;

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[296] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji

PARSOTAM GIR (*Defendant*) *v* DAT GIR (*Plaintiff*) *
[14th February, 1903]

Hindu law—Endowed property—Powers of alienation possessed by manager of endowed property

Held that, with the exception of cases which come under the operation of Bombay Act No II of 1863, there is no absolute prohibition against the alienation of endowed property by the manager for the time being, but for ... nent aliens ... man Persaud ... Shibessouree ... i Kishore Roy ... r Doorganath ... a Chetti (6) ... Nath (8) and ...

[Ref 11 C. W N 489=6 C L J 401, 34 Cal 249=11 C W N 261=6 C L J 442, 6 C L J 631 8 A L J 1120=11 I C 308]

THE suit out of which this appeal arose was brought by one Dat Gir to recover money alleged to be due on two promissory notes executed by the defendant in favour of the plaintiff The promissory notes upon which the suit was based bore date the 22nd of September, 1898, and were for principal sums of Rs. 25,000 and Rs 3,000 respectively The larger of the two promissory notes was addressed by the defendant to the Thanapatis of the Akhara Panchayati Maha Nirbani, of which the plaintiff was the head, and was in the following terms —" With due respect I beg leave to state that I have borrowed Rs 25,000 from you as a loan on interest at the rate of eight annas per cent I promise to repay the money in eleven months " It was signed—" Mahant Parsotam Girji, Mahant and gaddi nashin of the gaddi of Baba Baghambri at Baski Bagh " The other note was in similar terms, and was also signed by Parsotam Gir as Mahant and gaddi-nashin The defendant Parsotam Gir was, as he described himself, Mahant and gaddi nashin of the gaddi of Baba Baghambri, an endowment situated near [297] Allahabad, and, according to the plaintiff's allegation, the moneys on account of which these promissory notes had been executed were moneys advanced to one Naipal Gir, the predecessor in office of the defendant, and to the defendant Parsotam Gir himself for the purposes of the gaddi There had been a great deal of litigation in connection with the property of the gaddi of Baba Baghambri, and it was established by the evidence in the case both that funds were urgently needed for carrying on this litigation and that it was largely owing to the plaintiff having supplied those funds that a considerable quantity of property, which might otherwise have been lost to the gaddi, was saved

* First Appeal No. 177 of 1900, from a decree of H David, Esq , Subordinate Judge of Allahabad, dated the 30th of March 1900.

(1) (1856) 6 Moo I A 393
(2) (1869) 13 Moo I. A 270
(3) (1871) 7 B. L. R 621.
(4) (1875) L. R. 2 I A 145
(5) (1876) L R 4 I. A 52.
(6) (1879) I L R. 2 Mad 175
(7) (1881) I L R 5 Bom 393
(8) (1885) I L R 9 Bom 422
(9) (1896) I L R 24 Cal 77.

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succession to Prasad Gir, and another suit was also brought by Naipal Gir against Narbada Gir as mortgagee of certain other villages which Ramjiawan and Gopal Gir had mortgaged to him. Both suits were heard together and were decreed by the Subordinate Judge on the 29th of June 1893. An appeal was preferred against the decree in the first mentioned suit, which the High Court allowed on the 14th of November, 1895. During the pendency of the appeal Naipal Gir abdicated the Mahantship in favour of Parsotam Gir, the defendant-appellant, and on the 7th of November, 1895, Parsotam Gir's name was substituted on the record in the place of Naipal Gir. In the deed of transfer, dated the 3rd of May, 1895, which was executed on the occasion of the appointment of Parsotam Gir to the Mahantship, there are the following restrictions imposed as regards dealing with the endowed property:—" Parsotam Gir or any Mahant who may be appointed after him, shall not be competent to transfer a part or the whole of the moveable or the immoveable property, but the Mahant who occupies the gaddi shall be competent to [301] set apart the profits of any portion of the property belonging to the gaddi for the expenses of a virtuous action, such as opening a Sanskrit School or a Dharamasala, and shall, at the time of necessity for the purposes of facilitating the management and (improving) the interest of the gaddi, grant on his behalf a lease for a definite period of a portion or the entire ilaka appertaining to the gaddi to a reliable person after obtaining adequate security from him." This provision in the deed is relied upon by the defendant as proving that Mahant Dat Gir, the plaintiff, was aware that Parsotam Gir had no power to transfer any part of the property of the gaddi, inasmuch as Dat Gir was a witness to the execution of this instrument. On the 26th of June, 1896, leave to appeal against the decree of the High Court, dated the 14th of November 1895, to Her Majesty in Council, was granted to Parsotam Gir, with the result that on the 24th of March, 1899, their Lordships of the Privy Council reversed the decree of the High Court and restored that of the Court of first instance.

It was in the main to enable the Mahants of the gaddi to carry on the litigation for the recovery of the property of the gaddi that the moneys sought to be recovered in the present suit are alleged by the plaintiff to have been borrowed. The necessity for borrowing money arose out of the mismanagement and breach of trust of the former manager of the endowed property, and if the money had not been forthcoming to carry on the appeal before the Privy Council, it is clear that a substantial part of the endowed property would have been lost to the gaddi.

It is not denied by the defendant that, so far as moneys were *bonâ fide* borrowed and applied in the recovery of such properties, the amount is chargeable to the gaddi, but it has been contended before us that the amount so chargeable cannot be recovered by sale in execution of any portion of the property of the gaddi, but can only be realized out of rents and profits.

Two questions therefore have been argued before us, namely—(1) For what amount, if any, can the endowed property be held liable? and (2) if any sum shall be found to be so chargeable, whether or not such sum can in any event be realized in [302] execution by a sale of the endowed property, or any part of it? Upon the first question it has been admitted by the learned advocate for the appellant that portions of the moneys claimed were borrowed for the necessary purposes of the gaddi. The sums so admitted amount in the aggregate to Rs. 13,748. The

(3) because the plaintiff did not establish that the defendant spent any portion of the money claimed in the litigation in which the gaddi of Baba Baghambri was involved, and

[299] (4) assuming that the defendant did spend the money so borrowed in such litigation yet notwithstanding this the property of the gaddi was not liable in respect of the claim

The other grounds of appeal were abandoned at the hearing The promissory note to secure Rs 25,000 is addressed by Mahant Parsotam Gir to the Thanapatis of the Akhara Panchayati Maha Nirbani, and is in these terms —"With due respect I beg leave to state that I have borrowed Rs 25,000 from you as a loan on interest at the rate of eight annas per cent I promise to repay the money in eleven months," dated and so forth, and signed "Mahant Parsotam Girji Mahant and gaddi nashin of the gaddi of Baba Baghambri at Baski Bagh," etc The second note to secure Rs 3,000 is addressed in the same way, and is in similar terms, *mutatis mutandis*, and is likewise signed by Mahant Parsotam Gir as Mahant and gaddi nashin

The gaddi of Baba Baghambri it would appear, was founded more than a hundred years ago in a house in the neighbourhood of Allahabad Prior *to March, 1868, the last manager of the gaddi* was Baba Bhola Gir, who died on the 8th March, 1868 After his death the four leading disciples of the gaddi executed an agreement, dated the 26th March, 1868, whereby it was arranged that Naipal Gir should be gaddi nashin of the math, that Bijai Gir and Prasad Gir should be managers of the property of the gaddi, and that Moti Gir should stay in the math and carry on its management and affairs under the directions of the Mahant This document contained a provision that neither Bijai Gir, nor Prasad Gir, nor the Mahant himself should "have any power of partition, or temporary or permanent transfer in respect of the whole or any part of the moveable or immoveable property, because all the properties belong to the gaddi of Baba Baghambri, and they are not meant for person (*sic*) or for any particular individual Bijai Gir and Prasad Gir appear to have proved faithless to their trust, and appropriated to their own use the collections which were made in the villages which belonged to the gaddi, and of which they had been appointed managers A suit was in consequence instituted in the year 1884 against Prasad Gir by Naipal Gir for possession of the villages in his charge and for the usual accounts [300] Prasad Gir died during the pendency of the suit, and on his death his disciple Narbada Gir was brought on the record as defendant in his place The suit was decreed by the Subordinate Judge of Allahabad on the 18th of June, 1885, but his decree was reversed by the High Court on the 8th of March, 1886, the judgment of the High Court concluding with the following passage —"We think the Subordinate Judge should, as we propose to do, have left it open to the plaintiffs, or rather Naipal Gir, to institute a suit against Narbada Gir personally in which a number of questions, which as yet have never been raised or considered, can be properly dealt with and determined, and in holding that the present suit failed as against Prasad Gir, we leave untouched and undecided all matters affecting the rights of the plaintiff Naipal Gir on the one side and of Narbada Gir on the other' Bijai Gir having also died, the management of the properties which had been in his charge was taken over by his disciples Ramjiawan and Gopal Gir On the 13th of January, 1893 a suit was instituted by Naipal Gir against Narbada Gir for possession of the endowed properties in his charge in

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succession to Prasad Gir, and another suit was also brought by Naipal Gir against Narbada Gir as mortgagee of certain other villages which Ramjiawan and Gopal Gir had mortgaged to him. Both suits were heard together and were decreed by the Subordinate Judge on the 29th of June 1893. An appeal was preferred against the decree in the first mentioned suit, which the High Court allowed on the 14th of November, 1895. During the pendency of the appeal Naipal Gir abdicated the Mahantship in favour of Parsotam Gir, the defendant-appellant, and on the 7th of November, 1895, Parsotam Gir's name was substituted on the record in the place of Naipal Gir. In the deed of transfer, dated the 3rd of May, 1895, which was executed on the occasion of the appointment of Parsotam Gir to the Mahantship, there are the following restrictions imposed as regards dealing with the endowed property:—"Parsotam Gir or any Mahant who may be appointed after him, shall not be competent to transfer a part or the whole of the moveable or the immoveable property, but the Mahant who occupies the gaddi shall be competent to [301] set apart the profits of any portion of the property belonging to the gaddi for the expenses of a virtuous action, such as opening a Sanskrit School or a Dharamasala, and shall, at the time of necessity for the purposes of facilitating the management and (improving) the interest of the gaddi, grant on his behalf a lease for a definite period of a portion or the entire ilaka appertaining to the gaddi to a reliable person after obtaining adequate security from him." This provision in the deed is relied upon by the defendant as proving that Mahant Dat Gir, the plaintiff, was aware that Parsotam Gir had no power to transfer any part of the property of the gaddi, inasmuch as Dat Gir was a witness to the execution of this instrument. On the 26th of June, 1896, leave to appeal against the decree of the High Court, dated the 14th of November 1895, to Her Majesty in Council, was granted to Parsotam Gir, with the result that on the 24th of March, 1899, their Lordships of the Privy Council reversed the decree of the High Court and restored that of the Court of first instance.

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Two questions therefore have been argued before us, namely—(1) For what amount, if any, can the endowed property be held liable? and (2) if any sum shall be found to be so chargeable, whether or not such sum can in any event be realized in [302] execution by a sale of the endowed property, or any part of it? Upon the first question it has been admitted by the learned advocate for the appellant that portions of the moneys claimed were borrowed for the necessary purposes of the gaddi. The sums so admitted amount in the aggregate to Rs. 13,748. The

residue is disputed, and undoubtedly some items of the claim cannot be supported 1903 FEB 14

Unfortunately, as is not unusual in cases of disputes in regard to land in this country, the parties did not confine themselves to their civil remedies, as they ought to have done, but took the law into their own hands, with the result that the aid of the Criminal Courts had to be invoked, and no less than about 30 criminal cases issuing out of the dispute between the parties, or in connection therewith, were tried before the Criminal Courts In these the Mahant Parsotam Gir would appear to have been more or less implicated It has been clearly proved that a portion of the moneys which were borrowed from the plaintiff were expended in the course of and for the purposes of, these criminal cases The sums so applied amount to Rs 6,750 It is impossible for us to hold that moneys obtained and applied for such purposes were borrowed for the purposes of the gaddi, so as to be chargeable against the gaddi The plaintiff, if he did not know the purposes for which this money was borrowed, ought to have satisfied himself, as far as he could, that it was being borrowed for the purposes of the gaddi This, clearly, he did not do It has been weakly contended by the learned advocate for the respondent that these moneys were expended to save the honour and reputation of the Mahant, and so were properly payable out of the funds of the gaddi We are wholly unable to accede to this argument It is idle to contend that moneys applied by a Mahant in defending himself or any other parties from a criminal charge can be charged by him against the gaddi as expenditure made for the purposes of the gaddi In respect of this sum of Rs 6,750 the appeal must therefore be allowed

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As regards the balance of the principal sum claimed and secured by the promissory notes sued on, we are satisfied, after careful consideration of the evidence and of the arguments [303] presented to us, that the plaintiff respondent in making the advances which he did to the gaddi nashin of the gaddi, acted perfectly *bona fide*, and believed, after due inquiry, that there was fair ground of necessity made out for the loan A considerable part of the endowed property of the gaddi would have in fact been lost to it if the Mahants had not been able to raise money to meet the costs of the litigation in which they were involved in reference to the property of the gaddi , if, for example, money had not been forthcoming to enable the Mahant to prosecute his appeal to the Privy Council, undoubtedly a large portion of the endowed property would have been lost The defendant failed to produce any books of account, or to show how the moneys which had been borrowed were applied, and we have no hesitation in coming to the conclusion that, save in respect of the sum of Rs 6,750, which was advanced to defray the costs of criminal cases, the balance of the moneys secured by the two promissory notes in suit were borrowed to meet pressing necessities of the gaddi In respect of Rs 6,750, therefore, of the amount claimed the appeal must be allowed, and the claim of the plaintiff, in so far as it seeks to make the gaddi liable, dismissed, but the defendant is personally liable to repay this amount with interest, and as against him personally there will be a decree for that amount and interest

It was contended that inasmuch as the plaintiff was a witness to the deed of transfer of the 3rd of May, 1895, to which we have referred, and it contained a provision restraining the defendant from making any transfer of the property of the gaddi, the plaintiff must have been aware of the clause prohibiting alienation, and therefore ought not to have made

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the advances. The mere fact that the plaintiff witnessed this document does not prove that he had knowledge of the contents of it. There is nothing therefore in this argument.

The more difficult question as to the liability of the property of the gaddi, or any part of it to be sold for the satisfaction of the plaintiff's claim, now remains to be considered. The contention of the appellant is that the plaintiff can only get a charge on the rents and profits of the endowed property after making a reasonable allowance for the maintenance of the gaddi, [304] and that in no case can any part of the property be sold. The question for our determination is whether or not endowed property, such as the property in this case, or any part of it, can be sold in execution of a decree for advance found to have been *bona fide* made to the Mahant for the necessary purposes of the gaddi. There is no decision of this High Court upon this question; but in the other High Courts and also before the Privy Council we find cases in which the question has been considered. The authorities appear to be in conflict upon the point. In the case of *Hanooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) their Lordships of the Privy Council observe :—"Upon the third point it is to be observed that under the Hindu law the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title." This ruling supports the view that for the pressing necessities of an endowment its property may be mortgaged by the manager. In the case of *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (2) the suit had been brought by the plaintiff against the sebait of a talook dedicated to the service of the deity, and against certain other persons, to establish title to certain jummas and to recover possession of certain lands connected with them which the plaintiff claimed by purchase from four of the defendants, on whom, the plaintiff alleged, the right to the jummas was originally conferred. The jummas were claimed by the plaintiff as mouroosee (hereditary), and also as held at a fixed invariable rent. The sebait denied the hereditary character of the tenure, the invariable quality of the rent, and the purchase itself, and alleged that the tenants of the jummas from whom the plaintiff asserted that he had purchased had not any hereditary tenure, and that they had surrendered such interest as they had possessed to the sebait before the time of the alleged sale to the plaintiff. The sale under which the plaintiff claimed was established by the decree of the Judge of the [305] Civil Court, whose decision was affirmed by the High Court on appeal. On appeal to their Lordships of the Privy Council the appeal was allowed on the ground that the fact of the jummas being held at a fixed invariable rent had not been satisfactorily proved, and the suit was dismissed, without prejudice, however, to the plaintiff's bringing a fresh suit to establish his vendors' title as holding by mouroosee or hereditary title, and their power to transfer without the talookdar's assent. Lord Chelmsford, who delivered the judgment of their Lordships, in the course of his judgment (p. 273), observes :—" The talook itself with which these jummas were connected by tenure was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its

(1) (1856) 6 Moo. I. A. 393, at p. 412. (2) (1869) 13 Moo I. A 270.

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It was contended that inasmuch as the plaintiff was a witness to the deed of transfer of the 3rd of May, 1895, to which we have referred, and it contained a provision restraining the defendant from making any transfer of the property of the gaddi, the plaintiff must have been aware of the clause prohibiting alienation, and therefore ought not to have made

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decision, as Sir Montague E. Smith, who delivered the judgment of their Lordships, observed, was—"Whether these decrees can now be legally carried into effect, which raises the question whether [307] the profits of debutter lands can be attached and appropriated during the incumbency of succeeding sebaits by virtue of judgments obtained against a former sebait in respect of debts, properly and necessarily incurred by him for the service and benefit of the idol. It is to be observed that the question is not raised whether the lands themselves could be sold under the decree." In the course of his judgment he referred to the passage in Lord Chelmsford's judgment which we have quoted, and later on made these observations:—"But notwithstanding that property devoted to relgious purposes is, as a rule, inalienable, it is, in their Lordship's opinion, competent for the sebait of property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the sebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir." He then proceeds to give the definition of the power of the manager of an infant heir laid down by Lord Justice Knight Bruce in the case of *Hanooman Pershad Panday* v. *Mussumat Babooee Munraj Koonweree*, (1) referred to in our judgment, and later on says:—"It would seem to follow that the person so entrusted (that is, entrusted with the management of an endowed property) must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them." Towards the close of the judgment he says:—"It is to be observed that execution of the judgments sought to be set aside is decreed, and in their Lordships' view rightly, only against the rents and profits of the debutter lands." These last mentioned words are relied upon as authority for the contention that a decree obtained against a manager of endowed [308] property can only be realized out of the rents and profits of the endowed property. Their Lordships, however, laid down no such proposition. The decrees which the appellants in that case sought to set aside directed that the debt should be realized, if not from the sebait personally, from the rents and profits of the debutter lands. It was therefore in conformity with the decrees so passed, and which were held to be binding decrees, that execution should be decreed only against the rents and profits. Their Lordships carefully abstained from expressing any opinion as to whether or not the lands themselves could be sold under the decrees; and as regards the power of alienation of endowed property, merely state that such property is, as a rule, inalienable. In the later case of *Kanwur Doorganath Roy* v. *Ram Chunder Sen* (2), which was an appeal in a suit to set aside certain alienations of an ancestral mahal on the ground that the mahal had been dedicated to the worship of an idol, Sir Montague E. Smith, in delivering the judgment of the Privy Council, observed

(1) (1856) 6. Moo. I. A. 393. (2) (1876) L. R. 4 I. A. 52.

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property The sebait had not the legal property, but only the title of manager of a religious endowment In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage This statement of the law has been relied upon by the learned advocate for the appellant as equivalent to a ruling that under no circumstances can the sebait or manager of endowed property alienate any portion of such property It is to be observed that it was not necessary for their Lordships in that appeal to determine so wide a proposition, and having regard to later decisions of the Privy Council, we are disposed to think that the *dictum* of Lord Chelmsford was not intended by him, and was not accepted as laying down the rule that under no circumstances could a sebait alienate any portion of endowed property In the case of *Tayub un nissa Bibi* v *Sham Kishore Roy* (1) it was held that under the Hindu law a permanent alienation by a sebait of endowed property, such as the creation of a putni, is not absolutely null and void, that under special circumstances of necessity a permanent alienation by a sebait of such property is valid In that case the estate belonged to an idol and was under the management of one Chundra Nath Surma, the sebait of the idol Funds being wanted for repairing the temple and restoring the image of the idol, the defendants advanced money to the sebait on having a putni of a portion of the estate created in their favour On [306] special appeal from a decree of the Officiating Judge of Rungpore, reversing a decree of the Officiating Subordinate Judge, Mitter, J in the course of his judgment, observed —' Assuming, however, that the finding on the question of debutter is correct, we cannot agree with the Judge in holding that it has been finally decided by the Privy Council that a permanent alienation, such as the creation of a putni made by the sebait of an endowed property is absolutely null and void, even though it be made under special circumstances of necessity It is true that the idol must be treated in law as the owner of the property, and it is also true that the sebait must be looked upon in no other light than the sebait or trustee manager of that endowed property, but under the Hindu law a sebait is competent to alienate a reasonable portion of the property, if such alienation is absolutely required by the necessities of the management ' "This point,' he observed, ' has been so ruled by this Court In the case of *Prosunno Kumari Debya* v *Golab Chand Baboo* (2) their Lordships did not lay down a hard and fast rule that property devoted to religious purposes was under no circumstances alienable In that case the respondent had obtained two decrees against a sebait of an idol upon his bonds for the repayment of moneys alleged to have been borrowed for the idol and expenses of the temple Both decrees directed that the debts should be paid by the sebait personally or else realized from the profits of the debutter lands The appellants, who were sebaits in succession to the judgment debtor, instituted a suit to set aside the decrees so obtained, and to have the debutter property released from attachment issued in execution thereof It was held that the decrees being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, were entitled to the force due to judgments of competent Courts, and were binding on the succeeding sebaits, who formed a continuing representation of the idol s property The main point for

(1) (1871) 7 B L R 621 (2) (1875) L R 2 I A 145

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25 A. 313 (=23 A. W. N. 63.)

[313] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

GOKUL CHAND (*Objector*) *v.* MANGAL SEN AND OTHERS (*Applicants*).* [19th February, 1903.]

Act No. V of 1881 (*Probate and Administration Act*), *section* 3—*Will—Probate—Probate granted of a nuncupative will made by a Hindu.*

Held that probate may be granted of a nuncupative will made by a Hindu. *In re the will of Haji Mahomed Abba* (1) followed.

MANGAL SEN and others filed an application in the Court of the District Judge of Agra setting forth that, according to an oral will made shortly before her death, which occurred on the 18th of December 1901, one Musammat Gulab Kunwar, widow of Balmakund, and manager of a temple described as the temple of Murli Manoharji, the applicants with others had been constituted managers of the said temple, and certain instructions, afterwards embodied in writing by the persons concerned, had been given by the Musammat, and they prayed that this nuncupative will of the deceased lady might be admitted to probate, or in default, that letters-of-administration might be granted to them. This application was opposed by one Gokul Chand, who set up an alleged will said to have been executed by Gulab Kunwar on the day of her death. It was also opposed by one Murli, who alleged that Gulab Kunwar left no will at all, and that he himself was her heir.

The District Judge found in favour of the case put forward by the applicants, and that the will relied upon by Gokul Chand was a forgery invented to meet the applicants' petition, and accordingly granted the applicants' prayer for probate. Gokul Chand thereupon appealed to the High Court, urging that the nuncupative will set up by the applicants had not been satisfactorily proved, and if it had been, no probate could be granted of such a will.

Mr. *R. K. Sorabji* and Maulvi *Ghulam Mujtaba*, for the appellant.

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram*) and Dr. *Satish Chandra Banerji*, for the respondents.

[314] BLAIR and BANERJI, JJ.—This appeal arises out of an application to the District Judge of Agra, asking him to find in favour of the validity of a certain nuncupative will alleged to have been made by one Musammat Gulab Kunwar, a Brahman widow, who died on the 18th of December, 1901, and to admit that will to probate. On the other side the validity of the fact of such disposition of her property is denied, and furthermore, one Gokul Chand set up a written will of a later date. The oral will, as the Judge has found, was made four days before the death of the testatrix. The written will set up by Gokul Chand was alleged to have been made on the very date on which the testatrix died. We have considered the evidence on the record in relation to both of these wills, and we see no reason to differ from the conclusions arrived at by the learned Judge. It is not, in our opinion, proved that the document produced and alleged to have been signed on the date of the death of the testatrix was really her last will and testament. On the other hand, we think it not improbable that the testatrix should have

*First Appeal No. 98 of 1902 from an order of H. D. Griffin, Esq., District Judge of Agra, dated the 26th of July, 1902.

(1) (1899) I. L. R. 24 Bom. 8.

(p 62) that "Granting the lands were debutter, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol The mokurrari was granted, according to the statement, because the temple was out of repair and money was wanted to restore it The sale of part of the mokurrari rent was granted in consideration of money stated to be required for the completion of the temple, which, it was stated, was already in course of erection If, therefore, the statements in these deeds are taken as a whole, the alienations they contain were justifiable, assuming the property to have been debutter land Later on he observes —"If then the temples were out of repair, and if Rashmoni offered this mokurrari pottah to raise money for the purpose of doing the repairs that the temple required, the purchaser who *bonâ fide* took it upon that representation would clearly be entitled to keep his purchase It may be that Rashmoni did not intend to apply the money to the purpose for which she professed to require it It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did [309] But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object and by her having subsequently applied the money to a different purpose She as the manager of this estate had the same right, or an analogous right to that of the manager of an infant heir,' and then he quotes the language of the Privy Council in defining the power of a manager of an infant heir in the case of *Hanooman Persaud Panday* v *Mussumat Babooee Munraj Koonweree* (1) In this judgment their Lordships express in clear terms that in the case of necessity, and, *a fortiori*, in the case of an imperious necessity, endowed property may be sold In the case of *Sammantha Pandara* v *Sellappa Chetti* (2), in which the plaintiff sued to recover the amount due on foot of a bond executed by the Pandara Samadhi of a mattam in his favour, and asked for a decree awarding payment of the sum claimed with interest against the defendant, the executant of the bond, and two parties who claimed adversely to one another the office of Pandara Samadhi of the mattam, and out of the property of the mattam, the Court of first instance passed a decree in favour of the plaintiff against the head of the mattam and against the property of the mattam On appeal to the High Court, on the ground that a decree could not be passed against the appellant, nor against the property of the mattam, it was held by Sir Charles A Turner, C J and Muttusami Ayyar, J, that the head of a mattam may contract debts for purposes connected with the mattam, and the debts so contracted might be recovered from the mattam property After describing the origin of mattams, they say, as regards the property of the mattam, as follows —'The property is in fact attached to the office, and passes by inheritance to no one who does not fill the office It is in a certain sense trust property, it is devoted to the maintenance of the establishment, but the superior has large dominion over it and is not accountable for its management, nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in [310] furtherance of the objects of the institution Acting for the whole institution, he may contract debts for purposes connected

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(1) (1856) 6 Moo I A 393 (2) (1879) I L R 2 Mad. 175

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REVISIONAL CRIMINAL.

25 A. 315= 23 A. W. N. 57.

[Dist. 36 All. 132=12 A. L. J. 143=22 Ind. Cas. 977 ; Ref. 8 Bom. L. R. 847 ; 5 Cr. L. J. 298=U. B. R. 1906, Cr. 51 ; 13 Cr. L. J. 247=14 Ind. Cas. 599=9 A. L. J. 308 ; 15 Cr. L. J. 290=10 N. L. R. 8=23 Ind. Cas. 498 ; 15 Cr. L. J. 504 =24 Ind. Cas. 592=7 S. L. R. 123 ; 62 I. C. 415 ; Fol. 3 Cr. L. J. 123=181 P. L. R. 1905=57 P. R. 1905 ; 13 Cr. L. J. 6=9 Ind. Cas. 45 ; 38 Cal. 302=13 C. L. J. 425=9 I. C. 45 ; Expl. 8 Cr. L. R. 43=4 L. W. 32=(1916) 2 M. W. N. 159=35 I. C. 490.]

A MAGISTRATE of the 1st class having before him a complaint of an offence under the Cattle Trespass Act, 1871, came to the conclusion that the complaint was frivolous and vexatious. He did not, however, when discharging the accused, make an order for compensation against the complainant; but subsequently [316] to the discharge of the accused he held a separate inquiry, and in that proceeding made an order calling upon the complainant to pay compensation. The Sessions Judge of Moradabad, being of opinion that the lower Court's procedure was not supported by the Code of Criminal Procedure, referred the case to the High Court for orders under section 438 of the Code.

The following order was passed :—

BANERJI, J.—In this case one Safdar Husain brought a complaint against several persons, accusing them of an offence under the Cattle Trespass Act, No. I of 1871. The Magistrate discharged the accused, and came to the conclusion that the accusation was frivolous and vexatious. He then proceeded to record an order to the effect that he proposed to award compensation to the accused under section 250 of the Code of Criminal Procedure. It appears that he adjourned the proceedings to a future date in order to enable the complainant to show cause against the award of compensation, and manifestly made the actual order for awarding compensation, not on the date on which the accused were discharged, but on a subsequent date. I agree with the learned Sessions Judge that this proceeding of the Magistrate was not merely irregular, but his order was without jurisdiction. Section 250 requires that the Magistrate, if he wishes to exercise his discretion as to the award of compensation, should do so by his order of discharge or acquittal. There is nothing in the Code of Criminal Procedure which authorizes him to hold an inquiry on a subsequent date, and make an order under section 250 on such date. He was bound under the proviso to that section to record and consider any objection which the complainant might urge before he directed compensation to be paid; and if he directed compensation to be paid he was bound under clause (*b*) of the proviso to state his reasons for awarding compensation in his order of discharge or acquittal. It is quite clear, therefore, that the direction for payment of compensation must be contained in the order of discharge or acquittal. The Magistrate's order of discharge did not contain any such direction in the present instance. I therefore set aside his subsequent order, and, acting under section 423, clause (*d*), read with section 439, I direct that the compensation awarded be refunded to the complainant.

desired to perpetuate after her death the worship which had been going on upon her premises during her own life and probably before The evidence is considerable in quantity and in our view is open to no grave suspicion The amount at issue is very small No questions were put to show that the witnesses were persons who are likely to perjure themselves for so small a consideration, and except as co worshippers they have no interest in the estate disposed of by the oral will We therefore find that the nuncupative will alleged to have been made by the deceased widow was, in fact, made by her as her last will and testament

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The question of admitting the will to probate is one of some difficulty According to the interpretation clause in the Probate and Administration Act, 1881, probate means a copy of the will with a grant of administration to the estate of the testator, and it is argued with some considerable force that there can be no copy of a purely oral will The same question has been dealt with in England under the provisions of the law relating to oral wills The right to make an oral will was limited by the Statute of Frauds to sailors and [315] soldiers actually upon service and it was provided that the witnesses to such wills should make memoranda of the contents of the will within six days from the time when such will was made The Ecclesiastical Courts have, it seems to us, *ex necessitate,* granted probate of such wills It is true that in English law the probate of a will is not defined as it is in the Indian Act The word "probate includes everything which is necessary to establish a will, and there is no reference to writing It seems to us that the practice of the English law presents a bridge by which we may escape from the difficulty of finding that whereas a Hindu or Muhammadan can make a good oral will, no effect can be given to that will, such as would be given to a written document, and we have been led in that direction by the Bombay Court, which, in the judgment in *In re the will of Haji Mahomed Abba* (1) recognising clearly the difficulty of the situation, arrived at the conclusion that it is more in accordance with the intention of the Legislature and the spirit of the law that probate should issue, although the will is an oral will We approve of that decision, and affirming the order of the Judge, dismiss this appeal with costs

Appeal dismissed

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25 A 315 (=23 A W N 57)

REVISIONAL CRIMINAL

Before Mr Justice Banerji

IN THE MATTER OF THE COMPLAINT OF SAFDAR HUSAIN *
[20th February, 1903]

Criminal Procedure Code, section 250—Frivolous accusation—Award of compensation to accused—Such award to be made by the order of discharge or acquittal and not by a separate order

or vexatious,
ust do so by
uch an order
it was *held*

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* Criminal Reference No 30 of 1903

(1) (1899) I L R 24 Bom 8

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25 A. 317= 23 A. W. N. 45.

STANLEY, C. J.—This appeal raises a question as to the true interpretation of a section of the Civil Procedure Code, namely section 257A, which has been the subject of great divergence of opinion in the several High Courts, and which is to be found in the portion of Chapter XIX, which deals with the mode of executing decrees. The plaintiff Lalji Singh, on the 3rd of July, 1888, obtained a decree against the defendants Nos. 1 to 3 for a sum of Rs. 278-14-0 and future interest. The decree was put into execution, and the property of the judgment-debtors was advertised for sale. There was found to be due on the 1st of March, 1892, for principal, interest and costs, a sum of Rs. 331-15-0, and on this date the following adjustment of the claim was arrived at between the parties. The judgment-debtors paid to the decree-holder a sum of Rs. 200, and the decree-holder having remitted a sum of Rs. 19-15-0, the judgment-debtors gave a mortgage bond to secure the balance, namely Rs. 112, and undertook to pay that amount in two years. The decree was thus satisfied. The judgment-debtors made some payments on foot of the amount so secured, but failed to pay the entire sum, and in consequence the plaintiff instituted the suit out of which this appeal has arisen to recover the amount remaining due on foot of the mortgage bond.

The defence was set up that the bond was void by reason of the provisions of section 257A of the Code, the sanction of the Court not having been obtained to the agreement by which the claim was adjusted. The Court below decided that this section [319] was fatal to the plaintiff's claim and dismissed the suit. Hence the present appeal has been preferred. As the authorities upon the true meaning of section 257A were conflicting, the case was referred to a Bench of three Judges.

The mortgage bond sued on is dated the 1st of March, 1892. It recites the decree of the 3rd of July, 1888, the amount due on foot of it, the advertisement for sale of the judgment-debtors' property and the agreement for the adjustment of the decree in the manner which I have stated. After these recitals the mortgagors hypothecate a share in certain property as security for the payment of the sum of Rs. 112 in two years, with interest at the rate of 8 annas per cent. per mensem, and promise to pay the same. The bond then contains a covenant on the part of the mortgagors for payment of the interest, with a provision that in case of default in such payment, the plaintiff should have power to realize his money with interest at the rate of 12 annas per cent. per mensem; and it also contains a covenant on the part of the mortgagors for payment of the entire principal amount and interest within the stipulated time. The other provisions of the deed it is not material to be set forth. From the terms of this document it will be seen that by it there was a complete adjustment of the plaintiff's decree. Upon its execution the decree ceased to be enforceable, and the plaintiff's remedy was, as it seems to me, upon the mortgage bond, and upon that alone. The Court of first instance dismissed the suit, on the ground that the bond was a satisfaction of the plaintiff's decree, and was entered into without the consent of the Court, and was within the purview of section 257A of the Code, and void under the provisions of that section. The learned Munsif relied upon several decisions, and amongst others, upon that of the Bombay High Court in *Heera Nema* v. *Pestonji Dossabhoy* (1).

(1) (1898) I. L. R. 22 Bom. 693.

25 A 317 (=23 A W N 45)

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[317] FULL BENCH

Before Sir John Stanley, Knight, Chief Justice, Mr Justice Blair and Mr Justice Banerji

LALJI SINGH (*Plaintiff*) v GAYA SINGH AND OTHERS (*Defendants*) * [21st February, 1903]

Civil Procedure Code, section 257A—Execution of decree—Agreement for satisfaction of judgment debt—Agreement which supersedes the operation of the decree not within the terms of section 257A

Held that an agreement whereby a decree is adjusted, and so rendered unenforceable is not within the purview of section 257A of the Code of Civil Procedure *Ram Ghulam* v *Janki Rai* (1), *Jhabar Mahomed* v *Modan Sonahar* ...rai ... an ... jee ... v ... sad (10) and *Dalu Mahwahi* v *Palakdhari Singh* (11) distinguished

[Fol. 1 A L J 330, 1905 A W N 57=2 A L J 683, 32 Cal 917=9 C W N 1004, Ref. 88 P R 1904 61 P L R 1907=29 P R 1908, 35 Cal 870=7 C L J. 543=12 C W. N 674, 6 A L. J 726; Fol 12 I C 364]

THE facts of this case are as follows —

One Lalji Singh, on the 3rd of July, 1888, obtained a decree against Gaya Singh and others for a sum of Rs 278 14-0 and future interest The decree was put into execution, and the property of the judgment debtors was advertised for sale. There was found to be due on the 1st of March, 1892, for principal, interest and costs, a sum of Rs 331 15 0, and on that date the claim was adjusted between the parties in the following manner The judgment debtors paid to the decree-holder the sum of Rs 200, the decree holder remitted a sum of Rs 19 15 0, and the judgment debtors gave a mortgage bond to secure the balance, namely Rs 112, and undertook to pay that amount in two years The decree was thus satisfied The judgment debtors paid a portion of the amount so secured, but failed to pay the rest, and the decree-holder accordingly brought a suit on his bond to recover the balance.

[318] The defence set up was that the bond was void by reason of the provisions of section 257A of the Code of Civil Procedure, the sanction of the Court not having been obtained to the agreement by which the decree was adjusted. The Court of first instance (Munsif of Benares) dismissed the suit, holding that it was not maintainable having regard to section 257 of the Code The plaintiff appealed, and the lower appellate Court (District Judge of Benares) on similar grounds dismissed the appeal The plaintiff thereupon appealed to the High Court.

Dr *Satish Chandra Banerji*, Munshi *Haribans Sahai* and Munshi *Gokul Prasad*, for the appellant

Mr. *S. B. Sarbadhicary*, for the respondents.

* ... Esq, District ... ecree of Babu ...

(1) (1884) I L R 7 All. 124
(2) (1885) I L B 11 Cal 671
(3) (1889) I L R 16 Cal 504
(4) (1893) I. L R 17 Mad. 382
(5) (1900) I L. B. 25 Bom 252
(6) (1902) I L R 26 Mad 19
(7) (1901) 6 C W. N. 27.
(8) (1898) I L R. 22 Bom. 693
(9) (1902) I L. R. 27 Bom. 96
(10) (1896) I L R. 18 All 435.
(11) (1896) I L. R 18 All 479

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tion of which the latter was arrested. A compromise was effected between the parties out of Court, by which it was arranged that the defendant judgment-debtor should execute an instalment bond, providing for payment of the entire amount of the bond with interest in default of payment of any instalment. The fact of the decree having thus been satisfied was not certified to the Court. The defendant having failed to pay an instalment, the plaintiff instituted a suit to recover the amount due under the bond. The Judge of the Small Cause Court before whom the case came submitted the following, as also another question, for the decision of the High Court, namely "whether section 257A of the Code of Civil Procedure would bar the institution of a separate suit on the instalment bond, the bond not having been executed with the sanction of the Court." Garth, C.J., and Ghose, J., before whom the reference came, held that the instalment bond was not "an agreement to give time for the satisfaction of a judgment-debt," within the meaning of section 257A of the Code. "We agree," they observe, "with the Allahabad High Court that the provisions of that section are only intended to prevent any binding agreements between judgment-debtors and judgment-creditors for extending the time for enforcing decrees by execution without consideration and without the sanction of the Court. Those provisions [322] are not intended to prevent the parties from entering into a fresh contract for the payment of the judgment-debt by instalments, or in any other way, and any such fresh contract, of course, could only be enforced by a fresh suit." They then observed that they could not agree with the view which the Bombay High Court had taken of this question. In the case of *Hukum Chand Oswal* v. *Taharunnessa Bibi* (1), in which a bond had likewise been given in satisfaction of the balance of decretal money with interest, it was likewise held that section 257A was framed to prohibit the enforcement of an agreement of the kind mentioned in it, if made without the sanction of the Court in execution of the decree, but was not intended to take away the right of parties of entering into a fresh contract, either for payment of the judgment-debt, to give time for such payment, or for the payment of a larger sum than might be covered by the decree, if it be for a proper consideration. Prinsep and Ghose, JJ., in their judgment, say:—"It seems to us that it is only in the event of an application being made to enforce the agreement entered into between the parties under the bond in the course of the execution of the decree that an objection like that now raised could have been successfully made. Section 257A finds its place in the Procedure Code in the Chapter headed "Of the execution of decrees" under division E—"Of the mode of executing decrees;" and there can therefore be no reasonable doubt that what the Legislature had in view in framing that section was simply to prohibit the enforcement of an agreement of the kind mentioned therein if made without the sanction of the Court in execution of the decree. Again in the Madras High Court in the case of *Juji Kamti* v. *Annai Bhatta* (2) it was held that an instalment bond executed by a judgment-debtor in favour of the decree-holder, and in consideration of the benefit of the decree being given up was not void as an agreement falling under section 257A of the Civil Procedure Code. In *Tukaram* v. *Ananthhat* (3), the case to which I have already alluded, where a

(1) (1889) I. L. R. 16 Cal. 504.
(2) (1893) I. L. R. 17 Mad. 382.
(3) (1900) I. L. R. 25 Bom. 252.

Upon appeal the District Judge held that the adjustment amounted to a giving of time for payment of the decree, and also provided for the payment of a sum in excess of the sum due, and was in contravention of the section of the Code to which I have referred, the sanction of the Court which passed the decree to the agreement not having been obtained

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[320] The section in question runs as follows —" Every agreement to give time for the satisfaction of the judgment debt shall be void, unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be, under the circumstances reasonable

" Every agreement for the satisfaction of a judgment debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void, unless it is made with the like sanction

" Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment debt, and the surplus, if any, shall be recoverable by the judgment-debtor

This section has been variously interpreted by the several High Courts By some it has been interpreted to mean that an agreement made in contravention of its provisions, that is without the sanction of the Court, is void *in toto* and for all purposes, by others it has been held that the term " void ' means void only for the purposes of execution proceedings, and not void for all purposes One of the earliest cases bearing upon the subject is that of *Ram Ghulam* v *Janki Rai* (1) In that case the consideration for a mortgage in respect of which the suit was brought, consisted partly of the amount of two decrees held by the mortgagee against the mortgagor The mortgagor pleaded failure of consideration as a bar to the enforcement of the mortgage, basing his plea on the fact that the mortgagee had not certified the adjustment of the decrees as provided by section 258 of the Code of Civil Procedure, and therefore the decrees were still in force under the terms of that section Mahmood, J, commenting upon section 258, observes —" I hold that the adjustment of a decree out of Court, if never certified to the Court, is ineffectual *only so far as the execution of that decree* is concerned, but that if such adjustment is made by an agreement in itself valid, such agreement, like other lawful contracts, becomes the basis of a right which, if infringed, can afford a cause of action for a separate suit notwithstanding the provisions of section 244 of the Code of Civil [321] Procedure There is no provision in our law which renders such agreement void or otherwise illegal, and in the present case if the plaintiff respondent attempts, in breach of the contract contained in the mortgage deed, to execute the decrees, the amount whereof has already been included in the consideration of the deed, he will render himself liable to a separate suit by the defendant appellant in which full relief could be awarded " The Bombay High Court took a different view of this section, but in a *later decision, to which I shall presently refer,* the earlier decisions, as I understand them, of that Court were not followed In the case of *Jhabar Mahomed* v *Modan Sonahar* (2) the question came up for consideration before a Bench of the Calcutta High Court In that case the plaintiff had obtained a decree against the defendant, in execu

(1) (1884) I L. R 7 All 124 (2) (1885) I L. R 11 Cal 671

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of *Harkissen Dass Serowgee* v. *Nibaran Chander Banerjee* (1). In that case the plaintiffs had obtained a decree against the defendant Nibaran Chander Banerjee, and in execution of it had arrested him. To secure his release from arrest, Nibaran paid a certain sum of money, and together with his co-defendants executed a promissory note for a sum which was made up of the balance of the decretal amount and costs then due, or to become due, in respect of a bond which they agreed to execute for the balance. The sanction of the Court was not obtained to this agreement, nor was satisfaction of the decree entered up. The suit was instituted upon the promissory note and as a defence section 257A of the Code was relied upon. Sale, J., adhered to the decisions of the Madras and Calcutta High Courts, and held that the section is a bar only to execution proceedings in respect of agreements [325] therein mentioned, and does not prohibit their enforcement by separate suit. He observes, in the course of his judgment, that "the effect of the authorities in the Bombay and Allahabad Courts is that that section has a wider operation, and agreements which fall within it are void for all purposes." He does not refer, and apparently his attention was not directed, to the decision of the Bombay High Court in the case reported in I. L. R. 25 Bom. 252, to which I have referred. There was thus at the time when the judgment last quoted was delivered a consensus of opinion in the Bombay, Madras and Calcutta High Courts, that an agreement whereby a decree is adjusted and so rendered unenforceable in execution does not come within the purview of section 257A of the Code. Since, however, the case before us was argued, this consensus has been interrupted by a Bench of the Bombay High Court, which has refused to accept the decision in *Tukaram* v. *Anantbhat* (2). This is the case of *Dhanram Ragho* v. *Ganpat Sadashiv* (3), in which Crowe and Aston, JJ., followed the ruling in *Heera Neema* v. *Pestonji Dossabhoy* (4), and practically, as I think, refused to follow the later authority.

I now come to the two cases in this High Court upon which reliance has been placed as supporting the contention that the mortgage bond, the subject-matter of this suit, was given in contravention of the provisions of section 257A, and is therefore void. The first of these cases is *Dhan Bahadur Singh* v. *Anandi Prasad* (5). In that case a judgment-debtor asked for time to pay the decretal amount. The decree-holders agreed to give time on condition that he should give them a *hundi* for Rs. 1,500, which represented a portion of the decree-holders' claim which had been dismissed as barred by limitation. The judgment-debtor gave the *hundi*, but the sanction of the Court to the transaction was not obtained. In a suit by the decree-holders to recover the amount secured by the *hundi*, it was held that the transaction was one within the contemplation of section 257A, and inasmuch as it had been made without the sanction of the Court it could not be enforced. It is to be observed [326] in this case that the agreement did not and was not intended to be an adjustment or satisfaction of the decree: it was an agreement to give time for the satisfaction of the judgment debt, and merely suspended, but did not extinguish, the right of execution of the decree. Properly, therefore, as it seems to me, it was held that the agreement was in contravention of section 257A. The learned Judges who heard the

(1) (1901) 6 C. W. N. 27.
(2) (1900) I. L. R. 25 Bom. 252.
(3) (1902) I. L. R. 27 Bom. 96.
(4) (1898) I. L. R. 22 Bom. 693.
(5) (1896) I. L. R. 18 All. 435.

mortgage bond was given for an amount which included a sum due under [323] a decree, and made the whole amount payable in instalments, it was held that the mortgage bond did not suspend the right to execute the decree, but it put an end to the remedy on the decree, and substituted the mortgage bond, and was therefore not an agreement to give time for the satisfaction of the judgment debt, and did not fall within section 257A The learned Chief Justice, Sir Lawrence Jenkins, reviewed and explained the earlier decisions in the Bombay High Court, which were supposed to be authorities for the proposition that such an agreement was in contravention of the provisions of section 257A, and void for all purposes, with the object of showing that they did not support any such proposition, and he held that the mortgage bond in suit did not, according to its true construction, purport to suspend temporarily the right to execute the decree, but to put an end to the remedy on the decree, and to replace it with a mortgage bond, that the bond was itself "the actual and present satisfaction of the judgment, and being such, it necessarily followed that it was not an agreement to give time for the satisfaction of a judgment, for such an agreement *ex vi termini* implied that there had been no actual satisfaction, but merely a stipulation for a future satisfaction" "In other words," he observes "the agreement to which the first paragraph of section 257A relates is one which suspends, and does not destroy, the rights of execution consequent on the decree" In the case of *Venkata Subramania Ayyar* v *Koran Kannan Ahmod* (1), in which a judgment debtor executed a mortgage bond in favour of the decree holder promising payment of the amount of the decree by instalments, it was provided in the mortgage bond that in default of payment of an instalment the decree holder should be entitled to recover the amount due by executing the decree, it was held, and properly, in my opinion, if I may say so, that the mortgage was a contract to give time for the payment of the judgment debt within the meaning of section 257A, and was void for want of the sanction of the Court In his judgment the learned Chief Justice, Sir Arnold White, observes —"It seems to me clear that on the true construction of the bond the document purports [324] to give a two fold remedy to the plaintiff on failure by the defendants to pay the instalments mentioned in the bond—first, a right to sue for the balance of Rs 7,500, secondly, a right to recover the balance by executing the decree It is clear from this that the decree was not intended to be extinguished by the bond, but, on the contrary, to remain in force There was therefore, no adjustment of the decree' Later on in his judgment the Chief Justice says —"I think the real test is that adopted by the Bombay High Court in the case reported in I L R 25 Bom 252 If the parties agree that the judgment debt *quâ* judgment debt shall be put an end to, section 257A does not render void the new contract The new contract does not give time for the satisfaction of the judgment debt, since this judgment debt no longer exists If the judgment debt is still alive, a new contract like that contained in the bond in the present case to pay the judgment debt appears to me, although it may be supported by fresh consideration, to be an agreement to give time for the satisfaction of the judgment debt, and therefore void under section 257A "

There remain two cases to which I would refer before I deal with the two cases in this High Court upon which much reliance has been placed by the learned counsel for the respondents The first is the case

(1) (1902) I L R 26 Mad 19

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I approve of the ruling in the case of *Tukaram* v. *Anantbhat.* (1) It is not necessary in this appeal to determine whether or not an agreement made in contravention of section 257A is void for all purposes when the decree in reference to which it is made is still enforceable.

For these reasons I would allow the appeal, set aside the decrees of the Courts below, and remand the case to the Court of first instance under the provisions of section 562 of the Code of Civil Procedure with directions to readmit the suit under its original number in the register, and proceed to [328] determine it on the merits. The respondent should, I think, pay the costs of this appeal, and other costs should follow the event.

BANERJI, J.—I agree with the learned Chief Justice that the mortgage bond upon which the plaintiff appellant's suit is based is not an agreement contemplated by section 257A of the Code of Civil Procedure. In my judgment the agreement referred to in that section is an agreement which, whilst keeping alive the judgment debt as a judgment debt, suspends the operation of the decree. This is clear, not only from the position which the section occupies in the Code, but also from its provisions read as a whole. The section appears in Chapter XIX which relates to the execution of decrees, and under Division E, which is headed "Of the mode of executing decrees," and the last paragraph of it provides for the application of any sum paid in contravention of its provisions "to the satisfaction of the judgment debt." This cannot be done unless there is a subsisting judgment debt. The section, therefore, presupposes the existence of a judgment debt. Where the judgment debt is extinguished, in whole or in part, by the substitution for it of a contract of mortgage, such a contract cannot be regarded as an agreement to give time for the satisfaction of a judgment debt within the purview of section 257A, as a judgment debt to the extent to which it has been extinguished is no longer in existence. The mortgage in such a case is only an adjustment of the decree within the meaning of section 258. If the adjustment has not been certified to the Court, it shall not be recognised by the Court executing the decree, which will execute the decree in spite of the adjustment. Section 257A, however, has no application to such a case. In the present instance the plaintiff decree-holder did not, it is true, certify the adjustment, but he has never sought to execute the decree, and, in fact, he has allowed the decree to become incapable of execution by lapse of time. The decree has thus become totally extinct, and its place has been taken by the mortgage which is the basis of the present suit. To such a mortgage section 257A has, as I have already said, no application. As pointed out by the learned Chief Justice, there is on this point a consensus of opinion in the High Courts of Calcutta and [329] Madras, and in *Tukaram* v. *Anantbhat* (1) the High Court of Bombay also held the same view. I am not aware of any ruling of this Court to the contrary. The two cases reported in the 18th volume of the Indian Law Reports, Allahabad Series, on which reliance has been placed on behalf of the respondents, and with reference to which the Courts below have dismissed the suit, are clearly distinguishable. This has been fully shown in the judgment of the learned Chief Justice, and it is unnecessary to go over the same ground. In the earlier of the two cases *Dhan Bahadur Singh* v. *Anandi Prasad* (2) there are some observations in the concluding portion of the judgment which may be regarded

(1) (1900) I. L. R. 25 Bom. 252. (2) (1896) I. L. R. 18 All. 435.

appeal, however, in the course of their judgment, comment upon the decision of the Calcutta High Court in the case of *Hukum Chand Oswal* v *Taharunnessa Bibi* (1) to which I have referred They say —"The District Judge considered that the decision of the Calcutta High Court in *Hukum Chand Oswal* v *Taharunnessa Bibi* (1) applied So it did apply, but we entirely dissent from the view of the law therein expounded Where the Legislature has thought right to declare an agreement void, unless the Legislature expressly limit the application of its enactment, Courts are bound to give effect to it There is no such limitation to be found in section 257A' This case clearly does not govern the case before us, but in it, no doubt, dissent is expressed from the decision in *Hukum Chand Oswal* v *Taharunnessa Bibi* (1) A similar case is that of *Dalu Malwahi* v *Palakdhari Singh* reported in the same volume of the Indian Law Reports at p 479, and decided by the same Judges In that case the plaintiff had obtained a decree against the defendant which was transferred to the Collector for execution, the property sought to be sold in execution being ancestral In the Collector s Court the parties entered into an agreement for the payment of the decretal amount by instalments, to which the decree holder assented on the condition that the judgment debtor should pay enhanced interest on the decretal amount When the decree holder applied in the execution department for the realization of the excess interest, the judgment debtor refused to pay it, alleging that the agreement was void, being in contravention of section 257A of the Code The plaintiff then brought a suit to recover such enhanced interest, which was dismissed by the Court below, and also by the appellate Court, on the ground that the agreement was in contravention of section 257A, and therefore not enforceable In this case, too, the judgment was not intended to be, and was not extinguished by the [327] agreement Neither of these decisions, therefore, is applicable to the case which is before us Here the mortgage bond in suit was given as a complete satisfaction of the judgment debt The right to execute the judgment was not merely suspended by it, but was extinguished Consequently, as it appears to me, upon the true construction of section 257A, the mortgage bond was not an agreement within the purview of that section In interpreting an Act, as also a deed or contract, the meaning is to be found not so much in strict propriety of language as in the subject matter or occasion on which the language is used, and in the object which is aimed at—*Qui haeret in litera haeret in cortice.* The words in section 257A —"Every agreement to give time shall be void,' occurring as they do in the chapter of the Code which deals with the execution of decrees, are not, I think, to be interpreted, as they would doubtless be in a Code of substantive law, as amounting to an absolute prohibition against any such agreement, but must be read in connection with the subject matter of the chapter of the Code of which the section forms part, that is, the chapter dealing with the execution of decrees, and so read, must be construed as forbidding the enforcement of an agreement entered into in contravention of the section while a decree is subsisting and enforceable The section presupposes the existence of an enforceable judgment This is apparent from the last clause of it, which provides that any sum which may be paid in contravention of the provisions of the section is to be applied to the satisfaction of the judgment debt

(1) (1889) I L R 16 Cal 504

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nate Judge of Moradabad) made a decree to a large extent in the terms of the plaint, granting the second relief, and declaring that upon payment of Rs. 2,339 by the plaintiff to the vendee after Musammat Janki's death, the plaintiff would be entitled to recover possession of the property conveyed by the sale-deed, and that until the plaintiff took such possession the vendee was bound to account to him for the rents and profits of the property after Musammat Janki's death, receiving interest at the rate of 6 per cent. from the plaintiff. From this decree the plaintiff appealed to the High Court.

[331] Mr. *Abdul Jalil* and Pandit *Sundar Lal* (for whom Munshi *Gokul Prasad*), for the appellant.

Dr. *Tej Bahadur Sapru* (for whom Pandit *Mohan Lal Nehru*), for the respondents.

STANLEY, C.J. and BURKITT, J.—In this case the plaintiff, one Baldeo Singh, sues as reversioner to one Mohar Singh, deceased, for a declaration that a certain sale-deed executed by Musammat Janki, widow of the said Mohar Singh, be declared ineffectual beyond the life of Musammat Janki, and in the alternative prays that if the Court be of opinion that any of the items which made up the consideration mentioned in the sale-deed are valid as warranted by legal necessity under the Hindu law, he may be allowed to pay that amount to the purchaser after the death of Musammat Janki, and recover possession of the property. The Court below made a decree to a large extent in the terms of the plaint, granting the second relief, and declaring that on payment of Rs. 2,339 by the plaintiff to the vendee after Musammat Janki's death, the plaintiff would be entitled to recover possession of the property conveyed by the sale-deed, and that until the plaintiff took such possession the vendee was bound to account to him for the rents and profits of the property after Musammat Janki's death, receiving interest at the rate of 6 per cent. from the plaintiff. From this decree the defendant has appealed.

The first contention was that the decree made by the lower Court was a decree which ought not to have been passed ; and, secondly, it was contended that the amount of consideration, on receipt of which the defendant was to restore the property, ought to be much larger than that laid down by the Subordinate Judge. The learned vakil for the appellant contended that the decree passed by the lower Court was one which ought not to be passed, it being, he contended, of the nature of a mortgage redemption decree. In our opinion, however, the form of the decree is correct, as was decided by Sir Barnes Peacock and Mr. Justice Dwarka Nath Mitter in the case of *Phool Chand Lal* v. *Rughoobuns Suhaye* (1). In that case the Court laid down :—"If there were any necessity such as the Hindu law warranted, [332] for a sale of a part of the property, and the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorized her to raise, it appears to me that the sale would not be absolutely void as against the reversioners, but that they could only set it aside upon paying that amount which the widow was entitled to raise with interest. This decision was followed by Mr. Justice Phear and Mr. Justice Ainslie in the case of *Mutiee Ram Kowar* v. *Gopaul Sahoo* (2). In our opinion the present case is governed by the principle laid down in the case which has just been cited. Here we have the case of a widow who certainly was justified in raising money to pay off her husband's

(1) (1868) 9 W. R. 108. (2) (1873) 11 B. L. R. 415.

as supporting the contention of the respondents If by those observations the learned Judges who decided the case intended to place upon section 257A a different interpretation from that which has been adopted above, I am, with all deference, unable to agree with them The same remarks apply to the recent case of *Dhanram Ragho* v *Ganpat Sadashiv* (1) For the above reasons I hold that section 257A is not fatal to the plaintiff's claim, and I concur in the order proposed

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BLAIR, J —I concur in the conclusion at which the learned Chief Justice has arrived, and also in the reasons which have led him to that conclusion

BY THE COURT —*We allow the appeal, set aside the decrees of the* Courts below, and remand the case to the Court of first instance under the provisions of section 562 of the Code of Civil Procedure, with directions to re admit the suit under its original number in the register and proceed to determine it on the merits The respondents are to pay the costs of this appeal, and all other costs will follow the event

Appeal decreed and cause remanded

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25 A 330 (=23 A. W N. 57)

[330] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Burkitt

GOBIND SINGH (*Defendant*) v BALDEO SINGH (*Plaintiff*) AND JANKI KUNWAR (*Defendant*) * [23rd February 1903]

Hindu law—Hindu widow—Sale by widow of deceased husband's property partly for legal necessity and partly not—Rights of next reversioner

Where the widow of a separated Hindu sells property belonging to the estate of her deceased husband, the sale, as to a portion of the consideration therefor, being justified by legal necessity and as to the remainder of the consideration not so justified, it is competent to the next reversioner to the estate to sue for and obtain a decree that he is entitled after the death of the widow to recover the property sold by her from the vendee on payment of such portion of the consideration as represented moneys borrowed by the widow for legal necessity *Phool Chand Lal* v *Rughoobuns Suhaye* (2) and *Muttee Ram Kowar* v *Gopaul Sahoo* (3) referred to

[Fol 27 All 494=1905 A W N 68 7 A L J 337 32 All 392 25 I C 606 Ref 31 Mad 153=18 M L J 11=3 M L T 301 24 I C 670=37 Mad 245 18 C W N 1303=20 C L J 285 Dist 1908 A W N 173=5 A L J 366 1905 A W N 214]

IN the suit out of which this appeal arose the plaintiff claimed as reversioner to the estate of one Mohar Singh, deceased, and he asked for a declaration that a certain sale deed executed by Musammat Janki, the widow of Mohar Singh, might be declared ineffectual beyond the life of the Musammat The plaintiff also prayed in the alternative that, in the event of the Court being of opinion that any of the items which made up the consideration mentioned in the sale deed were valid, as warranted by legal necessity under the Hindu law, he might then be allowed to pay that amount to the purchaser after the death of Musammat Janki, and recover possession of the property The Court of first instance (Subordi

* First Appeal No 61 of 1901, from a decree of Babu Achal Behari, Additional Subordinate Judge of Moradabad, dated the 12th of December, 1900

(1) (1902) I L R 27 Bom 96 (3) (1873) 11 B L R. 415
(2) (1868) 9 W R. 108

lawful debts She did raise money to pay those debts, but she raised more than the circumstances of the case required We think, therefore, that the appellant was justified in asking the Court to set aside the sale with effect from the death of the life tenant, and to declare that on the happening of that event he would be entitled to possession of the property in dispute on payment of the amount which the widow might lawfully have raised as being legally necessary to discharge her late husband's debts, and other necessary legal expenses incurred by her

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The second point raised by the learned vakil for the appellant, namely that a larger sum should have been allowed him, we think is well founded There are seven items set forth as forming the consideration for the sale Of these, the first is Rs 1,731 said to be due on a bond for Rs 1,000 Out of this the learned Subordinate Judge allowed only Rs 1 188, holding that interest was overcharged It is now, however, admitted by the learned gentlemen who appear for the parties that the sum really chargeable on this account was Rs 1,355 The second item, Rs 545, has been allowed by the Court below The third item is one of Rs 139, which represents a sum of Rs 100, with interest, raised by Musammat Janki at a time when her infant son was alive after her husband s death She was setting about raising money to pay off her husband's debts but as her son was alive it was incumbent on her to get the permission of the District Judge before she could sell This [333] Rs 100 she raised for the purpose of making the application to the District Judge, and for the various expenses incidental to such proceedings We think this item of Rs 139 may well be allowed as a charge against the estate, and we accordingly allow it The fourth item, Rs 606, has been allowed by the Judge The fifth item, Rs 78 8 0, has been disallowed It respresents the costs of the stamp paper on which the sale deed, which is sought to be set aside, was written, and also for registering and engrossing expenses, and the like The Subordinate Judge says that ' according to law the vendee was bound to pay the expenses of the sale ' This is no doubt true, but the universal experience in these Provinces is that in such cases it is the vendor who wants to raise the money who has to pay the expenses of the stamp, registration, and the like We think the item also may be allowed The sixth item is of Rs 200 This refers to certain ornaments belonging to Musammat Janki s deceased husband which were said to have been pawned by him to Kundan Lal for Rs 200, and were released by Musammat Janki out of the money she received as consideration for the sale The Subordinate Judge says that there is no proof of the pawn of the ornament, and he remarks that Kundan Dal was a "big banker' and would have some account in which this item would be entered We think, however, that the fact of the pawning and release is sufficiently proved Budh Sen, the son of Kundan Lal, positively swears to it · he swears that the ornaments were pledged with his father and that they were released by Gobind Singh on behalf of the plaintiff on payment of Rs 200 The witness Lakhraj Singh a brother of Musammat Janki, also speaks to the same effect, and he says that his brother in law, Mohar Singh, had, some six years before his death, borrowed Rs 200 on pawn of the ornaments We think this item is proved, and is a proper charge on Mohar Singh's property

Adding together, then, the various items specified above, we arrive at the sum of Rs 2 923 8 0, and we think that that is the sum which

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25 A. 337= 23 A. W. N. 64.

not requested that the money should be paid to the defendants, but merely that it should be paid in their presence. From this we gather that the intention was not that it should be paid to the defendants for their own personal use, but simply that the mortgagee should have the protection of having it paid in the presence of all the mortgagors.

We were at first disposed to think that the plaintiff could not give evidence at variance with the express language of the bond to prove that he was surety merely; but having regard to the decision in the case of *Mul Chand* v. *Madho Ram* (1), we are disposed to think that such evidence is admissible, notwithstanding the provisions of section 92 of the Indian Evidence [340] Act. The parol evidence which has been given does not appear to us to throw much light upon the question before us. It certainly does not establish the case that the plaintiff was merely surety for the defendants. He no doubt himself has sworn that the money was procured for the defendants, and that he merely became surety for it; but having regard to the fact that it was admittedly borrowed for the defence of his own half-brother, we are unable to come to the conclusion that it is true that he was merely a surety. Gulab Rai, one of the witnesses who was the *munib* of the firm of Banarsi Prasad, has produced the account-books of the firm, which show that the three parties (the plaintiff and the two defendants) were jointly debited with the entire debt of Rs. 10,000, and that when the money was paid by the plaintiff he and they were credited with the amount so paid. This shows that the mortgagee, at all events, regarded the three parties as jointly his debtors. Mubarak Ali Khan, who is a son-in-law of the plaintiff, proves nothing more than that the money was taken into the room in which the defendants were stated behind a *parda*, and paid in the presence of the Sub-Registrar, and that they admitted having received the money. To the same effect is the evidence of Saadat Wali Khan, the plaintiff's son. Upon this evidence it is impossible for us to agree with the view adopted by the learned Subordinate Judge. The evidence establishes beyond any doubt that the plaintiff and his two half-sisters borrowed the money for the defence of Sardar Wali Khan, and that they each and all borrowed it as principals. The mere circumstance that the consideration-money was brought into the room where the Musammats were seated and the acknowledgment by them of its receipt, does not establish that they were alone principals in the transaction, and that the plaintiff was merely a surety. In all probability the payment of the money in the presence of the Musammats was a wise precaution on the part of the lender to ensure that the defendants should not afterwards attempt to set up the case that the money had not been received by them, or that they were no parties to the transaction—a case which nevertheless they did attempt to set up in the former suit.

[341] For these reasons we must allow the appeal. The learned vakil for the respondent has asked us, in the event of our holding an unfavourable view of his main contention, at all events to give the plaintiff a decree for contribution towards the amount of the debt which was satisfied by him. We are unable to accede to this application. To do so would be to change entirely the character of the suit, and to enable him to recover moneys contrary to the position which he had taken up in bringing this action, and in his defence in the former suit, in which he alleged that he was only a surety for his half-sisters. We can show

(1) (1888) I. L. R. 10 All. 421.

plaintiff, was a defendant, having purchased a house from one Kumar Harbans Singh jointly with eight other persons Of those persons, three are defendants to the present suit, namely the defendants Nos 2, 3 and 4 In that suit those three defendants allowed judgment to go against them and a decree was accordingly drawn up, the ambiguity of which, no doubt, led to the proceedings taken by the plaintiff in bringing this suit The terms of that decree are —' The claim of the plaintiff for possession by right of pre emption of one third of the house in dispute on payment of Rs 66 10 8 and proportionate costs within fifty days of the decree, be decreed against defendants Nos 7 to 9 The rest of the plaintiff s claim with proportionate costs be dismissed against defendants Nos 1 to 6 The defendants Nos 1 to 6 will get all their costs from the plaintiff And it is also ordered that the plaintiff will get possession of the shares decreed to him when he has paid Rs 66 10 8 within the time fixed by the Court, otherwise the decree for possession will stand dismissed " It is true that this decree is a decree dismissing the suit as against the present plaintiff, but in substance it gives to the then plaintiff, upon performance of the condition imposed, possession of one third of the property in which the plaintiff is interested It appears to us, having regard to the substance rather than the form, that the present plaintiff might have successfully appealed against that decree He now alleges that the confession of judgment by defendants Nos 2 to 4 was intended to be a fraud upon his rights as purchaser, and in this suit he contends that the effect of that decree, based, as it has been found to be, upon [336] a collusive agreement entered into by the then plaintiff and three of the defendants to this suit, *viz*, the defendants Nos 2, 3 and 4, and the transfer of property, as he calls it, which took place as the result of that decree, was to give rise to a pre emptive right upon his part That contention is not supported by any decided case Indeed, Pandit *Tej Bahadur Sapru* relied for this proposition entirely upon a passage in the *Hedaya*, which at a first glance seemed to favour his contention It is a passage set forth in the third volume of Hamilton s *Hedaya* at page 594 —"If a defendant compromise a suit by resigning or making over a house to the plaintiff, after having either denied his claim or acknowledged it, or refused to answer it, the right of *shuffa* is established with respect to the house, because, as the plaintiff here accepts the house in consideration of what he conceives to be his right, he is therefore (in adjudging the right of *shuffa* against him) dealt with according to his own conceptions' Upon examination it seems to us that this passage has no bearing upon the settlement of a suit for pre emption The suit referred to in it may be a suit of any kind in which a plaintiff seeks to enforce his right to any property he believes he has a right to, and it is only because the consideration for abandoning his right is the transfer of a house that the right of *shuffa* arises That is far from being an authority for the proposition contended for by Pandit *Tej Bahadur* It seems to us that there is an insuperable difficulty in the way of the plaintiff, namely, that he was a party to the previous proceedings In order to claim a pre emptive right he has to show that there has been an effective alienation of property in which he is interested The learned vakil for the appellant has not been able to draw our attention to any authority in which it is laid down that under any law of pre emption known in India, a right of pre emption arises upon the transfer of property by virtue of a decree in a suit for pre emption Pre emptive right is a right to step into the shoes

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25 A. 341= 23 A. W. N. 59.

put into possession of the fields in due course of law. Subsequently Churaman re-entered forcibly into possession and cultivated the fields. For this he was prosecuted and convicted under section 447 of the Indian Penal Code. The Magistrate who convicted him further ordered possession of the land to be restored to the complainant, and purported to make that order under section 522 of the Code of Criminal Procedure. That section authorizes a Court to order restoration of possession whenever a person is convicted of an offence attended by criminal force, and it appears to the Court that by such force any other person has been dispossessed of immoveable property. In order, therefore, to justify an order under that section, the Court must find, *first*, that the offence of which the accused is convicted was attended [343] with criminal force; and, *secondly*, that a person has been dispossessed of immoveable property by the use of such force. In the present case there was no evidence that in resuming possession of the fields, Churaman used criminal force as defined in section 350 of the Indian Penal Code, and there is no finding in the judgment of the Magistrate that criminal force was used. Section 522 of the Code of Criminal Procedure had therefore no application, and the Magistrate was not competent under that section to order possession to be restored. This view is supported by the ruling of the Calcutta High Court in *Ram Chandra Boral* v. *Jityandria* (1) and *Ishan Chandra Kalla* v. *Dina Nath Badhak* (2). I accordingly set aside so much of the order of the Magistrate as purports to have been made under section 522 of the Code of Criminal Procedure for restoration of possession.

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25 A. 343 (=23 A. W. N. 59.)

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

HAR DIN SINGH (*Opposite Party*) *v.* LACHMAN SINGH AND ANOTHER (*Petitioners*).* [2nd March, 1900.]

Execution of decree—Limitation—Act No. XV of 1877 (*Indian Limitation Act*), *Schedule II, Article* 165—*Application by judgment-debtor dispossessed of immoveable property disputing the right of the decree-holder to be put into possession.*

Held that article 165 of the second schedule to the Indian Limitation Act, 1877, is wide enough to include the case of a judgment-debtor who has been dispossessed of immoveable property, and who disputes the right of the decree-holder to be put into possession. *Assan* v. *Pathumma* (3) referred to.

[Ref. 31 All. 82 (F.B.)=5 M. L. T. 185=6 A. L. J. 71; Dist. 38 All. 339; 14 A. L. J. 401.]

THE facts of the case out of which this appeal arose are as follows:—On the 25th of July, 1894, one Thakur Singh executed a conditional sale in favour of Sheo Narain. On the 18th of March 1895 he made a usufructuary mortgage of the same property in favour of Lachman Singh. Subsequently he sold his equity of redemption to the same

* Second Appeal No. 246 of 1901 from a decree of Babu Ramdhan Mukerji, Subordinate Judge of Gorakhpur, dated the 21st of December, 1900, reversing a decree of Pandit Bishan Lal Sarma, Munsif of Basti, dated the 28th of September, 1900.

(1) (1897) I. L. R. 25 Cal. 434.
(2) (1899) I. L. R. 27 Cal. 174.
(3) (1899) I. L. R. 22 Mad. 494.

no indulgence to a litigant who comes into Court with a false case The claim for general relief would not justify us in so doing He sued merely as surety, and he cannot now turn round and say that, though not a surety, he was a joint mortgagor, and as such joint mortgagor, entitled to contribution from the other co mortgagors

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For these reasons we allow the appeal and dismiss the suit with costs in both Courts

Appeal decreed

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25 A. 341 (=23 A. W. N 59)

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji

CHURAMAN v RAM LAL * [27th February, 1903]

Criminal Procedure Code, section 522—Act No XLV of 1860 (Indian Penal Code), section 350—Restoration of possession of immoveable property—Use of criminal force

To support an order under section 522 of the Code of Criminal Procedure, restoring possession of immoveable property, it is necessary for the Court to find as a fact, not only that the person in whose favour such order is made was deprived of possession by an offence, but that such offence was attended by the use of criminal force *Ram Chandra Boral* v *Jityandria* (1) and *Ishan Chandra Kalla* v *Dina Nath Badhak* (2) followed

[Fol 11 Cr L J 591=8 Ind Cas 219 Ref 4 Cr L J 293=51 P L R 1907=12 P R 1906 15 Cr L J 275=112 P L R 1914=14 P W R 1914=23 Ind Cas 483, 50 I C 30=20 Cr L J 270, 61 I C 57=22 Cr L J 329]

THIS was a reference under section 438 of the Code of Criminal Procedure made by the Additional Sessions Judge of Aligarh. The applicant Churaman was a tenant of the Awa estate. He was ejected from certain agricultural land under [342] the orders of both the Civil and the Revenue Courts Subsequently, however, Churaman re entered upon the land from which he had been ejected and cultivated it He was accordingly prosecuted before a Tahsildar Magistrate, who convicted him under section 447 of the Indian Penal Code and further ordered the complainant to be restored to possession of the land under section 522 of the Code of Criminal Procedure On appeal this order was confirmed by the District Magistrate. An application for revision of these orders being made, the Additional Sessions Judge, in view of the ruling in the case of *Ishan Chandra Kalla* v *Dina Nath Badhak* (2) and there being no finding that possession of the property from which he had been ejected had been recovered by Churaman by the use of criminal force, reported the case to the High Court with the recommendation that the conviction and sentence should be quashed

Upon this reference the following order was passed —

BANERJI, J —This case has been referred under section 438 of the Code of Criminal Procedure, with the recommendation that an order of the Tahsildar Magistrate of Jalesar, whereby he directed possession of certain land to be restored to the complainant, be set aside It appears that one Churaman, who was a tenant of the Awa estate, was ejected from certain fields which formed his holding, and that the landlord was

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* Criminal Reference No 48 of 1903

(1) (1897) I L R 25 Cal 434 (2) (1899) I L R 27 Cal 174

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Gauri Dat, were parties to the suit. Har Din took out execution of the decree, and on the 3rd of June, 1899, possession was delivered to him in respect of the property, and the present respondents, Lachman Singh and Gauri Dat, were deprived of possession. On the 8th of June, 1899, Lachman Singh and Gauri Dat deposited in the foreclosure suit of Sheo Narain the amount of the mortgage-money, Sheo Narain or Har Din Singh not having at that date obtained an order absolute for foreclosure under section 87 of Act No. IV of 1882. On the 9th of August, 1899, Lachman and Gauri Dat made the application which has given rise to this appeal, and prayed that as they had paid the mortgage-money, they should be restored to possession of the property of which they had been deprived by the proceedings held in execution of the pre-emption decree obtained by Har Din Singh. The Court of first instance held that the application was not maintainable under section 244 of the Code of Civil Procedure, and upon that ground dismissed it.

[346] Upon appeal this order of the Court of first instance was set aside by the lower appellate Court, and the case remanded to the Court of first instance. That Court again dismissed the application, holding that it was beyond time under article 165, schedule II of the Limitation Act. The lower appellate Court has set aside this order of the Court of first instance, and ordered possession to be delivered to the respondents. From this order of the lower appellate Court the present appeal has been preferred. A preliminary objection has been taken to the hearing of this appeal, on the ground that if the application made by the respondents to the Court of first instance was not an application under section 244 of the Code of Civil Procedure, no appeal lay to the lower appellate Court, and that consequently no second appeal lies to this Court. In our opinion this objection has no force. We think that the application of the respondents of the 9th of August, 1899, was in substance, as it was in form, an application under section 244 of the Code of Civil Procedure. The application purported to be made in the pre-emption suit of Har Din Singh, No. 92 of 1899. There was a reference, it is true, in that application to the foreclosure suit of Sheo Narain, No. 109 of 1898. But from the whole context of the application it appears that this reference was made with a view to explain the title under which the applicants claimed to be restored to possession. As the application was, in our opinion, one under section 244, the present appeal is maintainable.

The first objection raised in appeal on behalf of the appellant is, that the application referred to above was beyond time, and that the lower appellate Court has erred in holding that article 165 is inapplicable to the case. In our judgment this objection must prevail. Article 165 provides a limitation of 30 days for an application under the Code of Civil Procedure by a person dispossessed of immovable property and disputing the right of the decree-holder to be put into possession. The article is wide enough to include the case of a judgment-debtor who has been dispossessed of immoveable property, and who disputes the right of the decree-holder to be put into possession. The same view was held by the Madras High Court in *Assan* v. *Pathumma* (1). [347] As the application in question was admittedly made after the expiry of the period prescribed by article 165, it was beyond time, and should have been rejected. This ground alone is sufficient for the disposal of the appeal.

(1) (1899) I. L. R. 22 Mad. 494.

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Lachman Singh and to one [344] Gauri Dat On the 5th of March 1898 Sheo Narain brought a suit for foreclosure of his mortgage of the 25th of July, 1894, against the mortgagor and the two transferees of the equity of redemption, namely Lachman Singh and Gauri Dat, and obtained a decree on the 30th of March, 1898 The decree fixed the 30th of September, 1898, as the date upon which payment of the mort gage money should be made Payment not having been made on or before that date, one Har Din Singh brought a suit for pre emption in respect of the foreclosure of the conditional sale, and obtained a decree on the 14th of March, 1899 To this suit Sheo Narain Singh, his mortgagor Thakur Singh as well as Lachman Singh and Gauri Dat were made parties Har Din Singh took out execution of his decree, and on the 3rd of June 1899 possession of the property was delivered to him, and Lachman Singh and Gauri Dat were deprived of possession On the 8th of June, 1899 Lachman Singh and Gauri Dat deposited in the foreclosure suit of Sheo Narain the amount of the mortgage money, neither Sheo Narain nor Har Din Singh having at that date obtained an order absolute for foreclosure, and on the 9th of August, 1899, they applied in virtue of this payment to be restored to possession of the pro perty of which they had been deprived by the proceedings held in execu tion of the pre emption decree obtained by Har Din Singh

The Court of first instance (Munsif of Basti) dismissed the appli cation, holding that it was not maintainable under section 244 of the Code of Civil Procedure On appeal the lower appellate Court (Addi tional Subordinate Judge of Gorakhpur) set aside this order and remand ed the case to the Court of first instance That Court again dismissed the application holding that it was beyond time under article 165 of the second schedule to the Indian Limitation Act 1877 The lower appel late Court set aside this order of the Court of first instance and ordered possession to be delivered to the applicants From this order Har Din Singh appealed to the High Court

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram*), for the appellant

Babu *Jogindro Nath Chaudhri* and Babu *Sital Prasad Ghosh*, for the respondents

[345] BLAIR and BANERJI, JJ —This appeal arises out of an application made by the respondents purporting to be under section 244 of the Code of Civil Procedure The circumstances under which the application was made were these —One Thakur Singh executed a con ditional sale in favour of Sheo Narain on the 25th of July, 1894 On the 18th of March, 1895, he made a usufructuary mortgage of the same property in favour of Lachman, respondent Subsequently he sold his equity of redemption to the same Lachman and to one Gauri Dat On the 5th of March, 1898, Sheo Narain brought a suit for foreclosure of his mortgage of the 25th of July, 1894, against the mortgagor and the two transferees of the equity of redemption, namely, Lachman and Gauri Dat, and obtained a decree on the 30th of March, 1898 The decree fixed the 30th of September, 1898, as the date upon which payment of the mortgage money should be made Payment not having been made on or before that date, the present appellant, Har Din Singh, brought a suit for pre emption in respect of the foreclosure of the conditional sale, and obtained a decree on the 14th of March, 1899 Sheo Narain Singh, his mortgagor Thakur Singh, and the respondents, Lachman Singh and

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APPELLATE CIVIL.

25 A. 347= 23 A. W. N. 61.

subsequent order absolute under section 89 for sale of certain mortgaged property against the father of the judgment-debtor of the plaintiffs. A sale took place under this decree, and the greater part of the mortgaged property was sold, except a small portion which had previously been disposed of in execution of a decree held by a prior mortgagee. The proceeds of this sale proved insufficient to meet the demand of the mortgagee's representative, and he therefore applied to the Court for a decree over under section 90 of the Transfer of Property Act. Rightly or wrongly he obtained that decree on the 3rd of August 1901. Having obtained it, he sold the decree to one Lachmi Dayal, who in execution thereof attached the property which had been already attached by the plaintiffs. The plaintiffs thereupon came into Court asking for a declaration that the property in question was not saleable in execution of Lachmi Dayal's decree. The Court of first instance (Subordinate Judge of Farrukhabad) dismissed the plaintiff's suit. On appeal the lower appellate Court (District Judge of Farrukhabad) reversed the decree of the Subordinate Judge and decreed the plaintiffs' claim. The defendant Lachmi Dayal appealed to the High Court.

Messrs. *W. K. Porter* and *W. Wallach* and Babu *J. N. Chaudhri* (for whom Munshi *Gulzari Lal*), for the appellant.

[349] Pandit *Moti Lal* (for whom Dr. *Tej Bahadur Sapru*), for the respondents.

BLAIR and BANERJI, JJ.—The suit out of which this appeal arises was brought by two persons Har Danni Lal and Nand Kishore against Shib Dayal, Lachmi Dayal, and Rani Indomati. The prayer for relief in the plaint is couched in the following terms:—"That it may be declared that the 6 biswa share in Fatehpur, pargana Kanauj, district Farrukhabad, attached in execution of the plaintiffs' decree and in possession of the defendant No. 1, is not saleable in execution of the decree of the defendant No. 2, Lachmi Dayal, dated the 3rd of August, 1901." The circumstances are a little complicated. The plaintiffs are persons who have attached the property in suit in execution of a simple money decree. The defendant appellant is the representative in title of one Jai Narain, who obtained a decree under section 88 of the Transfer of Property Act, and the subsequent order absolute under section 89 for sale of certain mortgaged property against the father of the judgment-debtor of the plaintiffs. At the sale the greater portion of the mortgaged property was sold; but one small portion having been already sold in execution of the decree of a prior mortgagee, was not sold. The proceeds of the sale proved insufficient to meet the demand of the mortgagee's representative, and he therefore applied to the Court for the personal remedy under section 90 of Act No. IV of 1882. Rightly or wrongly he obtained that decree on the 3rd of August, 1901. That decree he assigned to Lachmi Dayal, the appellant before us. In execution Lachmi Dayal attached the property which had already been attached by the plaintiffs. It is the validity of that decree which forms the basis of the plaintiffs' contention in this case. It is first of all disputed by them on the ground that it had been obtained by fraud. That question has been tried, as a matter of fact, by the lower appellate Court, and it has been found that the decree was not tainted with fraud. The plaintiffs therefore are now driven to the position of assailing the validity of an extant decree against which no fraud can be imputed. We have asked them in vain to show us any authority for the proposition

But we are also of opinion that on the merits the appeal must succeed As the respondents were parties to the pre emption suit in which Har Din Singh obtained his decree, and as that decree directed delivery of possession to be made to Har Din Singh, the respondents are precluded from contesting his right to obtain possession in execution of that decree The suit by Har Din Singh was for pre emption of the sale, which he alleged had become an absolute sale by reason of the non-payment of the mortgage money within the time fixed in the decree for foreclosure obtained by Sheo Narain Singh If the respondents wished to contend that the conditional sale had not become absolute, they ought to have raised that contention in the pre emption suit, and it is too late for them now to urge that the conditional sale has not become absolute Such a contention would have gone to the whole root of the cause of action in the pre emption suit Having allowed a decree for possession to be passed, it is no longer open to them to question the right of the decree-holder to obtain possession by virtue of that decree Upon this ground also the application of the respondent ought to have been dismissed The result is that we allow the appeal with costs, set aside the decree and order of the lower appellate Court with costs, and restore that of the Court of first instance

1900 MARCH 2

APPELLATE CIVIL

25 A 343=23 A W N 59

Appeal decreed

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25 A 347 (=23 A W N 61)

APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Banerji

LACHMI DAYAL (*Defendant*) v HAR DANNI LAL AND ANOTHER (*Plaintiffs*) AND SHIB DAYAL AND ANOTHER (*Defendants*) [[illegible] March, 1903]

Exec [illegible] *ditor for* [illegible] *that* [illegible]

The plaintiffs, as judgment [illegible] for money certain immoveable property of their judgment-[illegible] another [348] judgment-creditor who had attached the same property, asking for a declaration that the property attached was not saleable in execution of the second judgment creditor's decree The suit was based upon the allegation that the decree held by the second judgment-creditor was a decree which as a matter of law, the Court ought not to have passed, although it was otherwise within the Court's jurisdiction It was found that the decree impugned had not been obtained by means of fraud *Held* that the plaintiffs as attaching creditors had no cause of action The decree assailed might have been a bad decree in law, but it was the decree of a Court which had jurisdiction, and it was not tainted with fraud *Moti Lal* v *Karrabuldin* (1) and *Malkarjun* v *Narhari* (2) referred to

THE plaintiffs in this case were persons who in execution of a simple money decree had attached certain property The defendant was the representative in title of one Jai Narain, who had obtained a decree under section 88 of the Transfer of Property Act and a

* Second Appeal No 732 of 1902 from a decree of L Stuart, Esq, District Judge of Fatehgarh, dated the 4th of September 1902, reversing a decree of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Fatehgarh, dated the 31st of July 1902

(1) (1897) I L R 25 Cal 179 (2) (1900) I L R 25 Bom 337.

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APPELLATE CIVIL.

25 A. 351= 23 A. W. N. 66.

[Reversed : 30 All. 84=5 A. L. J. 67=12 C. W. N. 231=7 C. L. J. 131=3 M. L. T. 144=18 M. L. J. 7 =10 Bom. L. R. 59=35 I. A. 59 ; Diss. 29 All. 217=1907 A. W. N. 19=4 A. L. J. 68 ; Ref. 9 O. C. 119 ; 8 C. L. J. 20 ; Fol. 46 Bom. 153.]

THE suit out of which this appeal arose was brought by Rabi Nath Ojha and Gangadhar Ojha. The suit was for a declaration that one Musammat Surajmani was incompetent to transfer certain immoveable property set out in the plaint, and that a will which had been executed by the said Musammat Surajmani on the 19th of March, 1896, was invalid so far as the plaintiffs were concerned. Musammat Surajmani was the widow of one Iswar Nath Ojha. Iswar Nath Ojha on the 2nd of April 1887, had executed a document purporting to be a deed of gift to take effect after his death, whereby he transferred certain properties in favour of each of his two wives Surajmani and Dhanmati, and also in favour of his daughter-in-law Musammat Sarsuti. The main issues raised in the suit were whether the plaintiffs were the nearest reversioners to Iswar Nath Ojha, and what powers of alienation, if any, were possessed by the widow Surajmani. The Court of first instance (officiating Subordinate Judge of Gorakhpur) found in favour of the plaintiff son both these issues and decreed the claim. Against this decree the defendants appealed to the High Court.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the respondents.

KNOX and AIKMAN, JJ.—This appeal arises out of a suit brought by Rabi Nath Ojha and Gangadhar Ojha. The relief that they claimed was, that it should be declared that Musammat Surajmani, the first defendant, was incompetent to transfer [352] certain immoveable property set out in the plaint, and that a will that had been executed by the said Musammat Surajmani on the 19th of March, 1896, was invalid, so far as the plaintiffs were concerned. Musammat Surajmani was the widow of one Iswar Nath Ojha. Iswar Nath Ojha, on the 2nd of April, 1877, had executed a document, purporting to be a deed of gift, to take effect after his death, whereby he transferred certain properties in favour of each of his two wives Musammat Surajmani aforesaid and Musammat Dhanmati, and also in favour of his daughter-in-law Musammat Sarsuti. We are not concerned with the property conveyed to Musammat Dhanmati and Musammat Sarsuti. The whole case in this appeal turns upon the answer to the question whether Musammat Surajmani, who now professes to alienate the property which had been conveyed to her, had or had not such power of alienation. There were other pleas contained in the memorandum of appeal, but none of those pleas were urged before us.

We have first to consider the document by which the property was conveyed to Musammat Surajmani, and to see whether under it Musammat Surajmani had acquired any interest capable of alienation by her. This document will be found at page 1 of the appellant's book, and the following words are the important words which we have to consider:— "After my death they shall under this document get their names recorded in the public records in respect of the respective properties given to them, and remain in possession as owners with proprietary powers." On turning to the original we find the actual words used are the words "Malik wa khud ikhtyar." The executant

that that decree can now be assailed by them Their [350] position is only that of a person who has obtained an attachment, and it has been expressly held by their Lordships of the Privy Council in the case of *Moti Lal* v *Karrabuldin* (1) that attachment only prevents alienation, but does not confer title In this case there is no alienation attempted or proposed, which, under the meaning of the ruling of their Lordships of the Privy Council, amounts to voluntary alienation by one person to another That, however, is very different from saying that the person who had attached the property in execution of a simple money decree has a *locus standi* to dispute a decree of a competent Court The Court had jurisdiction to make the decree That it had jurisdiction is not questioned, and that the decree was not tainted with fraud has been found It is said that the Court made an erroneous decree But a Court which has jurisdiction, has jurisdiction to decide wrongly as well as rightly, as had been observed by their Lordships of the Privy Council in *Malkarjun* v *Narhari* (2) Upon that principle Courts continually act in cases of revision under the Code of Civil Procedure We note that the plaintiffs do not in their prayer for relief ask for any declaration of the invalidity of the decree obtained by the appellant under section 90 of Act No IV of 1882 Without inviting us to say that that decree is invalid, it is manifest that it is not open to them to urge that such a decree cannot be executed In their prayer they dispute solely the saleability of the property in dispute in execution of the decree of the defendant No 2 They have not asked for a declaration that the decree is invalid, so that there is not before us any prayer the accession to which by this Court would render the execution incapable of being proceeded with On the other hand, we have no fact before us to show that it is open to them in the absence of fraud to dispute the validity of that decree We find, therefore, that the plaintiffs have no cause of action, and their plaint discloses no cause of action against the appellant here, and we decree the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance

1903 MARCH 3

APPELLATE CIVIL

25 A 347= 23 A W. N 61.

Appeal decreed

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25 A 351 (=23 A W N 66)

[351] APPELLATE CIVIL

Before Mr Justice Knox and Mr Justice Aikman.

SURAJMANI AND OTHERS (*Defendants*) v RABI NATH AND OTHERS (*Plaintiffs*) * [3rd March, 1903]

Hindu law—Mitakshara—Property given or devised to wife by husband—Widow's powers of alienation

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* First Appeal No 106 of 1901, from a decree of Babu Anant Prasad, Subordinate Judge of Gorakhpur, dated the 11th of March 1901

(1) (1897) I L R 25 Cal 179
(2) (1900) I L R 25 Bom 337
(3) (1869) N W P H C Rep, 1869, p. 66.
(4) (1874) L R 2 I A 7
(5) (1896) I L R 19 All 133
(6) (1897) I L R 24 Cal 834

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on the 12th of May 1900, is inoperative. This Court in *Shiam Behari Lal* v. *Rup Kishore* (1) has laid down that such a suit is maintainable. By that Full Bench ruling I am bound. I think it sufficient to say in this case that I am prepared to adopt the reasons of the Collector and that being so, this appeal fails and, in my opinion, should be dismissed with two sets of costs.

AIKMAN, J.—I also am of the opinion that this appeal should be dismissed. I put it on the short ground that in my judgment the plaintiff appellant is not entitled to the relief asked. It appears to me that to grant that relief would be to assist the plaintiff in perpetrating a fraud upon the defendant, Babu Gappu Lal. The plaintiff and Gappu Lal obtained a joint money decree. They put in a joint application for execution of that decree on the 21st of November 1895. For some reason that application proved infructuous. On the 23rd September 1896, the appellant Mathura Das put in another application in his own name. Section 231 of the Code of Civil Procedure allows one of two or more joint decree-holders to apply for execution of the whole decree " for the benefit of them all." The Court which received the application omitted to notice that Mathura Das in his application carefully avoided saying that the application was for the benefit of himself and Babu Gappu Lal. The property attached being ancestral land, execution of the decree was transferred to the Collector, by whom the property was sold on the 22nd of February 1900. It was knocked down to the plaintiff Mathura Das for a sum of Rs. 13,000. Mathura Das paid no part of the sale-consideration in cash, but he gave a receipt for the amount of the decree which was in favour of himself and Gappu Lal. Having done so, it is clear that he did not himself thus pay the whole of the sale price. If he had asked that the sale should be confirmed in the name of himself and Gappu Lal, his conduct would not [358] have been open to objection. But he claimed, and still claims, to have acquired the whole of the property for himself. On application of the judgment-debtor the sale was set aside by the Collector, on the ground of irregularities which, in the Collector's opinion, were the cause of the property having been sold for an inadequate price. The plaintiff Mathura Das had the right of appeal from the order of the Collector to the Commissioner. Of that right he did not choose to avail himself. He brought the present suit against the judgment-debtor and against his co-decree-holder asking for the relief which would, if granted, have the result of making him the sole owner of the property in dispute. In my opinion, on the facts stated, the plaintiff is clearly not entitled to any such relief. On this short ground I am of opinion that the appeal should be dismissed.

ORDER OF THE COURT :—The appeal is dismissed with two sets of costs.

Appeal dismissed.

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(1) (1898) I. L. R. 20 All. 379.

further provides that "should he have a male issue hereafter, the deed of gift shall be considered null and void as against him" The Court below after considering the authorities cited to it came to the conclusion that the words we have set out above did not convey an alienable estate in favour of Musammat Surajmani We have listened to an able and well sustained argument by the learned vakil who appears for the appellants after we have heard all he had to argue in support of the opposite view, we have arrived at the conclusion that the judgment of the Court below must be sustained

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[353] To begin with what is laid down upon the subject in the Mitakshara, Chapter I, Part II, Section 1, Placitum 20 We find it there stated—"What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give it away, excepting immoveable property This authority is clearly in favour of the view taken by the lower Court The learned vakil contended that, in view of what had been laid down, not only by this Court but by other Courts, that rule of the Mitakshara was no longer a binding authority To this contention we are unable to accede We find that Mr Mayne, in the latest edition of his Hindu Law and Usage, at page 865, says —"Immoveable property, when given or delivered by a husband to his wife, is never at her disposal, even after his death It is stridhanum so far as it passes to her heirs, not to his heirs But as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male, even though the gift is made in terms which create a heritable estate Of course it is different if the gift or devise is coupled with an express power of alienation" To the same effect is a passage at page 333 of the Tagore Law Lectures, 1878 We have carefully examined the authorities cited to us and also others, and we find that the summary contained in Mr Mayne's work is in full accordance with what has been laid down in the decided cases One of the earliest authorities of this Court is the case of *Jeewun Punda* v *Mussumat Sona* (1) The learned Judges who decided that case stated, as we think, the law on the subject very clearly They say that "if a Hindu make a gift of land to his wife without any express power of alienation, it may well be contended that he does so, knowing that, under the law, she takes no interest which she could aliene, if, on the other hand, he makes such a gift accompanied by an express power, it may be contended with even greater reason that, knowing the disability which by law would attach to a simple gift, he desired to clothe her with larger powers than those to which she would, by the operation of the law, be entitled" What is here said is in accordance [354] with what their Lordships of the Privy Council said in the case of *Moulvie Mahomed Shumsool Hooda* v *Shewuk Ram* (2) They held that "it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate" We would also refer to the case of *Janki* v *Bhairon* (3) where the passage above quoted from Mr Mayne's book is cited with approval The learned vakil for the appellants strongly pressed us with the case of *Lalit Mohun Singh Roy* v *Chukkun Lal Roy* to be found in the Indian Law Reports, 24 Calcutta, at p 834 That case

(1) (1869) N W P H C Rep, 1869, p 66.
(2) (1874) L R 2 I A 7 at p 15
(3) (1896) I L R 19 All 133, at p. 135

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contrary, would take care of it so that his name might be perpetuated. By the document he transfers to Phul Chand a number of small shares in different villages, and also his interest in certain mortgages, the estimated value of the property so disposed of being Rs. 6,000. Of this Rs. 3,000 represented mortgaged debts. He reserved for himself the holding, consisting of 31 bighas 19 biswas which he held as an occupancy tenant, and also a dwelling-house. He also retained his money-lending business and the capital employed in it. According to the evidence Kalyan [360] Singh paid Rs. 130 yearly as income-tax. This sum would represent the tax upon trading income of about Rs. 5,000 a year. Under the circumstances the gift does not appear to be unnatural. The donor had no son. He felt, no doubt, that owing to his age and infirmity his life would not be long spared, and he was, as he says, attached to his son-in-law who had assisted him in business. It was not unnatural, therefore, that he should have desired to make a substantial provision for him. The deed in question was drawn up and executed at Aligarh, to which place Kalyan Singh had gone, according to the evidence, for the purpose not merely of having this deed executed, but also of attending at the hearing of a case in which he was the plaintiff, and it was there drawn up, executed and registered. When Kalyan Singh returned from Aligarh, the female members of his household, who had evidently taken umbrage at the preference which was shown to Phul Chand, induced him to join with them in the present suit for the purpose of having the deed set aside, and accordingly the suit out of which this appeal has arisen, was launched, and the deed impeached on the ground that the donor was incapable of understanding the transaction, and that the gift was procured by Phul Chand by the exercise of undue influence and pressure. The Subordinate Judge yielded to the contention of the plaintiffs and set aside the deed.

There has been a good deal of discussion and argument before us in regard to the obligation of a party who sets up a deed of gift made in his favour to establish the *bona fides* of the transaction. Let us see what the evidence is which was adduced in support of this voluntary deed. The plaintiffs adopted the objectionable practice which prevails in these Provinces of examining the defendant as their witness. Phul Chand, the defendant, was accordingly one of the first witnesses who was examined on behalf of the plaintiffs. This procedure appears to us to be highly inconvenient, and it has been carried to great lengths in these Provinces. Phul Chand in his evidence states that on several occasions Kalyan Singh had stated to him that he would make a gift of the property to him. He gives an account of what took place at [361] Aligarh when the deed was prepared. They had gone there, he said, not merely for the purpose of having the deed executed, but also for the hearing of the case in which one Ganga Ram was a defendant. That case was, as a matter of fact, adjourned on the 18th of August, the day on which the deed was registered. The draft of the deed, he says, was prepared by Ulfat Rai, a pleader, who gave the draft, when prepared, to his clerk to have a fair copy of it made. The draft was made on the 16th, a fair copy was made on the 17th, and the deed was registered on the 18th. He says that Kalyan Singh executed the deed of his own accord, and that no pressure was put upon him. He also in his evidence says that property worth Rs. 20,000, including the capital employed in the money-lending business, was left undisposed of by Kalyan Singh

25 A 358 (=23 A W N 70)

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APPELLATE CIVIL

APPELLATE CIVIL

25 A 358=
23 A W N
70.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

PHUL CHAND (*Defendant*) v LAKKHU AND OTHERS (*Plaintiffs*) *
[16th February, 1903]

Act No IV of 1882 (Transfer of Property Act), section 123—Hindu law—Gift—Transfer of possession not necessary when gift of immoveable property registered—Act No I of 1872 (Indian Evidence Act), section 111—Gift to an agent—Undue influence—Mental capacity of donor

Held that, assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property that law has been abrogated by section 123 of the Transfer of Property Act in cases were the instrument of gift has to be registered *Dharmodas Das* v *Nistarini Dasi* (1) followed

Held also that there is nothing to prevent an agent from being the object of the bounty of his principal If an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld

[Fol 27 All 169 34 Cal 853=11 C W N 956=6 C L J 233 Ref 20 A L J 744]

THE facts of this case are fully stated in the judgment of the Court

Pandit *Sundar Lal*, for the appellant

Pandit *Moti Lal*, for the respondents

STANLEY, C J, and BURKITT, J —This is an appeal from a decree of the Subordinate Judge of Aligarh, setting aside a [359] deed of gift which was executed by one of the plaintiffs Kalyan Singh in favour of his son in law, the defendant, Phul Chand The plaintiffs are Kalyan Singh, two of his daughters, his wife, and the widow of a son who had pre deceased him Kalyan Singh who has died since the institution of the suit, was the owner of some zamindari property which was self acquired He also carried on a money lending business His son in law Phul Chand lived with him for seven or eight years prior to the execution of the deed of gift, the subject matter of the suit, and helped him in carrying on his business Kalyan Singh had, it appears from the evidence, a stroke of paralysis over two years before the deed of gift was executed, and in consequence was rendered more or less incapable of conducting his business as theretofore On the 2nd of April 1898, he executed a general power of attorney in favour of Phul Chand, in which it is stated that suits were pending between himself and others, which he was unable to attend to owing to his being engaged in his personal business, *i e*, his money lending business The deed of gift is dated the 16th of August, 1898 In it Kalyan Singh states that he is old and life is uncertain, therefore he wished to make arrangements in respect of his property, so that there might be no dispute after him, that he had no son, but had three daughters who were comfortable in their respective homes that he had great affection for his son in law, Phul Chand, to whom his second daughter was married, and that he (Phul Chand) had also attended on him a good deal, that he was very much pleased with him (Phul Chand), and considered him competent in every way and hoped he would not waste his property, but, on the

* First Appeal No 306 of 1900 from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 27th of June 1900.

(1) (1887) I L R 14 Cal 446

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property to Ulfat Rai; those lists he says were brought by Kalyan Singh [363] and not by Phul Chand. He also says that Kalyan himself paid the fee to the pleader for the preparation of the draft. This seems to us very strong evidence in support of the *bona fides* of the transaction. Not merely was an independent pleader employed to prepare the draft, but a pleader who was an old acquaintance of Kalyan Singh was requested by Kalyan Singh to accompany him to the house of the District Registrar and identify him for the purpose of registration. Kalyan Singh came from his home prepared with all the particulars of the property to be given to his son-in-law, and so far as we can judge from all the facts he was perfectly capable at the time of understanding what he was doing and had come with a free and unfettered intention of making a gift to his son-in-law. As against this body of evidence we have the evidence of a few witnesses, whose evidence, intended to show that Kalyan Singh was incapable of executing a deed of gift at the time, was worthless in the face of the evidence that has been given on behalf of the defendant. It is clear that Kalyan Singh before the Subordinate Judge feigned to be more seriously affected, both physically and mentally than he really was. The learned Subordinate Judge makes the following comment on this in the course of recording his evidence:—"The witness takes a long time to answer a question which is prejudicial to him, and a question which is favourable to him is answered easily." From his evidence it appears that up to the time it was given he was actually managing his money-lending business, which disproves the allegation of his own witnesses that he was then mentally incapable of understanding money transactions. In his evidence Kalyan Singh patently exaggerated his illness and endeavoured at first to make out that he had no knowledge of the deed of gift but was forced to sign it by Phul Chand. The other witnesses, including the plaintiff Musammat Makundi, are clearly unreliable.

The law as regards voluntary gifts is not doubtful. A man may make a deed of gift of his property, if he so pleases; but when such a gift is made, it must satisfactorily appear that the donor knew what he was doing and understood the contents of the instrument and its effect, and also that undue influence or pressure was not exercised upon him by the party [364] in whose favour the gift is made. If the person in whose favour the gift is executed stood at the time in a position of active confidence to the donor, the law throws the burden of proving the good faith of the transaction on the donee (see section 111 of the Indian Evidence Act). In this case Phul Chand did stand in a position of active confidence to Kalyan Singh at the date of the execution of the deed of gift, as he was at that time managing some of his business under the power of attorney, but that he had any influence over Kalyan Singh there is no evidence to indicate. There is nothing to prevent an agent from being the object of the bounty of his principal. If an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. The fact that Kalyan Singh at the date of the gift was advanced in years, and that he had had a paralytic seizure have been pressed upon our attention. There is nothing, however, in the evidence to lead us to suppose that he was so physically or mentally affected as not to be able to transact business, and exercise a free and unfettered judgment in the management of his property. On

He also says that Kalyan Singh paid Rs 130 for income tax, this has not been controverted The pleader Ulfat Rai, who prepared the draft, was examined on commission He testified to the effect that Kalyan Singh was quite intelligent and "in his senses,' as he describes it, when he gave instructions for the draft, but that he faltered in his speech He says that Kalyan Singh and Phul Chand were present at the time, and he made the draft at the direction of both of them, that Phul Chand gave the details of the property, and Kalyan Singh admitted the correctness of it that after the draft had been prepared he read it out to them He says that in his opinion Kalyan Singh could understand the nature of the transaction, and that he gave reasonable answers, but that he spoke falteringly Two other persons were present, but he could not say whether they were relations or not of Kalyan Singh This witness says that Kalyan Singh assigned as a reason for making the gift that he was pleased with Phul Chand and wanted to make a gift in his favour It has been commented upon by the learned counsel for the respondents that it was strange on the part of Kalyan Singh that he should go to Ulfat Rai for the purpose of having this draft prepared, Ulfat Rai never having done any work before for him One would no doubt expect that he would have placed the matter in the hands of a pleader who had acted for him before The clerk [362] of Ulfat Rai, Kanhaia Lal, states in his evidence that he made a fair copy of the draft and that he read it out to Kalyan Singh, that Kalyan Singh signed the deed of his own free will, that no pressure was put upon him, and that he was perfectly intelligent and understood what he was doing, so far as he could see He also says that he read out the document to Kalyan Singh at Kalyan s request, and that Kalyan paid him a fee of Rs 4 for making a fair copy of the draft He also says that Kalyan Singh himself paid Rs 10 to Ulfat Rai for the preparation of the draft If this evidence be reliable, it is difficult to see that any pressure was put upon Kalyan Singh to execute the deed in question In addition however, to these witnesses, Khwaja Muhammad Ismail, a pleader, who was an old acquaintance of Kalyan Singh, was asked by him to attend at the house of the District Registrar to identify him for the purpose of registration He says that at this time Kalyan Singh appeared to be prefectly sensible He says, "his senses were all right Further than being an identifying witness, he was no party to the preparation or execution of the deed and was not aware of its contents Paras Ram, who was an attesting witness to the document, says that he witnessed it at the request of Kalyan Singh, and that when he asked Kalyan Singh what the document was he replied that it was a deed of gift in favour of his son in law Witness says that before he witnessed the deed he read out the whole of it in a loud voice and that Kalyan Singh must have heard him This evidence shows that the deed was not executed without deliberation on the part of Kalyan Singh A somewhat important witness is the patwari of the village in which Kalyan Singh resides, namely, Prasadi Lal He accompanied Kalyan Singh to Aligarh on the occasion when the deed was executed, and went with him to the house of Ulfat Rai, and was present when instructions were given to the pleader for the preparation of the draft He says that when they reached the house of Ulfat Rai, Kalyan Singh gave instructions for the preparation of the draft, that Kalyan Singh had the details of the property in Hindi with him, with the exception of one village, and that Kalyan read out the lists of

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perty of a value less than Rs. 100, it is provided that the transfer may be made either by a registered instrument or by delivery of the property, while in the case of a transfer of immoveable property of greater value than Rs. 100 the transfer can be made only by a registered instrument. This shows that, though delivery of possession of property is necessary in the one case, it is not necessary in the other. That the Hindu law upon the question of gift does not now affect the provisions of the Transfer of Property Act, is apparent from the terms of section 123. This question was discussed in the case of *Dharmodas Das* v. *Nistarini Dasi* (1). It was there held that, assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property, that law has been abrogated by section 123 of the Transfer of Property Act. The judgment of Mr. Justice Mitter is well deserving of attention, and commends itself to us as a true exposition of the present state of the law.

For these reasons we are of opinion that this appeal must be allowed. We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge, and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

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25 A. 366 (=23 A. W. N. 81).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BHIKHI RAI AND ANOTHER (*Defendants*) *v.* UDIT NARAIN SINGH (*Plaintiff*) AND HANWANT RAI AND ANOTHER (*Defendants*).*
[17th February, 1903.]

Act No. III of 1877 (*Indian Registration Act*), *section* 50—*Prior and subsequent incumbrancers—Notice—Prior incumbrance not compulsorily registrable, but incumbrancer in possession.*

Held that if a person about to take a mortgage which must be made by registered deed, finds some person other than the intending mortgagor in possession, the fact of such possession is sufficient to put the would-be mortgagee on inquiry as to the title of such person; and if such person's title is that of [367] a prior mortgagee under a document not compulsorily registrable, the second mortgagee cannot, by getting his mortgage registered, obtain priority over the first mortgagee. *Barnhart* v. *Greenshields* (2), *Gunamoni Nath* v. *Bussunt Kumari Dasi* (3)' *Krishnamma* v. *Suranna* (4), and *Diwan Singh* v. *Jadho Singh* (5) referred to.

[Ref. 10 I. C. 233; 9 C. W. N. 14; 31 Bom. 566=11 C W N. 1009=9 Bom. L. R. 1062=17 M. L. J. 465=4 A. L. J. 750=6 C. L. J. 674=2 M. L. T. 394; 17 C. L. J. 209=16 I. C. 811; Applied. 5 A. L. J. 607=1908 A. W. N. 99=30 All. 238; Rel. 18 C. W. N. 657=19 C. L. J. 352.]

THE suit out of which this appeal arose was brought by one Udit Narain Singh on foot of a mortgage, dated the 5th of January 1900, to recover the amount due to him. Amongst other defendants one Bhikhi Rai was impleaded in the suit, he being regarded as a trespasser upon the property in dispute. It appeared, however, at the hearing that Bhikhi Rai was in possession under a usufructuary mortgage of the

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* Appeal No. 2 of 1902, under section 10 of the Letters Patent.

(1) (1887) I. L. R. 14 Cal. 446.
(2) (1853) 9 Moo. P. C. 18.
(3) (1889) I. L. R. 16 Cal. 414.
(4) (1892) I. L. R. 16 Mad. 148.
(5) (1898) I. L. R. 20 All. 252.

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the contrary, it shows that he was capable of transacting, and did transact his money lending business at the time of the execution of the deed, and up to the time when he was examined at the hearing of this case The evidence also shows that he gave instructions for the preparation of the deed to the pleader Ulfat Rai, and had it registered himself We have no hesitation in coming to the conclusion that Kalyan Singh was competent to deliberate upon and weigh the nature and consequences of the deed of gift, and that he understood it fully, and in making it exercised a free and unfettered judgment It was only when he was overborne by the tears and importunities of his women folk that he submitted to the humiliation of joining in the institution of the present suit, and to the subsequent humiliation of making the personal exhibition of himself in Court which elicited the unfavourable comments of the Subordinate Judge, in order to undo what was on his part a deliberate act The Subordinate Judge, in our opinion, took an erroneous view of the case It would seem [365] from his judgment that he regarded it as inequitable on the part of Kalyan Singh to confer *such large benefits on one member of the family to the disappoint*ment of the others, and that an old man who was not strong in physical health was not, in the eyes of a Court of Equity, justified in making an unequal division of his property He did not, however, in his judgment find that Kalyan Singh was incapable of executing the deed, and it seems to us that the learned Judge did not consider that he was legally incapable of doing so As has been said, where there is legal capacity there can be no such thing as equitable incapacity This does not appear to be the view held by the learned Subordinate Judge On the merits, therefore, we hold that he was in error, and that the deed should not have been set aside, either on the ground that Kalyan Singh was not capable of understanding its contents, or did not understand its contents, or on the ground that he was labouring under undue influence or pressure The learned Judge says that the deed was not read out to Kalyan Singh by the District Registrar, but we may point the attention of the learned Judge to the fact that there is no duty imposed on the District Registrar to read out to the parties deeds brought by them for registration

Another question has been discussed before us at some length, and that is, as to whether or not it was necessary in order to perfect the gift that possession of the property should have been delivered over to the donee Pandit *Moti Lal* has pressed upon us this point There is no doubt that prior to the passing of the Transfer of Property Act, there was some doubt as to whether or not delivery of possession was necessary in order to perfect a deed of gift according to the Hindu law It seems to us, however, that this question has been set at rest by the provisions of section 123 of the Transfer of Property Act Section 123 provides that "for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses" In the case of a gift of moveable property, the same section provides that transfer may be effected either by a registered instrument or by delivery This section [366] clearly seems to have the effect of rendering unnecessary the delivery of possession, substituting, as it does, for delivery of possession registration On turning to section 54 this becomes more apparent In that section, in dealing with the sale of immoveable pro-

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25 A. 366= 23 A. W. N. 81.

it is clear on the findings of both the Court of first instance and the lower appellate Court that the prior mortgagee was, as a matter of fact, in possession of the mortgaged property from the date of his mortgage. [369] This being so, it seems to us to follow, according to the decisions of the Courts, that the plaintiff had notice, or must be taken to have had notice, of such possession, and therefore is affected by any equities which the mortgagee in possession could enforce against his mortgagor. In the case of *Barnhart* v. *Greenshields* (1) it was held by their Lordships of the Privy Council that where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that this equity extends not only to interests connected with his tenancy, but also to interests under collateral agreement; they held that the possession of the tenant was notice that he had some interest in the land, and the purchaser having notice of the fact of possession, was bound to enquire what that interest was. That case is referred to and cited in a number of decisions in the High Courts in this country, and amongst others in the Calcutta High Court in the case of *Gunamoni Nath* v. *Bussunt Kumari Dasi* (2). In that case it was held that notice of possession of the rents of property is notice of a tenancy, though it would not affect a purchaser with notice of the lessor's title. In a Full Bench case in the Madras High Court, namely, the case of *Krishnamma* v. *Suranna* (3) this question was fully discussed. There the defendants 1 and 2 in 1877 placed the plaintiffs' father (since deceased) in possession of certain rents under an unregistered mortgage deed for a sum of Rs. 99, and in 1883 mortgaged the same property to defendant No. 3 by a mortgage deed which was registered. Defendant No. 3 obtained a decree on his mortgage in 1886, and applied for sale of the mortgaged property. The plaintiffs opposed his application for an order for sale without success, and in consequence instituted a suit for a declaration of their title as mortgagees. It was found that the defendant No. 3 took his mortgage with notice of the mortgage of 1877, but had not otherwise acted fraudulently. It was held that the plaintiffs were entitled to priority in respect of the mortgage of 1877; that wher it is proved that a subsequent incumbrancer under a registered convey ance had notice of a valid prior unregistered incumbrancer, and of possession by such incumbrancer, or [370] of such conveyance without possession, the Courts are not bound to interpret the Registration Act of 1877, section 50, so as to defeat the title of the prior incumbrancer. In that case the leading case of *Agra Bank, Ltd.* v. *Barry*, which has a close bearing upon this question, was referred to, as also some decisions of the several High Courts as supporting the view that if a party is in possession of property under an instrument not compulsorily registrable, and a subsequent mortgage is executed in favour of a third party, the subsequent mortgagee can derive no advantage from the registration of his mortgage. In a somewhat recent case in this High Court the question came up before a Bench consisting of Edge, C. J., and one of us, in which the decision of our Brother Aikman was upheld (see *Diwan Singh* v. *Jodha Singh*) (4). It was held in that case that section 50 of the Indian Registration Act will not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an

(1) (1889) 9 Moo. P. C. 18.
(2) (1889) I. L. R. 16 Cal. 414.
(3) (1892) I. L. R. 16 Mad. 148.
(4) (1898) I. L. R. 19 All. 145 and I. L. R. 20 All. 252.

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property, dated the 19th of November 1896, which had not been registered The Court of first instance, finding that Bhikhi Rai was in possession of the mortgaged property under a prior usufructuary mortgage, held that the suit could not be maintained, and accordingly dismissed it On appeal the lower appellate Court held that, having regard to the provisions of section 50 of the Registration Act, the puisne mortgagee, whose incumbrance was registered under that Act, took priority over the holder of the prior unregistered document An appeal was preferred to the High Court, which was dismissed From the judgment dismissing this appeal the present appeal was preferred by the defendants under section 10 of the Letters Patent

Maulvi *Muhammad Ishaq* (for whom Mr *Ishaq Khan*), for the appellant

Babu *Devendra Nath Sen* (for whom Babu *Beni Madho Ghosh*), for the respondent

STANLEY, C J, and BURKITT, J —The facts of this case are very simple The suit was brought by the plaintiff on foot of a mortgage, dated the 5th January 1900, to recover the amount due to him Amongst other defendants the present appellant Bhikhi Rai was impleaded in the suit, he being regarded as a trespasser upon the property in dispute It appeared, however, in the course of the hearing, that Bhikhi Rai was in possession under a usufructuary mortgage of the property, dated the 19th of November 1896, which had not been registered The Court [368] of first instance, finding that Bhikhi Rai was in possession of the mortgaged property under a prior usufructuary mortgage, held that the suit could not be maintained, and accordingly it was dismissed On appeal the lower appellate Court, without apparently attaching weight to the fact of possession of the property by the first incumbrancer, held that, having regard to the provisions of section 50 of the Registration Act, the puisne mortgagee, whose incumbrance was registered under that Act, took priority over the prior unregistered document An appeal was preferred to this High Court, which was dismissed This appeal comes before us under section 10 of the Letters Patent

One of the main questions argued on appeal is, that the plaintiff by his registered mortgage bond obtained no priority over the defendants unregistered mortgage inasmuch as the plaintiff had notice of the unregistered document The learned Judge who heard the appeal was of opinion that there was no substance in that ground of appeal He observes :—" I have said that that point was not raised in the Court below where the fact of notice or no notice would have been categorically found, but though not so raised, the Court below has by a very unequivocal sentence found that the plaintiffs were (sic) deceived into accepting a mortgage of property already incumbered That disposes of this appeal " We understand from this that the learned Judge considered the finding that the plaintiff had [illegible] as equivalent to a find[illegible] document This does [illegible] the lower appellate Court's finding The meaning of the passage we take to be, that the plaintiff, believing that he was getting a first mortgage upon property, accepted the word of the mortgagors and advanced his money, and so was deceived, the property having already been mortgaged There was no finding by the lower appellate Court that the plaintiff had not notice, or at least constructive notice, of the prior incumbrance Now

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a decree for sale in default of payment of the mortgage-debt, which was followed in due course by an order absolute for sale. Some of the mortgaged property was brought to sale by the decree-holders, but the village of Salempur, the Government revenue of which had been allowed to fall into arrears, was sold for satisfaction of the arrears due and was purchased, ostensibly by one Abdul Rahman, but in reality by the mortgagor judgment-debtor himself. The price paid for Salempur being more than the revenue due on it, the mortgagees applied for and obtained payment of the surplus. The next thing that happened was that [372] the mortgagor died, and his widow Rani Indomati sold the village to one Tulshi Ram. In course of time the decree-holders became aware that Salempur had really been bought in by the mortgagor, and not purchased *bona fide* by an outsider, and accordingly applied to bring it to sale under their decree. The Court of first instance (Subordinate Judge of Farrukhabad) rejected this application on the ground that the decree-holders by their action in obtaining payment to themselves of the surplus proceeds of the Revenue Court sale were estopped from now seeking to bring the village to sale in execution of their decree. The decree-holders accordingly appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Munshi *Gulzari Lal*), for the appellants.

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram*), for the respondent.

BLAIR and BANERJI, JJ.—These are proceedings in execution of a mortgage decree obtained by the appellants upon a certain village called Salempur together with other property. Chaudhri Raj Kumar, the representative of the mortgagor, allowed the Government revenue upon the village Salempur to fall into arrears. The property was put up to sale for satisfaction of those arrears by the Collector, and was bought for a sum in excess of the amount due for Government revenue. The apparent purchaser was one Abdul Rahman, and the actual purchaser was the mortgagor Raj Kumar. The holders of the mortgage took out the proceeds of the sale which were left after the Government revenue had been satisfied. They received the money, believing at the time that the purchaser was a person unconnected with the mortgagor, and a person in whose hands the property would vest free of all incumbrance. As a matter of fact, the purchaser bought *benami* for the mortgagor, so that the property, the subject of the mortgage, had returned into his possession. After his death his widow became seised of the property, and sold it to the present objector, Tulshi Ram. The sale-deed to Tulshi Ram recited that Raj Kumar had been the real purchaser at the sale held for the satisfaction of the Government revenue. The [373] plaintiffs having sued the mortgagor for the sale of the property mortgaged, and having got a decree, have recovered in execution by sale of sundry villages a large portion of the decretal amount. They now seek to bring to sale the village Salempur, which was purchased by Raj Kumar at the sale for arrears of revenue, and which was bought by Tulshi from the widow of Raj Kumar with full knowledge that he had been the purchaser at what for brevity we call the revenue sale. Tulshi Ram objects to the sale prayed for by the plaintiffs decree-holders, and his objection has been maintained by the Court below. The Court below has decided upon the ground that the decree-holders by taking out the surplus proceeds of the revenue sale have relinquished their right in

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earlier unregistered deed not being a compulsorily registrable deed, if in fact the holder of the registered deed has at the time of its execution notice of the earlier unregistered deed Now in this case the first mortgagee was undoubtedly in possession This fact was notice to the subsequent mortgagees that he had some interest in the land, and was sufficient to put him upon inquiry as to the nature of that interest He was a resident of the same village, and undoubtedly had easy means of ascertaining under what circumstances possession had been handed over to the defendant In England possession is *primâ facie* evidence of a seisin in fee, in India it is ordinarily presumptive proof of title (see section 110 of the Indian Evidence Act) In our opinion therefore the plaintiff was not entitled to maintain his suit for sale This being our view on the main question, it is unnecessary to consider the other matters which have been discussed before us The decision of the Court of first instance was, in our opinion, correct under the circumstances Accordingly we allow this appeal, set aside the decree of this Court, and dismiss the suit with costs in all Courts

Appeal decreed.

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25 A. 371 (=23 A. W N 75)

[371] APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Banerji.

GANGA SAHAI AND ANOTHER (*Decree holders*) v TULSHI RAM (*Objector*) * [23rd February, 1903]

Mortgage—Execution of decree—Sale of mortgaged property for arrears of revenue—Purchase of the same by the mortgagor—Realization of surplus sale proceeds by mortgagees—Subsequent application to sell the same property under a decree on the mortgage

[illegible] the mortgaged [illegible] at auction by the [illegible] *benami* in the name of a third person The mortgagees, believing that this purchase was a genuine purchase, applied for and obtained payment out of Court of the surplus realised by the sale over and above the revenue due Subsequently the mortgagees discovered the true nature of the purchase made by the mortgagor at the Revenue Court sale, and sought to have the same property, then in the hands of a [illegible] title, sold in execution of a de[illegible] was no legal objection to the [illegible]rtgage decree *Otter* v *Lord Vaux* [illegible]ugh (2) referred to

[Ref 5 C L J 95=11 C W N 284]

THE facts of this case are as follows —On the 7th of April 1875, Chaudhri Jai Chand mortgaged several villages, including a village called Salempur, to Ganga Sahai and others The mortgagor died without having paid the mortgage debt, and subsequently the mortgagees brought a suit for sale on their mortgage against the representative of the mortgagor and other persons who were in possession of portions of the mortgaged property On the 8th of May 1893, the mortgagees obtained

* First Appeal No 134 of 1902, from a decree of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Farrukhabad, dated the 19th of March 1902

(1) (1856) 6 De Gex M and G 638 (2) (1895) I L R 23 Cal 397

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difference in point of principle between a charge for revenue created upon the property by the mortgagor's failure to pay the Government revenue and the case of a clear mortgage created by him in [375] the ordinary way. In the case in the House of Lords a mortgagor having made two successive mortgages of his estate to different persons, purchased the estate from the first mortgagee, selling under a power of sale contained in his mortgage; it was held that the mortgagor could not by this purchase defeat the title of the second mortgagee. This case has been followed in *Raghunath Sahay Singh* v. *Lalji Singh* (1). That was a case in which a property had been put up for sale under a mortgage decree and purchased by the mortgagor; but the purchase money was not sufficient to satisfy the mortgage debt. The mortgagee a second time attempted to put the same property to sale. It was held that he was entitled to do so, and that the previous sale under the mortgage decree was no bar to a fresh sale under the same decree. The principle of this ruling seems to us to be applicable to this case. We have failed to detect in the argument to the contrary addressed to us any sort of substance. We think, therefore, that the order of the Court below cannot be supported. We are also of opinion that the plea of *res judicata* set up on behalf of the respondent is untenable. We accordingly decree this appeal, set aside the order of the Court below, and send back the case to that Court under section 562 of the Code of Civil Procedure for disposal according to law. The appellants are entitled to their costs of this appeal.

Appeal decreed and cause remanded.

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25 A. 375 (=23 A. W. N. 79.)

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

EMPEROR *v.* GIRAND.* [28th February, 1903.]

Criminal Procedure Code, sections 123 *and* 340—*Security for good behaviour—Reference to the Sessions Judge—Notice to be given of proceedings before the Judge to the persons required to find security.*

Where under section 123 of the Code of Criminal Procedure reference is made to the Sessions Judge in the case of a person called upon by a Magistrate to find security for a term exceeding one year, it is expedient, and highly desirable for the ends of justice, that a date should be fixed for the [376] hearing of such reference, and that notice of such date should be given to the person concerned. *Jhoja Singh* v. *Queen-Empress* (2), *Nakhi Lal Jha* v. *Queen-Empress* (3) followed. *Queen-Empress* v. *Ajudhia* (4) and *Queen-Empress* v. *Mutasaddi Lal* (5) referred to.

THE facts of this case sufficiently appear from the order of the Court.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BANERJI, J.—In this case five persons were ordered by a Magistrate of the first class to furnish security for good behaviour, and as the security was not given he submitted the proceedings to the Sessions Judge

* Criminal Revision No. 853 of 1902.

(1) (1895) I. L. R. 23 Cal. 397.
(2) (1896) I. L. R. 23 Cal. 493.
(3) (1900) I. L. R. 27 Cal. 656.
(4) Weekly Notes, 1898, p. 60.
(5) (1898) I. L. R. 21 All. 107.

under section 123 of the Code of Criminal Procedure The Sessions Judge, on the 9th of September 1902, made an order confirming the order of the Magistrate, but did not follow the procedure prescribed in section 123 His proceedings were accordingly set aside by this Court on the 27th of October 1902, and the Sessions Judge was directed to pass orders in compliance with the provisions of the section referred to above

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The learned Judge has made an order directing the five persons concerned to enter into securities for good behaviour for a period of three years, and has ordered them to be rigorously imprisoned for three years in the event of their failing to give security Applications have been made to this Court for the revision of this order, and one of the grounds taken in the applications is, that the learned Sessions Judge did not give the applicants an opportunity to show cause before him In the judgment of the learned Sessions Judge he stated that notice had been issued to Girand, Muni, Lachman, Baldeo Singh and Mathura Singh, but no appearance had been made in their behalf As no notice was found on the record, I asked the learned Judge to forward to this Court the notices to which he referred in his judgment He now states that he did not give any notice to the applicants of the date of hearing, and that all that he did was to write a letter to the superintendent of the jail to communicate to the persons concerned the result of their application to this Court The learned Judge, [377] however, proceeded to observe that there was no provision in the Code of Criminal Procedure requiring that notice of the date of hearing of references under section 123 of the Code of Criminal Procedure should be given to the parties concerned, that it was his "practice to take up references at the first convenient opportunity and that it was not usually practicable to intimate the date of hearing to the persons concerned" It is true the Code of Criminal Procedure does not in terms direct that notice of the proceedings under section 123 should be issued to the person against whom such proceedings are taken, but it has been repeatedly held by this Court that before any order is made to the prejudice of an accused person, notice should be given to that person to appear and show cause why the order should not be passed I may refer to the case of *Queen Empress* v *Ajudhia* (Weekly Notes, 1898 p 60) Section 340 of the Code of Criminal Procedure provides that every person accused before any criminal Court may of right be defended by a pleader It was held in *Queen Empress* v *Mutasaddi Lal* (1) that a person against whom proceedings are taken under Chapter VIII is an 'accused person within the meaning of the Code of Criminal Procedure, being a person over whom a Magistrate or other Court could exercise jurisdiction Therefore the person against whom proceedings are taken under section 110 or section 123 of that Code, may of right be defended by a held by the Calcutta High Court in *Jhoja* The right which a person against whom hese sections has of being defended by a pleader cannot be exercised by him unless a date is fixed for hearing, and notice of such date is given to him The practice, therefore, to which the learned Sessions Judge refers in his letter is not only one which is not warranted by law, but is a practice which in many cases may result in the denial of justice In the recent case of *Nakhi Lal Jha* v *Queen-*

(1) (1898) I L R 21 All 107 (2) (1896) I L R 23 Cal 493

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Empress (1), it was held that when a reference is made to the Sessions Judge under section 123 of the Code of Criminal Procedure, he is bound to give notice to [378] the person concerned. It is true, as I have already said, that the Code of Criminal Procedure does not in distinct terms require that such notice should be given, but it is expedient, and highly desirable for the ends of justice, that a date should be fixed for hearing, and that notice of such date should be given to the person concerned. As it is clear in this case that no such notice was given to the applicants, and they had not an opportunity of being heard, I must set aside the order of the learned Sessions Judge, and send back the case to him with directions to pass proper orders after fixing a date for hearing, and giving due notice thereof to the persons concerned. I order accordingly.

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25 A. 378 (=23 A. W. N. 76.)

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

ANANT RAM (*Defendant*) *v.* CHANNU LAL AND ANOTHER (*Plaintiffs*).*
[28th February, 1903].

Act No. IX of 1872 (Indian Contract Act), section 239—Partnership—Joint Hindu family—Rights and liabilities of a partnership composed partly of individual members of a joint Hindu family and partly of strangers.

In a suit for accounts and division of profits of a partnership alleged to have been previously dissolved, such partnership having been composed of certain individual members of a joint Hindu family, and of one person who was a stranger to the family, it was *held* on a plea taken as to non-joinder of necessary parties, namely, other members of the joint Hindu family—(1) that a member of an undivided Hindu family may enter into a contract in his individual capacity, and when suing to recover moneys due to him under that contract, he need not join the members of the joint family as plaintiffs, and (2) that members of an undivided Hindu family who are minors, and who are not shown to have been admitted into the trading firm, or to have taken part in its business, need not be made parties as plaintiffs to a suit to recover moneys due to the family trading firm. *Kalidas Kevaldas* v. *Nathu Bhagvan* (2), *Imam-ud-din* v. *Liladhar* (3), *Samalbhai Nathubhai* v. *Someshvar* (4), *Alagappa Chetti* v. *Vellian Chetti* (5), *Jugal Kishore* v. *Hulasi Ram* (6) *Ramsebuk* v. *Ramlall Koondoo* (7), *Jagabhai Lallubhai* v. *Rustamji Nasarwanji* (8), and *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (9), referred to.

[Ref. 69 P. R. 1906=118 P. L. R. 1906; 87 P.L.R. 1909; 38 I. C. 111; 41 Mad. 824.]

[379] THIS was a suit for dissolution of partnership, or rather, as the partnership had admittedly been dissolved some years before suit, a suit to have accounts taken and profits divided. The plaintiffs and four out of the five defendants were descendants of one Sheo Lal, who, with his sons Balkishan and Sita Ram, was the owner of a prosperous trading firm known by the style of Sheo Lal Balkishan. That firm by partition and sub-division was broken up and came to be represented by three firms known by the names of Sheo Lal Sita Ram, Lalman Lachman Das and Gobind Prasad, all started by and belonging to descendants of Sheo Lal.

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* First Appeal No. 185 of 1900 from a decree of Munshi Shiva Sahai, Subordinate Judge of Cawnpore, dated the 13th of July 1900.

(1) (1900) I. L. R. 27 Cal. 656.
(2) (1883) I. L. R. 7 Bom. 217.
(3) (1892) I. L. R. 14 All. 424.
(4) (1880) I. L. R. 5 Bom. 38.
(5) (1894) I. L. R. 18 Mad. 33.
(6) (1886) I. L. R. 8 All. 264.
(7) (1881) I. L. R. 6 Cal. 815.
(8) (1885) I. L. R. 9 Bom. 311.
(9) (1899) I. L. R. 26 Cal. 349.

In the year 1873 a new and distinct firm was started The persons who established it were one Lalman and certain individual members of a joint family descendants of Sheo Lal This Lalman was a stranger to the family of Sheo Lal The new firm took the name of Channu Lal Lalman At starting the agreement was that the capital, Rs 1,000, should be contributed by the members of the firm who were descendants of Sheo Lal, while Lalman contributed only his business ability Lalman was to receive half the profits, the other half going to the members of the family of Sheo Lal. The firm so constituted continued to trade, prosperously on the whole, for some years It was dissolved, according to the plaintiffs in 1896, according to the defendants in 1892, and out of its dissolution arose the present suit for accounts and distribution of profits The Court of first instance found that the partnership had subsisted till 1896, and passed a decree for the taking of accounts down to that year One of the defendants, the son of Lalman, appealed to the High Court, and the principal question raised was whether the suit was or was not bad for non joinder of parties, namely certain members of the family of Sheo Lal

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Pandit *Sundar Lal*, Pandit *Moti Lal* and Pandit *Baldeo Ram Dave*, for the appellant

Babu *Jogindro Nath Chaudhri*, Mr *R Malcomson* and Babu *Satya Chandra Mukerji*, for the respondents

BURKITT and AIKMAN, JJ —In this suit the plaintiffs Channu Lal and Bindraban prayed to have a partnership between themselves and the defendant dissolved, to have the [380] accounts of the partnership taken, and for payment to them of their share of the divisible profits But as admittedly the partnership had been dissolved some years previously, the real object of this suit is to have the accounts taken and profits divided There were five defendants impleaded Of them, four appeared and defended the suit

It is unnecessary to discuss all the matters raised by them Practically only two important issues were raised and decided at the hearing before the lower Court Those issues arose out of the pleas as to non joinder and limitation, and were decided by the lower Court in favour of the plaintiffs respondents Hence this appeal, which has been instituted by one only of the defendants, namely, by Anant Ram The others have submitted to the decree The appellant disputes the decision of the Subordinate Judge on both the questions indicated above As to the first of those questions, his contention is that the suit is bad, and not maintainable because certain persons who, he contends, were necessary parties have not been impleaded in it To understand the meaning of this plea it is necessary to enter into the history of the firm in question in this suit

The plaintiffs and the defendants (with the exception of the appellant Anant Ram) are descendants of one Sheo Lal, who, with his sons, Balkishan and Sita Ram, was owner of a prosperous trading firm known by the style of Sheo Lal Balkishan That firm by partition and subdivision has been broken up, and is now represented by three firms known by the names of Sheo Lal Sita Ram, Lalman Lachman Das and Gobind Prasad, all started by and belonging to descendants of Sheo Lal. In the year 1873 (1930 S) a new firm (quite separate from any of those just mentioned) was started The persons who established it were one Lalman and certain individual members of a joint family, descendants of

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Sheo Lal, who are now represented by the plaintiffs and the first four defendants. The Lalman just mentioned (who must not be confounded with the Lalman who is a defendant in the suit) was not a member of the family, and was an entire stranger to the ancestral family firm of Sheo Lal Balkishan The new firm started in 1873 took the name of Channu Lal Lalman, Channu Lal (one of the plaintiffs here) being one of Sheo [381] Lal's descendants and Lalman being the stranger. This is the firm the account of which the plaintiffs seek to have taken. At starting the agreement between the parties was that the capital, Rs. 1,000, should be contributed by the parties who were descendants of Sheo Lal, while as to Lalman it was agreed that he should not be required to put it in any capital. He was to contribute his brains (*i.e.*, his business capacity) to the business, no doubt as the working partner, and was to take one half of the profits as his share, the other moiety going to the other partners. The firm so constituted continued to trade, prosperously on the whole, up to S. 1953 (1896), according to the plaintiffs, when they say it was dissolved, but according to the defendants up to S. 1949 (1892) only. The above then being the admitted facts as to the establishment and constitution of this firm, the appellant contends that the suit is bad because the sons of the plaintiffs and the sons of some of the defendants (including his, the appellant's sons) have not been made parties to it. Most of these omitted parties, we may mention, are minors, some of them being of tender years. The contention is that, as by Hindu law a son on birth acquires an interest in his father's ancestral property, the sons of the plaintiffs and of the defendants, who have not been impleaded, being co-owners with their fathers in the interest of the latter in the firm were necessary parties to the suit and should have been impleaded in it. Now in dealing with this contention it is most essential to bear in mind that the firm Channu Lal Lalman was not an ancestral Hindu family firm belonging to the members of a Hindu joint family, and as such, subject to the peculiar rules by which such a firm is governed. The relationship between the persons who established this firm was not that created by the personal law and arising out of the status of the members of a Hindu joint family, but that which takes its rise from a contract between partners as defined in section 239 of the Contract Act. The firm was an ordinary commercial trading firm, consisting of several persons who had agreed to combine their property, and skill in the business of purchasing and selling cloth at a profit, dividing the profits among themselves in certain proportions. Whatever may be the rules which govern an ancestral [382] joint Hindu family partnership, they cannot, in our opinion, affect a firm such as that which we have before us in this case. Whatever may be the interests which under Hindu law sons possess in their father's property in a joint Hindu family, the answer to the appellant's contention is that, so far as the firm of Channu Lalman is concerned, the sons who have not been impleaded were never partners in that firm, and therefore were not necessary parties to this suit. The partners in the firm are the survivors of the persons who originally established it, together with representatives of the deceased partners who were admitted as partners with the unanimous consent of the surviving partners. This, for instance, was done in the case of the appellant Anant Ram on the death of his father Lalman, and also in the case of Lalman on the death of his father Lachman Das. The members of the firm apparently did not act on the rule by which a

trading firm is dissolved by the death of one partner They simply by consent admitted a son of the deceased partner in the room of the latter, and went on as before with the business From this action we gather that this was in accordance with the agreement entered into when the partnership was started The persons of whose absence from the suit the appellant complains could not have in any way controlled or interfered in the conduct of the business They could not have demanded an inspection of the account books of the firm, nor could they have brought about a dissolution of the partnership or a winding up of the business It may be that, as between themselves and their respective fathers, the latter under the rules governing a joint Hindu family are accountable to their sons for the profits they may receive from the business, just as they might be accountable to them for dividends received on shares in public companies, but that does not make the sons partners in the firm any more than in the public companies Several reported cases were cited to us, and discussed at length by the learned advocate at the hearing of this appeal None of them, however, seem to have much bearing on the question we have to decide In *Kalidas Kevaldas v Nathu Bhagvan* (1) one member of a joint Hindu family sued in his [383] own name to recover a debt due to a joint family, which consisted of himself and two brothers It was held that the brothers were necessary parties, and that in their absence the suit could not be maintained This case evidently has no bearing on the question before us, the facts being quite dissimilar To the same effect is the rule laid down in *Imamuddin v Liladhar* (2) It approves of and follows the rule laid down in I L R 7 Bombay The case of *Samalbhai Nathubhai v Someshvar* (3) has no bearing on the case before us It was a suit against the members of a joint ancestral Hindu trading firm in which it was held that all the members were responsible for a debt contracted by the firm The rule laid down in the case of *Alagappa Chetti v Vellian Chetti* (4) and in *Jugal Kishore v Hulasi Ram* (5) and in *Ramsebuk v Ramlall Koondoo* (6) is the same in all respects as in 7 Bom 217 already referred to In the case of *Jagabhai Lallubhai v Rustamji Nasarwanji* (7) the suit was one to determine the rights of the parties in respect of certain advances of moneys made by the plaintiff appellant to enable the defendant respondent and another to carry out a building contract It was objected that the plaintiff being a member of a joint Hindu family was incompetent to sue without joining his three brothers as co plaintiffs It was, however, held by the Chief Justice, who delivered the judgment of the Court, that "as the contract was entered into with the plaintiff in his individual capacity, and not on behalf of the family, there was nothing on the face of the contract to show that he was acting on behalf of the family firm, and the plaintiff was entitled to sue alone This case has a material bearing on the question now before us For there is nothing to show that the persons who, in 1873, entered into a contract with one who was not a member of the family to establish the firms of Channu Lal Lalman acted on behalf of the joint family of which they were members, or that they acted otherwise than in their individual capacity, nor is there anything to show

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(1) (1883) I L R 7 Bom 217
(2) (1892) I L R 14 All 524
(3) (1880) I L R 5 Bom 38
(4) (1894) I L R 18 Mad 33
(5) (1886) I L R 8 All 264
(6) (1881) I L R 6 Cal 815
(7) (1885) I L R 9 Bom 311

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that Lalman, when he entered into an agreement with certain individuals to establish a trading business, contemplated the inclusion as partners in the firm of all the sons [384] already in existence and to be born in the families of those individuals. It follows, therefore, that it is not necessary to make such sons parties to a suit like the present. The last case discussed before us was that of *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (1), in which in a suit to recover the amount due on a promissory note payable to a Hindu family trading firm, it was held to be unnecessary to implead infants (possibly of tender years) not shown to have been admitted into the trading partnership or to have taken any part in the business or exercised any control over it.

Now the great difference between all the above cases and the facts in the appeal before us is that not one of them touches the case in which the partners of the trading firm were (as here) members of different families who entered into a contractual partnership in the terms of section 239 of the Contract Act. It is with the incidents of such a partnership that we are concerned, and not with those of a joint Hindu family trading firm. But still we gather from those cases—(1) that a member of an undivided Hindu family may enter into a contract in his individual capacity, and that when suing to recover moneys due to him under that contract he need not join the members of the joint family as plaintiffs, and (2) that members of an undivided Hindu family who are minors, and who are not shown to have been admitted into a trading firm, and to have taken part in its business, need not be made parties as plaintiffs to a suit to recover arrears due to a family trading firm. This latter rule has special application to the present case, in which most (if not all) of the absent parties are minors, and some of them are children of tender years.

On the whole, therefore, as to this question of misjoinder, we are of opinion that the suit is not bad by reason of the absence from it of the sons of the plaintiffs, and of the sons of the defendants, including those of the appellant. We think the lower Court was right in the conclusion at which it arrived as to this matter.

[The Court then took up the second question, which turned on findings of fact, and agreeing with the Subordinate Judge dismissed the appeal with costs. The remainder of the judgment is therefore not reported.—ED.]

Appeal dismissed.

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25 A. 335 (=23 A. W. N. 80.)

[385] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

MUHAMMAD UMARJAN KHAN (*Defendant*) *v.* ZINAT BEGAM (*Plaintiff*).*
[5th March, 1903.]

Mesne Profits—Decree for mesne profits to be subsequently assessed—Application for assessment of mesne profits not an application in execution, but an application in the suit.

Held that, where a decree awards mesne profits to be subsequently assessed, an application for the assessment of such mesne profits is not an application

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* Second Appeal No. 331 of 1901, from a decree of Rai Kishun Lal, Additional District Judge of Meerut, dated the 5th of January, 1901, confirming a decree of Mr. A. Rahman, Subordinate Judge of Meerut, dated the 24th of March 1900.

(1) (1899) I. L. R. 26 Cal. 349.

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25 A 385=
23 A W N
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in execution of the decree, which does not become an "operative decree" until such assessment is completed but is an application in the suit in which the decree is made *Radha Prasad Singh* v *Lal Sahab Rai* (1) and *Puran Chand* v *Roy Radha Kishen* (2) followed *Kallu Rai* v *Fahiman* (3), *Tarsi Ram* v *Man Singh* (4) and *Daya Kishan* v *Nanhi Begam* (5) referred to

[Ref 33 Mad 78=6 M L T 187 39 Cal 220 37 Mad 186 40 All 211 61 I C 448=45 Bom 819=22 Bom L R 263, Diss 23 Bom L R 263]

IN this case the plaintiff had brought her suit for possession and mesne profits, and obtained a decree on the 30th of August, 1889, which was confirmed on appeal on the 18th of December, 1893 The plaintiff had asked the Court to decree mesne profits both past and future The decree decreed the suit, giving a specified amount for past mesne profits, but was silent as regards future mesne profits The judgment was a judgment decreeing the plaintiff's claim, which was for mesne profits both past and future Possession was given on the 21st of September, 1894 The plaintiff then instituted a suit for mesne profits from the 31st of August, 1889, to September, 1894, but that suit was subsequently withdrawn The plaintiff also made an application to have the decree brought into conformity with the judgment, and the decree was amended on the 23rd of February, 1899 That amendment gave the plaintiff a right to recover mesne profits from the date of the suit up to the date of possession On the 3rd of May, 1899, the plaintiff applied for ascertainment of the amount of mesne profits so due The Court of first instance (Subordinate Judge of Meerut) assessed the amount due to the plaintiff at Rs 1,043 5 0, and an appeal from the Subordinate Judge's order was dismissed by the Additional District Judge

[386] The defendant judgment-debtor thereupon appealed to the High Court

Babu *Devendra Nath Ohdedar*, for the appellant.

Maulvi *Ghulam Mujtaba* (for whom Maulvi *Rahmat ullah*), for the respondent

BLAIR and BANERJI, JJ —This is an appeal from an order made by the Additional District Judge affirming an order of the Court of first instance for the ascertainment of mesne profits after commencement of suit The circumstances under which the application was made were as follows A suit was brought for possession and mesne profits, and a decree was passed on the 30th of August, 1889, which was afterwards confirmed on appeal on the 18th of December, 1893 The plaintiff had asked the Court to decree mesne profits, both past and future The decree decreed the suit, giving a specified amount for past mesne profits, but was silent as regards future mesne profits The judgment was a judgment decreeing the plaintiff's claim, which had been a claim for mesne profits, both past and future An application was made, whether time barred or not it is needless to inquire, for the purpose of obtaining future mesne profits Possession was given on the 21st of September, 1894 The plaintiff then instituted a fresh suit for mesne profits from the 31st of August, 1891, up to September, 1894 The suit was withdrawn An application having been made for amendment of the decree, in order to bring it into conformity with the judgment, that amendment was granted on the 23rd of February, 1899 That amendment gave the plaintiff a right to recover mesne profits from the date of the suit up to the date of pos

(1) (1890) I L R 13 All 53
(2) (1891) I L R 19 Cal 132
(3) (1890) I L R 13 All 124
(4) (1886) I L R 8 All 492
(5) (1898) I L R 20 All 301

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session. The application out of which this appeal arises was made on the 3rd of May, 1899, for the ascertainment of the amount of mesne profits so due.

The contention urged upon us by Mr. *Ohdedar* for the appellant is that that application was a proceeding in execution, and that the *terminus a quo* for applications in execution must be taken to be the date of the original decree. We have had cited before us a number of cases—*Kallu Rai* v. *Fahiman* (1), *Tarsi Ram* v. *Man Singh* (2) and *Daya Kishan* v. *Nanhi* [387] *Begam* (3) as supporting the contention that the date of amendment of the decree does not give a fresh starting point to limitation for an application in execution ; and, indeed, we might be forced to that conclusion if we were of opinion that the application for the assessment of mesne profits was a proceeding in execution. In our opinion that question is concluded by authority to which we are bound to defer. In the case of *Radha Prasad Singh* v. *Lal Sahab Rai* (4) there are expressions from which it is manifest that their Lordships of the Privy Council look upon proceedings up to the assessment of mesne profits as being proceedings in the suit and not in the execution. They speak of the decree which has upon such an application been made to include mesne profits as having become an "operative decree." The only inference which we can draw from these words is that the decree was not an operative decree until the amount for which execution was to be had had been ascertained by the Court. The same view has been held by the Full Bench of the Calcutta High Court in *Puran Chand* v. *Roy Radha Kishen* (5). We are therefore face to face with an authority which we cannot dispute and which compels us to find that this is not an application in execution and therefore not an application to which article 179 of schedule ii of the Indian Limitation Act, No. XV of 1877, applies. It seems to us unnecessary to decide whether the general article 178, which provides for applications not otherwise dealt with, prescribes the limitation applicable to a case of this kind, because, assuming that it does so, the application of the 3rd of May, 1899, was well within the three years prescribed by article 178. That being so, we must dismiss this appeal with costs.

Appeal dismissed.

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25 A. 388 (=23 A. W. N. 86.)

[388] FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Blair and Mr. Justice Burkitt.

WAHID-UN-NISSA AND OTHERS (*Defendants*) *v.* GOBARDHAN DAS (*Plaintiff*) AND KAIM ALI KHAN AND OTHERS (*Defendants*).*
[7th March, 1903.]

Mortgage—Prior and subsequent incumbrancers—Suit by prior incumbrancer not making subsequent incumbrancer a party—Suit for redemption and sale by puisne mortgagee—Rights of purchaser at auction sale under the decree in the first suit and of the assignee of the original mortgagee.

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* Appeal No. 43 of 1900, under section 10 of the Letters Patent.

(1) (1890) I. L. R. 13 All. 124.
(2) (1886) I. L. R. 8 All. 492.
(3) (1898) I. L. R. 20 All. 304.
(4) (1890) I. L. R. 13 All. 53.
(5) (1891) I. L. R. 19 Cal. 132.

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26 A. 388= 23 A. W. N. 86.

One K, holding a first mortgage on certain property, brought a suit for sale [illegible] he [illegible] m- [illegible] een made a party to K's suit, brought a suit to redeem K's mortgage and sell the property. K transferred his rights as mortgagee to P, who was thereupon made a defendant. G obtained a decree for redemption and sale.

Held that P was entitled to the whole amount which G had to pay for redemption of the prior mortgage with the exception of the amount of the purchase money paid by B at the auction sale, which amount, and that only, would be due to B or his representatives. *Dip Narain Singh* v. *Hira Singh* (1) approved.

[Ref 5 C. L. J. 315=11 C. W. N. 403.]

THE facts of this case are as follows. On the 19th of April, 1878, Musammats Habiban and Bina made a simple mortgage of 544 bighas 2 biswas in favour of Kaim Ali Khan, Mazhar Ali Khan and Nazar Ali Khan for Rs. 1,500. On the 29th of January, 1886, Musammat Habiban alone mortgaged a one-fourth share of the same property to one Gobind Ram. The first mortgagees brought a suit upon their mortgage against one of their mortgagors and the heirs of the other, and obtained a decree for sale on the 1st of August, 1889. To that suit the puisne mortgagees were not made parties. One Bansidhar held a simple money decree against Kaim Ali Khan and others the first mortgagees, and in execution thereof caused their decree on the mortgage of the 19th of April, 1878, to be attached. As attaching creditor he took out execution of the decree, caused the mortgaged property to be sold by auction on the 24th of March, 1894, and purchased it himself for Rs. 1,050. On the 24th of November, 1884, Bansidhar sold the said property to [389] Wahid-un-nissa and Jan Muhammad for Rs. 4,400, and the vendees on the same date made a usufructuary mortgage of it to Dungar Singh and others for Rs. 6,000, and the usufructuary mortgagees were put into possession.

Gobind Ram, the second mortgagee, brought a suit for sale on his mortgage and obtained a decree on the 23rd of February, 1892. When in execution of that decree he sought to bring the mortgaged property to sale he was not permitted to do so by reason of the prior sale of the 24th of March, 1894. He thereupon, on the 4th of November, 1894, assigned his decree to one Gobardhan Das.

On the 7th of December, 1894, Gobardhan Das instituted a suit for redemption of the mortgage of 1878. The ground of his claim was that as Gobind Ram had not been made a party to the suit brought by the first mortgagees, the decree obtained in that suit and the auction sale held in execution of that decree were not binding upon him; that as subsequent mortgagee of the property he had still a right to redeem the first mortgage, and that consequently the plaintiff by virtue of his assignment from Gobind Ram was entitled to redeem. The plaintiff prayed for a decree for redemption of the mortgage of 1878, upon payment of Rs. 1,050, the amount of sale consideration paid for the mortgaged property, or such other sum as the Court might declare to be payable, and for possession of the property comprised in the first mortgage.

After the institution of this suit, namely on the 17th of December, 1894, the first mortgagees conveyed to one Prasadi Lal all their rights under the mortgage of 1878 and the decree obtained on that mortgage, and Prasadi Lal was accordingly added as a defendant to the suit.

(1) (1897) I. L. R. 19 All. 527.

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Wahid-un-nissa and Jan Muhammad denied the right of the plaintiff to redeem the first mortgage, and asserted that as Gobind Ram was the mortgagee of only one-fourth of the property, the claim to redeem the remaining three-fourths was not maintainable, and that redemption could take place, if at all, only upon payment of the whole amount due under the mortgage of 1878, which they alleged to be Rs. 9,182-0-6, and not upon payment of the sale price.

[390] The defence of Dungar Singh and others mortgagees from these defendants was very similar, only that they alleged a larger sum to be due upon the first mortgage.

Prasadi Lal urged that the plaintiff was not entitled to redeem except upon payment of the whole amount due upon the mortgage, and claimed to be entitled to the whole of that amount with the exception of Rs. 1,050, the amount of consideration paid by Bansidhar.

The Court of first instance (Subordinate Judge of Aligarh) was of opinion that as Gobind Ram was a mortgagee of a one-fourth share of the property, the plaintiff was entitled to redeem that share only on payment of a fourth part of the mortgage money, which the parties admitted amounted to Rs. 10,000 on the date of the decree of that Court. The claim for possession was dismissed, and a decree was made for sale upon payment of Rs. 2,500 to which it declared Prasadi not to be entitled.

From this decree the plaintiff appealed, and Prasadi Lal filed objections under section 561 of the Code of Civil Procedure.

The lower appellate Court (District Judge of Aligarh) held that the plaintiff was entitled to redeem the whole of the property in suit upon payment of Rs. 10,000 admitted to be due upon the first mortgage on the 30th of September, 1896, and further interest on the said amount up to the date of the decree of the appellate Court. The learned Judge next proceeded to consider the respective rights of the rival defendants to the said amount, and came to the conclusion that Wahid-un-nissa and Jan Muhammad were entitled to the Rs. 1,050 paid by Bansidhar and interest on that amount, and that Prasadi Lal as representing the first mortgagees was entitled to the balance. He also held that the plaintiff should be granted a decree for sale.

Against this decree the defendants Wahid-un-nissa and Jan Muhammad appealed to the High Court. The appeal came before a Division Bench (1), the members of which differed in opinion as to the proper application of the Rs. 10,000, Banerji, J., holding that Prasadi Lal was entitled to the whole amount paid for redemption of the prior mortgage, except the amount of the purchase money paid by Bansidhar at the auction sale and interest [391] thereon, which amount alone was payable to Bansidhar or his representatives; while Aikman, J., was of opinion that the auction purchaser, or his representative, was entitled to the whole amount. Under section 575 of the Code of Civil Procedure the decree of the Court below was affirmed, and from this decree the defendants preferred an appeal under section 10 of the Letters Patent.

Messrs. *Karamat Husain* and *Abdul Raoof*, for the appellants.

Pandit *Sundar Lal*, Pandit *Moti Lal Nehru* and Munshi *Ratan Chand*, for the defendants.

STANLEY, C. J.—The facts of this case are fully stated in the judgments of this Court, which are reported in the Indian Law Reports, 22 Allahabad, at page 453. It may be convenient, however, for me to state

(1) I. L. R. 22 All. 453.

a few of them Musammats Habiban and Bina, being the owners of certain property made a simple mortgage of it in favour of Kaim Ali Khan, Mazhar Ali Khan and Nazar Ali Khan on the 19th of April, 1878, to secure a sum of Rs 1,500, and on the 29th of January, 1886, Musammat Habiban alone mortgaged a fourth share in the same property to one Gobind Ram, and subsequently made two other mortgages The first mortgagees brought a suit on their mortgage against one of the mortgagors and the heirs of the other, and obtained a decree for sale on the 1st of August, 1889 The puisne mortgagees were not impleaded in that suit Bansidhar, one of the defendants in the suit out of which this appeal has arisen, held a simple money decree against Kaim Ali and the other first mortgagees, and in execution of that decree he caused the decree of the first mortgagees to be attached, and as attaching creditor he took out execution of the decree, and caused the mortgaged property to be sold by auction on the 24th of March, 1894, and purchased it himself for Rs 1,050 On the 24th of November, 1894, he sold the property to the defendants, Wahid un nissa and Jan Muhammad, for Rs 4,400, and these purchasers on the same date made a usufructuary mortgage of it in favour of Dungar Singh and others, the fourth party defendants, to secure Rs 6,000 Gobind Ram, the second mortgagee, who, as I have said, had not been impleaded in the suit of the first mortgagees, brought a suit for sale on his mortgage, and obtained a decree on the 23rd of [392] February, 1892 In consequence of the prior sale of the 24th of March, 1894, he was unable to bring to sale the mortgaged property, and consequently he assigned his decree to the present plaintiff, Gobardhan Das, on the 4th of November, 1894, and as assignee of this decree Gobardhan Das brought the present suit on the 7th of December, 1894 On the 17th of December, 1894, Prasadi Lal (the fifth party defendant) purchased the interest of the first mortgagees in the mortgaged property and in the decree which the first mortgagees had obtained, and was added as a defendant to the suit The claim of the plaintiff is based on the fact that Gobind Ram was not made a party to the suit brought by the first mortgagees, and that consequently the decree obtained in that suit and the auction sale held in execution of it were not binding on Gobind Ram, and therefore, as subsequent mortgagee, Gobind Ram had the right to redeem the first mortgage, and the plaintiff as assignee of the interest of Gobind Ram was likewise entitled to redeem It is unnecessary to state in detail the various proceedings in the lower Courts suffice it to say that it was ultimately held on appeal from the Court of first instance that the plaintiff was entitled to redeem the whole property upon payment of Rs 10,000, the sum admitted to be due on the first mortgage on the 30th September, 1896, and further interest from that date up to the date of the decree of the appellate Court It was held by the lower appellate Court that Wahid un nissa and Jan Muhammad, the transferees of the interest of Bansidhar, the auction purchaser, were entitled, out of the moneys so paid, to Rs 1,050, being the sum paid by Bansidhar for the purchase of the property and interest on that amount, and that Prasadi Lal, as representing the first mortgagees, was entitled to the balance The Court also held that the plaintiff was entitled to a decree for sale, and made a decree accordingly.

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From this decree an appeal was preferred to this High Court, and was heard before my brothers Banerji and Aikman, who differed in

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opinion as to the proper application of the Rs. 10,000, Banerji, J., holding that Prasadi Lal was entitled to the whole amount paid for redemption of the prior mortgage, save and except Rs. 1,050, the amount of the purchase [393] money paid by Bansidhar at the auction-sale, and interest on that sum, and that this latter amount, with interest, alone was payable to Bansidhar or his representatives; while Aikman, J., was of opinion that the auction purchaser or his representatives were entitled to the whole amount. Under the provisions of section 575 of the Code of Civil Procedure the decree of the Court below was affirmed.

From this decree the present appeal has been preferred under section 10 of the Letters Patent. The appeal has been exhaustively and ably argued by the learned counsel and advocate for the parties interested in the only question submitted for our determination. This is the question: to whom the sum of Rs. 10,000 payable for redemption of the prior mortgage is to be paid?

Mr. *Karamat Husain* on behalf of the appellants contended that Bansidhar, the auction purchaser, having purchased at the auction-sale the interest in the property of as well the first mortgagees as the mortgagor, no interest in the property was left for the benefit of the first mortgagees, that the auction purchaser having acquired the equity of redemption of the mortgagor as also the interest of the first mortgagees, he, and he alone, became entitled to the redemption money, and the first mortgagees or their assignees have no right to share in it.

Pandit *Sundar Lal* on behalf of the respondents contended that the auction purchaser was under the circumstances only entitled to hold up the first mortgage, to satisfy which the sale took place, as a shield; that the measure of the shield was the amount due on the first mortgage; but that in no event could the amount recoverable by him or his assignee exceed the sum which he had actually paid for the property.

It is not disputed that in every suit brought for sale by a prior mortgagee a puisne mortgagee of whose interest the plaintiff has notice should, under section 85 of the Transfer of Property Act, be joined as a party in order that he may have an opportunity of exercising his right of redemption, and that where a prior mortgagee has obtained a decree for sale without making the subsequent mortgagee a party to his suit, the right of redemption of the latter does not become extinct, that he is [394] entitied to exercise it even after a sale has taken place in execution of a decree obtained by the first mortgagee. He is entitled, according to the rulings of this Court, to be placed in the same position as he would have occupied if he had been made a party to the suit. It is also conceded that, as was held in the case of *Dip Narain Singh* v. *Hira Singh*, (1) he could redeem the prior mortgagee only upon payment of the whole amount due upon the mortgage. The puisne mortgagee in fact cannot be prejudiced by a sale which has taken place behind his back and in contravention of the express provisions of section 85 of the Act to which I have referred. Let us see what the position of the auction purchaser was. He knew, or must be taken to have known at the time of the sale, that there was a puisne incumbrance affecting the property, and that the puisne incumbrancer had not been impleaded in the suit brought by the first mortgagees. It is admitted that he must be taken to have had such notice. In purchasing therefore at the auction-sale he

(1) (1897) I. L. R. 19 All. 527.

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was aware, or must be taken to have been aware, that it was open to the puisne incumbrancer to institute a suit for redemption of the first mortgage, and for sale of the mortgaged property His position was therefore not that of an innocent purchaser, and he cannot claim the favourable consideration which an innocent purchaser might be entitled to, or any exceptional treatment whatsoever He purchased the property with the knowledge that it might be redeemed by the puisne mortgagee, but possibly in the expectation that it would not be redeemed He purchased it, no doubt, with the knowledge that if it were redeemed he would at least recover back the amount of his purchase money, and would therefore meet with no serious loss The value of the property was, in the eyes of the purchasers, no doubt depreciated by the fact that there was every likelihood of the institution of a suit for redemption Bansidhar purchased in fact a law suit, and it may be, as things have turned out, a costly law suit But he must abide by the consequences following on the purchase of a bad title Can it be said that a purchaser purchasing property under such circumstances for a sum of Rs 1,050 [395] can rightly claim the entire moneys, namely Rs 10,000, which the puisne mortgagee was liable to pay for redemption, and which, I am entitled to assume, he would have paid to the first mortgagees if he had had an opportunity of redeeming the property before the auction sale took place, as he was entitled to do? The assignees of Bansidhar can stand in no higher position than that which he occupied Let us next see what the position and right of the puisne incumbrancer were He had a right to pay off the amount due under the first mortgage, and upon such payment become the holder of the first charge on the property with power to realize that charge, as also the amount of his puisne incumbrance, by a sale of the mortgaged property, unless the auction purchaser as owner of the equity of redemption chose to redeem him Section 74 of the Transfer of Property Act in express terms gives him this right The tender under that section must be made to the prior mortgagee This was undoubtedly the right of the puisne mortgagee I may here also observe that a puisne incumbrancer in redeeming a prior mortgage has an interest in seeing that the redemption money reaches the hands of the prior mortgagee, inasmuch as the payment to the prior mortgagee relieves his debtor, the mortgagor, from the incubus of the prior mortgagee's debt It is in the interest of a creditor that his debtor should be a solvent person If as is contended for here on the part of the appellants, the entire redemption money is to go into the pockets of the auction purchaser or his assignees, the debt of the first mortgagees, so far as it has not been satisfied by the proceeds of the auction sale, will remain a subsisting debt, in respect of which the first mortgagees will be entitled to apply for and obtain an order against the mortgagor under section 90 of the Transfer of Property Act Therefore, notwithstanding the fact that the puisne incumbrancer has paid money sufficient to satisfy the prior mortgagee's debt, that debt so intended to be satisfied would, according to the appellants contention, remain to a large extent unsat [illegible], if the appellants' contention be correct, [illegible] the sale of his security the proceeds of sal [illegible] satisfy the money due to him on foot of his mortgage, as also the sum paid for the redemption [396] of the prior mortgage, would have the right to apply for a decree under section 90 of the Transfer of Property Act

against the mortgagor in respect of such deficiency. The mortgagor would thus be liable to have two decrees passed against him under that section for recovery of the same debt, one at the instance of the first mortgagees, and the other at the instance of the puisne incumbrancer. From no point of view can this result be regarded otherwise than as inequitable. In his judgment my brother Aikman observes :—"The only defect in the purchaser's title to the property is that the property is still liable for the amount of the mortgage, owing to the second mortgagee not having been made a party to the suit on the first mortgage." This language does not appear to me to be strictly accurate. The defect, I would say, was that he purchased a defeasible title, that is a title capable of being defeated by the redemption of the first mortgage by the puisne mortgagee. The property in the hands of the purchaser was not merely liable for the amount of the second mortgage, but it was liable, on redemption of the first mortgage by the second mortgagee, to be sold for the realization of the debt due to the second mortgagee, including the sum so paid for redemption. The right then of the puisne mortgagee being, in the first instance, to redeem the first mortgage by payment of the mortgage debt, the question is to whom is such payment to be made? Clearly the mortgage-debt must be discharged by him, and presumably it ought to be paid to the first mortgagees, or their assignees. The right which a puisne incumbrancer enjoys, as prescribed by section 74 of the Transfer of Property Act, is "to tender to the next prior mortgagee" the amount due to him and acquire in respect of the mortgaged property all the rights and powers of such prior mortgagee. It has not been, and could not be, contended in this case that the auction-purchaser is the assignee of the entire mortgage-debt. He is merely the purchaser of the mortgaged property. The remedies of the first mortgagees for recovery of their debt were not exhausted when the auction-sale was completed. They had still a right to proceed against their mortgagors under section 90 of the Transfer of Property Act to recover the balance remaining due to them. The auction-purchaser therefore could clearly not [397] give a good discharge for the entire mortgage-debt. Such a discharge could only be given by the first mortgagees in conjunction with the auction-purchaser. All the rights of the first mortgagees certainly did not pass on the auction-sale to the purchaser. Again, my brother Aikman says :—" Now supposing the said mortgagee pays in the amount due under the first mortgage, from what source will this amount ultimately come? It is clear that it will come out of the property, for unless the property is of sufficient value to satisfy both the first and second mortgages, the second mortgagee will not, in order to recover a comparatively small sum, as in this case, risk the loss of a very large amount." I am unable clearly to understand this observation. It does not seem to me necessarily to follow if the second mortgagee pay in the amount due under the first mortgage, that this amount will ultimately come out of the property. It is impossible to say what amount will be realized on a sale. If, however, the proceeds of the sale of the property should prove insufficient to satisfy the amount paid by the second mortgagee, the second mortgagee will have a remedy over against the mortgagor for recovery of any deficiency. I have no hesitation, after a consideration of the facts and the arguments which have been presented to us, in coming to the conclusion that my brother Banerji's view on this

question is correct The argument presented to us in favour of the other view was ingenious and plausible, but it is supported, so far as I can discover, by no principle of equity In the case of *Dip Narain Singh* v *Hira Singh* (1) my brothers Banerji and Aikman thus stated the rule in such a case :—" In this case subsequent mortgagees are seeking to redeem the prior mortgage, and as the property of which the plaintiffs are the subsequent mortgagees was liable for the whole amount of the prior mortgage, they cannot relieve that property from liability under the prior mortgage without paying the whole of that amount The fact that the mortgagee *himself* has purchased the property cannot, in our opinion, make any difference in this respect Had a third party purchased the property, and had his purchase money discharged the prior mortgage in full, [398] he would undoubtedly have been entitled to claim that a subsequent mortgagee, who, by reason of his not being a party to the prior mortgagee's suit, had the right to redeem him, must pay him the full amount of the prior mortgage But if the purchase money paid by such a purchaser did not fully satisfy the amount of the prior mortgage, he is not entitled upon redemption by a puisne mortgagee to the whole amount of the prior *mortgage* The subsequent mortgagee would in our opinion, have to pay the full amount due upon *the prior mortgage, but that* amount would be apportioned between the purchaser whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of the mortgage money is due Where there are more purchasers than one the apportionment should be made between them *pro rata*, and the balance should go to the mortgagee But in no case can redemption be allowed except upon payment of the whole amount due under the mortgage This passage fully supports the ruling of the District Judge in regard to the apportionment of the money to be paid for redemption of the first mortgage My brother Aikman, however, observes in his judgment in the case before us that " the passage which I have cited was not necessary for the decision of the case before the Court, and must therefore be regarded as an *obiter dictum* ,' and that the argument of the learned counsel for the appellants had satisfied him that the opinion expressed in the passage was erroneous I am wholly unable to agree with him as to this It appears to me that the passage in question accurately defines the rights of the parties in accordance with every principle of equity In Mr Ghose's treatise on the Law of Mortgage in India 3rd Edition, at page 740, a passage is quoted from a judgment of Mr Justice Bradley of the United States Supreme Court, which puts the matter clearly and forcibly It is as follows —" To redeem property which has been sold under a mortgage for less than the mortgage-debt, it is not sufficient to tender the amount of the sale The whole mortgage debt must be tendered or paid into Court The party offering to redeem proceeds upon the hypothesis that as to him the mortgage has never been foreclosed and is still in existence Therefore he can only lift it by paying it, the money being [399] subject to distribution between the mortgagee and the purchaser *in equitable proportions so as to reimburse the latter his purchase money* and pay the former the balance of his debt ' This ruling appears to me to be consonant with good sense, and with the principles of equity and good conscience If the appellants had elected to pay off the puisne

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(1) (1897) I L R 19 All 527

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mortgage, as they might have done, no difficulty would have arisen. They have not done so, however, but have insisted upon the puisne mortgagee redeeming the prior mortgage.

For these reasons I am of opinion that the conclusion arrived at by my brother Banerji is entirely correct, and I would therefore dismiss this appeal.

BLAIR, J.—The parties immediately interested in this appeal are the representative of the first mortgagees of certain immoveable property, and the representatives of a purchaser thereof at an auction-sale held in execution of a decree for sale obtained by such first mortgagees in a suit upon their mortgage in which a puisne incumbrancer was not impleaded. The suit out of which this appeal arises is a suit by the puisne incumbrancer, in which he has obtained from the lower appellate Court a decree for sale subject to his redeeming the prior mortgage. Under that decree the sale in the suit of the first mortgagee was treated as a nullity. It has been agreed that the amount due upon the first mortgage up to September 30th, 1896, should be taken to be Rs. 10,000. That sum has been paid by the second mortgagee, and the only point before us for decision is whether the purchaser at the auction-sale is entitled to the whole amount as paid, or whether it belongs to the representative of the prior mortgagees, whose mortgage was redeemed by the payment, subject only to the right of the purchaser to the return of the purchase money paid by him, and subject to his option of redeeming the puisne incumbrancer in his turn. The Court of first appeal has held that the purchaser's right is limited to the amount paid by him at the sale. On appeal to this Court that decision has been affirmed by Mr. Justice Banerji. On the other hand, Mr. Justice Aikman has held that the purchaser is entitled to the whole of the money paid for redemption of the first mortgage. It appears to me that if, setting aside [400] what may be delusive formulæ, we direct our attention exclusively to the facts of the case, we shall find that a satisfactory answer is not far to seek. The first mortgagees, in consideration of a pecuniary advance to the mortgagor, obtained from him the execution in their favour of a mortgage-deed. That document, either by express words or by implication of law, embodies a promise to repay the amount advanced, plus the stipulated interest. So far it differs not substantially from an ordinary money bond. It is, however, distinguished from a mere money bond by the further provision that the executant pledges certain immoveable property for the repayment of the amount due. It is this incidental provision for the repayment of the money that forms the characteristic feature of, and gives the name to, a mortgage bond. In this country under the provisions of the Transfer of Property Act, it is an essential feature of this combination of a promise to pay with the assignment of specified property as security for such payment that the right of the mortgagee to put in force the ordinary remedies for the unpaid money debt is postponed to the remedy against the security in case he proposes to have recourse to that security. The mortgagee must first satisfy, as far as possible, his claim by the sale of the mortgaged property, and then, and then only, if the price received at the sale fail to satisfy the obligation, can he poperly apply to a Court to decree such reliefs as are appropriate to an obligation under a simple money bond, that is to give him a decree under section 90 of the Transfer of Property Act. It is common ground

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that Bansidhar purchased the property in suit at the sale held in execution of the decree obtained by the first mortgagees That decree was the ordinary decree for sale on failure to pay the mortgage money within a prescribed time That Bansidhar had notice, actual or constructive, that he was purchasing a defeasible title must be taken for granted He must be taken to have known that the sale at which he bought was voidable at the will of the second mortgagee, who had only to redeem the first mortgage to enable him to put up the property for sale in satisfaction of both incumbrances As against the second mortgagee he had acquired absolutely no title However, the second mortgagee has redeemed the first mortgage, and [401] has totally nullified the purchase by Bansidhar and all devolutions which derive from him As against the second mortgagee, he has of course no shadow of right to a pice of the sum paid by him to clear off the first incumbrance So far as the second mortgagee is concerned, the money deposited in Court was deposited to the credit of the first mortgagees solely *Prima facie* the money is the money of the prior mortgagees only The question now to be decided is whether Bansidhar has any equity against the first mortgagees to recover from them any part of the redemption money paid by the second mortgagee, who on such payment has obtained an absolute right to sell the mortgaged property As it turns out, the first mortgagees sold nothing, and Bansidhar bought nothing Each party must be taken to have contemplated that contingency The Court below has given him the price he paid at the sale, and Mr Justice Banerji has confirmed that decision He has been treated as a party to a contract where there has been a total failure of consideration He has been restored to the status he occupied before the sale The first mortgagees having received from the second mortgagee every penny of the second mortgage money due to them, have received also Rs 1,050 from Bansidhar To that sum they have no equitable title They have received it twice over As paid by Bansidhar it would have gone *pro tanto* to the reduction of their mortgage debt, and then the second mortgagee would have paid off by redemption the whole of that debt, including the Rs 1,050, part and parcel of it The propriety of the judgment of the lower appellate Court upon this point is not in controversy Neither the first mortgagees who obtained a decree which was a fraud upon the puisne incumbrancer, nor the purchaser who with his eyes open bought under an indefensible decree, merit any special consideration It is to both in some measure owing that the second mortgagee has been forced into costly and unnecessary litigation It seems to me that the price paid by Bansidhar at the auction sale and the price paid by Prasadi Lal for the rights of the first mortgagee are absolutely immaterial, but it is very material to consider what they respectively bought What Bansidhar bought has been set forth above What Prasadi [402] Lal bought is thus described

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sale at which Bansidhar bought in the property Therefore as between Prasadi Lal and the first mortgagees he bought all the remedies to which they were entitled on the failure of the sale upon the mortgage decree to satisfy their claim, that is to say he bought their right to a decree under section 90 of the Transfer of Property Act, their remedy against the hypothecated property having been exhausted But he bought also

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the right to have the property redeemed by the second mortgagee, if the latter should seek to enforce his right against the mortgaged property. That right never passed to Bansidhar either on his attachment of the mortgage decree or on the sale under that decree. Indeed the right to the personal decree under section 90 does not arise until the mortgaged property has been sold, and the net proceeds of the sale have proved insufficient to pay the amount due upon the mortgage. Unless that ulterior or supplemental right had by some means or other passed to Bansidhar, I can conceive no legal or equitable doctrine under which he can claim from the first mortgagees or their representative the sum paid to them for the redemption of their mortgage beyond the price he paid upon the abortive sale. It seems to me indisputable that on redemption of the first mortgage the right to a decree under section 90 passed to the second mortgagee to be exercised in case the sale under their decree should not satisfy the aggregate sum due in respect of both mortgages. I regret to find myself unable to follow the argument of my brother Aikman, which is, as I understand it, that the money paid to redeem the first morgage comes ultimately out of the mortgaged property, and that the first mortgagee having exhausted his rights against the property by the sale is not entitled to receive anything more out of that property. But the sale has been nullified by the decree of the Court below, and the price paid at the sale has been ordered to be refunded to the purchaser. Unless, therefore, the first mortgagee is permitted to retain the redemption money, he will have obtained nothing whatever out of his security. As [403] I have pointed out before, the first mortgagee did not by the sale part with the personal remedy against the mortgagor. For that right he will have received no consideration whatever if the redemption money be ordered to be paid to the purchaser. I therefore concur in the order passed by the Chief Justice, and would dismiss this appeal.

BURKITT, J.—I have had an opportunity of perusing the judgments just delivered by the learned Chief Justice and my brother Blair. I fully concur in the conclusions at which they have arrived, and in the reasons given therefor. I have nothing to add.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

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25 A. 403 (=7 C. W. N. 617=5 Bom. L. R. 474=30 I. A. 152=8 Sar. 431.)

PRIVY COUNCIL.

PRESENT:

Lord Davey, Lord Robertson, Sir Andrew Scoble and Sir Arthur Wilson.

TIRLOCK NATH SHUKUL AND OTHERS (*Plaintiffs*) *v.* LACHMIN KUNWARI AND ANOTHER (*Defendants*). [20th March and 30th April, 1903].

[*On appeal from the High Court of Judicature at Allahabad.*]

Act No. I of 1872 (*Indian Evidence Act*), *section* 112—*Presumption as to paternity of child born after death of husband—Burden of proof—Illness of husband rendering act of begetting child improbable.*

Where a child was born after the death of the husband, under such circumstances as to give rise to the presumption under section 112 of the Evidence Act (I of 1872). *Held* in a suit by the appellants to dispute the paternity of

the child that the burden of proof lay on them, and that on the evidence the presumption was not rebutted (1)
[Dist. 44 All 470]

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PRIVY COUNCIL

25 A 403= 7 C. W N 617=5 Bom L R 474= 30 I A 152= 8 Sar 481.

APPEAL from a decree (7th August, 1899) of the High Court at Allahabad, which reversed a decree (22nd March, 1897) of the Subordinate Judge of Gorakhpur

The suit was brought by the appellants against the respondents to have it declared that the first respondent Musammat Lachmin Kunwari had no son, and that she was not pregnant by her husband at the time of his death

[404] On the 16th of May, 1895, Bish Nath Prasad Shukul died of small pox, leaving Musammat Lachmin Kunwari his widow He was possessed of certain landed property, and on the 10th of July, 1895, the widow applied to have her name entered in the revenue records as owner of the property belonging to her deceased husband In her petition she stated that she was pregnant, and that her husband during his illness had given her authority to adopt in case no male child were born to her, or in case such male child did not survive On the 7th of August, 1895, some of the plaintiffs in the present suit filed a petition stating that the allegation that the widow was pregnant at the time of her husband's death was untrue The Revenue authorities, however, finding that the widow was in possession, ordered that her name should be duly entered as in possession of her late husband's estate. In January, 1896, an announcement was made that Lachmin Kunwari had been delivered of a son on the 4th of January, and the plaintiffs, the reversionary heirs, filed their plaint on the 25th of February, 1896, for a declaration as above, alleging that the second defendant was not the son of Lachmin Kunwari, but was the son of Ram Autar Tiwari The defence was that Bish Nath Shukul had died during the pregnancy of Lachmin Kunwari, that after his death she gave birth to a son, the second defendant Kashi Prasad, and that as the son of Bish Nath he was entitled to the whole property and the plaintiffs had no right to it

The only material issue raises the question of the legitimacy of Kashi Prasad

The Subordinate Judge decided this issue in favour of the plaintiffs, holding that Kashi Prasad was not proved to be the son of Bish Nath Shukul and the first defendant Lachmin Kunwari He therefore decreed the suit

On appeal a Division Bench of the High Court (KNOX, C J and AIKMAN, J) relying on the natural presumption, found that the second defendant was the son of Lachmin Kunwari by her deceased husband Bish Nath Prasad They consequently reversed the decision of the Court below and dismissed the suit with costs

On this appeal

[405] Mr *J D Mayne* for the appellants contended that the evidence showed that Lachmin Kunwari was away from home for five or six months before her husband's illness, and only returned three or four days before he died of small pox of which he was ill for 16 days There was therefore, it was submitted, no such access proved as would make it possible that Kashi Prasad was the son of Bish Nath Shukul and Lachmin Kunwari The presumption, therefore, under section 112 of the Evidence Act (I of 1872) did not arise

(1) See *Narendra Nath Pahari* v *Ram Gobind Pahari*, I L R 29 Cal 111, Reporter's Note

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PRIVY COUNCIL.

25 A. 403= 7 C. W. N. 617=5 Bom. L. R. 474= 30 I. A. 152= 8 Sar. 481.

Mr. *G. E. A. Ross* for the respondents was not heard.

1903, *April 30th*.—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE :—

The only question in this case is whether Kashi Prasad, the second respondent, is the legitimate son of the first respondent, Musammat Lachmin Kunwari, by her deceased husband, Bish Nath Prasad Shukul.

The rule of law on the subject is contained in section 112 of the Indian Evidence Act, 1872, which provides that "the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties had no access to each other at any time when he could have been begotten."

Bish Nath died of small-pox after a few days' illness on the 16th of May, 1895, and Kashi Prasad was born on the 4th of January, 1896, 223 days later. The burden of proof was therefore on the appellants, who, as reversionary heirs of Bish Nath according to Hindu law, filed their suit on the 25th of February, 1896, for a declaration that Kashi Prasad was not the son of Bish Nath. They asserted that the widow had never been pregnant by her husband, and suggested that the boy put forward as his son was really the son of one Ram Autar Tiwari.

At the hearing they offered no evidence in support of this suggestion, but called witnessess to prove that Lachmin had been absent at Benares on a visit to her parents for some time before the beginning of her husband's illness, and that she returned to [406] her house only three or four days before his death, at which time "he was senseless." Two of the witnesses said that she had gone to Benares "five or six months before," and a third that she went there "in the month of Magh;" the others did not attempt to fix any date. There was a good deal of evidence upon less material points, and the Subordinate Judge, who seems to have thought that the burden of proof lay on the widow, decided in favour of the plaintiffs, the present appellants.

The High Court at Allahabad took a different view. The learned Judges who heard the appeal came to the conclusion that "the evidence adduced by the plaintiffs was so feeble that there was really no case for the defendants to meet;" and relying "upon the natural presumption," they found in favour of the legitimacy of Kashi Prasad.

In this conclusion their Lordships concur. The evidence of the widow is clear as to the possibility of access within the necessary period, and no imputation is made against her character. Her statement as to her pregnancy before her husband's death is supported by the sister, uncle, and other relatives of her husband, as well as by members of her own family; and the actual birth of the child to her is proved by witnesses who were present, and whose testimony was not shaken by cross-examination.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants—Messrs. *Pyke and Parrot.*

Solicitors for the respondents—Messrs. *Barrow, Rogers and Nevill*

25 A 407 (=30 I A 165=5 Bom L R 478=7 C W N 681=8 Sar 433.)

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25 A 407=
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[407] PRIVY COUNCIL

PRESENT

Lord Davey, Lord Robertson, Sir Andrew Scoble and Sir Arthur Wilson

GHARIB ULLAH (*Representative of Plaintiff*) v KHALAK SINGH AND OTHERS (*Defendants*) [20th, 24th March and 7th May, 1903]

[*On appeal from the Judicial Commissioner of Oudh, Lucknow*]

Hindu Law—Joint Hindu family—Mitakshara—Appointment of guardian of member of family—Liability of members on mortgages executed by karta

A guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family, such interest not being individual property and therefore not property with which a guardian, if appointed would have anything to do

make a mortgage of the minor s property without the sanction of the Court, which admittedly was not obtained. *Held* by the Judicial Committee that

benefit of the family and for legal necessity, be enforced against all the members

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[Ref 7 O C 46 12 C W N 598=35 Cal 561=8 C L J 256 5 Bom L R 678 20 M L J 855=3 I C 195=9 M L T 26=34 Mad. 422=1910 M W N 649 12 M L T 585=23 M L J 706=1913 M W N 79=17 I C 473 23 M L J 610=1912 M W N 1188=17 I C 497 35 All 150 62 I C 132 Expl 6 M L T 249 23 C W N 500=29 C L J 280=51 I C 597 53 I C 364=1919 M W N 356 Fol 40 Cal 784 (P C) 40 I C 145 (Hindu Law—Joint family—Manager) Fol, 3 O L J 13 165 P L R 1906 43 P R 1909=39 P L R 1909 4 M L T 462=32 Mad 139=1 Ind Cas 999 43 P R 1910=33 P W R 1910 Ref 33 Bom 152=7 Bom L R 609 6 C L J 383 10 M L T 385=(1911) 2 M W N 461=12 I C 568=21 M L J 1077=37 Mad 38 Con 43 I C 855=1917 M W N 744=22 M L T 380 46 I C 815 7 I C 31 40 Cal 342 61 I C 762 (Onus of proof—Plea of minority) 61 I C 575 Ref 12 N L R 12=32 I C 242 3 O L J 390 6 P L J 526 (F B) Fol 3 O L J 32 Ref 13 A L J 94=27 I C 687 84 P L R 1915]

APPEAL from a decree (18th January, 1898) of the Court of the Judicial Commissioner of Oudh at Lucknow which modified a decree (3rd January, 1895) of the Subordinate Judge of Unao, who had decreed the appellants suit

The suit was one for foreclosure of two deeds of mortgage by conditional sale and for other relief, and the main questions in the appeal related to the liability of the respondents under the two deeds, one of

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which was executed on the 6th of February, 1889, and the other on the 19th of September, 1890.

The facts were that one Hindu Singh had three sons—Ahlad Singh, who died without issue prior to 1875; Mardan Singh, who [408] died also without issue on the 7th of June, 1876, and Chet Singh. The last-named died about 1879, leaving three sons, Khalak Singh, Jangli Singh and Jai Singh and a widow, Musammat Lachmin. Khalak Singh was born in 1861, Jangli Singh about 1870, and Jai Singh in 1872.

Hindu Singh owned a 4 anna or 5 biswa share in the village of Rookarna in the district of Unao. On his death the names of his three sons were recorded in the Collector's registers as owners of his property in equal shares. On the death of Ahlad Singh Khalak Singh's name was substituted on the record as his heir. On the death of Mardan Singh (who was lambardar of the village) in 1876 Khalak Singh's name was again entered as heir to his share, and he was appointed lambardar; but as he was a minor, Chet Singh was to act as manager for him. On the death of Chet Singh the names of Khalak Singh, Jangli Singh and Jai Singh were entered as owners in equal shares by right of inheritance of the 4 anna share in Rookarna.

On the death of Chet Singh, Khalak alone had attained majority, the age of majority being 18 years generally, and 21 years for minors for whose persons or property a guardian has been appointed by a Court of Justice, or who have been brought under the jurisdiction of the Court of Wards.

Khalak Singh attained his majority at the age of 18 years and acted as head of the family, consisting of himself and his minor brothers, which had been and continued to be a joint undivided Hindu family governed by the Mitakshara Law.

When Chet Singh died he left the family in debt. On the 11th of January, 1875, Mardan Singh and Chet Singh had mortgaged two-thirds of the 4 anna share of Rookarna to one Parmanand, who on the 24th of October, 1884, sued the three sons of Chet Singh on the mortgage, the minor sons being sued as under the guardianship of their mother, Musammat Lachmin. He obtained a decree for sale on the 22nd of December 1884, and in execution of that decree the share was advertised for sale.

On the 23rd of April, 1885, Musammat Lachmin had obtained a certificate of guardianship under Act XL of 1858, relating to the property of her two minor sons, Jangli Singh and Jai Singh. [409] On the 23rd of October, 1885, Khalak Singh, on his own behalf and as agent of Musammat Lachmin, applied to the Subordinate Judge of Unao for permission to sell a portion of the minors' property sufficient to satisfy Parmanand's decree. The order on this application was to the effect that permission of the Court was not necessary.

On the 27th of November, 1886, a certificate was granted to Khalak Singh authorizing the transfer of the two-thirds share of Rookarna which had been attached by Parmanand, and the property was notified for sale on the 20th of August, 1887; but it was not sold, as the amount of the decree was paid off by a loan of Rs. 3,300 obtained from one Madari Singh on the 17th of August, 1887. On that date Musammat Lachmin executed a mortgage in his favour, which recited that she was the guardian of her minor sons; that their interest in Chet Singh's property amounted to a 2 anna, 8 pie share; that the share had been mortgaged

to Parmanand, who had attached it in execution of his decree, and that she mortgaged the share to Madari Singh to discharge the judgment-debt and prevent a sale in execution

After Chet Singh s death, Khalak Singh was obliged to borrow money for the necessities of the family For the marriage of his sister he obtained loans on the 26th of January, 1881, and the 4th of July 1881, from one Thakur Prasad, who brought a suit for the money and obtained a decree on the 21st of July, 1883 In order to pay Govern ment revenue, to discharge a debt of Chet Singh's and for family expenses, Khalak Singh on the 6th of March, 1883, borrowed a further sum of Rs 1,000 from one Durga Singh on a mortgage of his 1 anna, 4 pie share The debts were consolidated on the 22nd of December 1883, by a mortgage, at a lower rate of interest, of his 1 anna, 4 pie share, exe cuted by Khalak Singh in favour of Jai Ram The debts due to Thakur Prasad and Durga Singh were paid off from the money received from Jai Ram, who subsequently sued on his mortgage and obtained a decree for foreclosure of the mortgaged property on the 19th of December, 1888 He had on the 25th and the 28th of September, 1888, obtained other decrees for sums of Rs 90 4 0 and Rs 215 lent to Khalak Singh

[410] On the 6th of February, 1889, the family borrowed the sum of Rs 10,000 from one Amin ullah, now represented by the appellant Gharib ullah, the object of the loan being to pay off the above debts due to Jai Ram and Madari Singh The whole of the 4 anna share in Rookarna was mortgaged as security for repayment the mortgage was one by conditional sale and was executed by Khalak Singh and Jangli Singh for themselves and by Musammat Lachmin as guardian of Jai Singh Out of the money advanced Rs 6,222 were paid to Jai Ram on the 7th of February, 1889, and Rs 3,774 to Madari Singh, being the principal and interest due to him in full

On the 19th of September, 1890, the family being again in need of money borrowed Rs 1 000 by giving Amin ullah a further charge on the 4 anna share in Rookarna This deed was also executed by Khalak Singh and Jangli Singh for themselves and by Musammat Lachmin as guardian of Jai Singh Both deeds provided for repayment on the 6th of February, 1894, and no payments either on account of principal or interest having been made, Amin ullah on the 7th of June, 1894, institut ed the suit out of which this appeal arose against Khalak Singh, Jangli Singh and Jai Singh, the last named being sued through his mother as guardian *ad litem*

The plaint recited the facts and claimed foreclosure, a money decree by way of damages in respect of interest due, for which foreclosure could not legally be given, and other relief

The defendant, Khalak Singh, admitted execution of the mortgage deeds He alleged that the money was borrowed partly for, and partly without, necessity, and pleaded that the covenant for interest was penal and should not be enforced

The defendant, Jangli Singh, in his own behalf and Musammat Lachmin as guardian of Jai Singh, jointly filed a written statement, in which they admitted execution and pleaded that the money was borrow ed without necessity They also pleaded that Jangli Singh and Jai Singh were minors at the time of the execution of the mortgage deeds, and that their mother as guardian could not create a valid charge on their

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property. They alleged that the mortgages were illegal because the family was joint and undivided, and urged that the covenant to pay [411] interest was penal, and that their liability at any rate was limited to such amount only as might be found to have been borrowed for legal necessity.'

The Subordinate Judge, on the 3rd of January, 1895, on issues raising these contentions gave the plaintiff a decree for foreclosure unless the defendant, before the 3rd of July, 1895, paid to the plaintiff or into Court the sum found to be due on the mortgages.

The Court of the Judicial Commissioner, to which the defendants appealed, was of opinion that the mortgage deeds had been executed by Musammat Lachmin as guardian, and in no sense by Khalak Singh as head of the family; that the certificate of guardianship under Act XL of 1858, though not properly granted, as the minors were members of a joint family and possessed no separate property, was nevertheless good in law to constitute her the guardian of the property of her minor sons under the appointment by Court and subject to the provisions of the Act under which the appointment was made. The Judicial Commissioner's Court further held that under section 29 of Act VIII of 1890 and section 18 of Act XL of 1858 the certificated guardian could not without the previous sanction of the Judge mortgage the minor's property, and that the mortgages in suit having been executed without such permission were invalid so far as the interest of the minors was concerned. The Court also held that whether or not the moneys borrowed were spent on legal necessities and for the benefit of the minors, they were under no liability to refund any portion thereof.

As to Khalak Singh's liability, the Judicial Commissioner's Court was of opinion that as a member of a joint family he could not mortgage even his own share except for legal necessity or for the benefit of the family. Such legal necessity, the Court held, was proved in the case of the mortgage of the 6th of February, 1889, to discharge the bond of Madari Singh and the decree of Jai Ram dated the 19th of December, 1888, to the extent of Rs. 3,774 *plus* Rs. 5,916, making a total of Rs. 9,690; but no such necessity was proved in regard to Jai Ram's decrees dated the 25th and 28th of September, 1888, for Rs. 90 and Rs. 215 respectively.

[412] The Court was further of opinion that no necessity was proved in regard to the mortgage dated the 19th of September, 1890. In the result the Judicial Commissioner dismissed the suit against Jangli Singh and Jai Singh; passed a decree for foreclosure of the 1 anna, 4 pie share of Khalat Singh, the mortgage-money being fixed at Rs. 9,690 with interest, under the terms of the deed dated the 6th of February 1889; and also passed a money decree against Khalak Singh for Rs. 305 with interest in accordance with the terms of that deed; and a money decree was also passed for Rs. 1,000 with interest in accordance with the terms of the deed of the 19th of September, 1890.

On this appeal, which was heard *ex parte*—

Mr. *De Gruyther* for the appellant contended that the mortgage deeds were sufficiently executed by Khalak Singh as the head of the joint family so as to bind all the other members of the family. As to the powers of the manager of a joint family governed by Mitakshara Law and the effect of a decree against a member of such a family, reference

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was made to *Sadabart Prasad Sahu* v *Foolbash Koer* (1), *Deendayal Lal* v. *Jagdeep Narain Singh* (2), *Suraj Bansi Koer* v *Sheo Proshad Singh* (3) and *Balgobind Das* v *Narain Lal* (4) Khalak Singh had full power to execute the deeds, and the amounts advanced under them were borrowed for the benefit of the family and for legal necessity That this was so as to the greater portion of the loans made had been found by both Courts, and the Judicial Commissioner was, it was submitted, in error in finding that a portion of the money was not so raised The mortgages were therefore enforceable for the full amount of the mortgage money against the whole share mortgaged Moreover, the deeds were executed by Jangli Singh as being of full age, as he was by the Hindu law, and if he was not under the guardianship of Musammat Lachmin, and he should, under any circumstances, be held liable under them to the same extent as Khalak Singh

As to the appointment of Musammat Lachmin to be guardian under Act XL of 1858, it was contended that the certificate of [413] guardianship granted to her was invalid on the ground that a guardian could not be appointed of a member of a joint family governed by the Mitakshara Law, where such member had no separate property, which was now settled law [see *Sham Kuar* v *Mohanunda Sahoy* (5) and *Virupakshappa* v. *Nilgangava* (6) where all the cases on the point are referred to] Reference was made to the case of *The Collector of Monghyr* v *Hurdai Narain Sahai* (7) the decision in which was upheld in *Hurdey Narain Sahu* v *Ruder Parkash Misser* (8) by the Privy Council, and *Deorani Koer* v *Farusman Narain* (9) Even if the certificate was valid and the mortgages were considered to be made by Musammat Lachmin for the minors and to be invalid as having been made without the permission of the Court, the minors would not, under Act XL of 1858 or Act VIII of 1890, be released from the liability to refund the sums actually received under the mortgage deeds

The judgment of their Lordships was delivered by SIR ARTHUR WILSON —

This is an appeal against a decree of the Court of the Judicial Commissioner of Oudh, which varied the decree of the Subordinate Judge of Unao

The three defendants (respondents) are brothers forming a joint Hindu family governed by the Mitakshara law, and as such they are the proprietors of a 4 anna or 5 biswa share in the village of Rookarna

On the 6th of February, 1889, a deed was executed which purported to mortgage the family share in the village to Aminullah to secure a loan of Rs 10,000, and interest, and on the 19th of September, 1890, a second deed was executed, which purported to charge the same property in favour of the same mortgagee with a further sum of Rs 1,000 advanced by him, with interest The appellant is the representative of Amin ullah, who brought the present suit in the Court of the Subordinate Judge of Unao to enforce the two mortgage deeds

(1) (1869) 3 B L R F B 31
(2) (1877) L R 4 I A 247 (251) I L R 3 Cal 198 (206)
(3) (1878) L R 6 I A 88 (101), I L R 5 Cal 148 (167)
(4) (1893) L R 20 I A 116 (124, 125), I L R 15 All 339 (350, 351)
(5) (1891) I L R 19 Cal 301
(6) (1894) I L R 19 Bom 309
(7) (1879) I L R 5 Cal 425, 5 C L R 112
(8) (1883) L R 11 I A 26, I L R 10 Cal 626
(9) (1882) 12 C L R 516

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[414] The material parts of the first deed are as follows:—" We are Khalak Singh and Jangli Singh, sons of Chet Singh, and Jai Singh son of Chet Singh under the guardianship of Musammat Lachmin, wife of Chet Singh, represented by Khalak Singh as her agent." The title of the three brothers is recited, and then follows: " We have mortgaged the same," and the conditions are then stated. The deed was executed by " Khalak Singh with his own pen," " Jangli Singh with his own pen," " Musammat Lachmin with the pen of Mewa Ram, Karinda," and " Jai Singh with his own pen." The acknowledgment for the purpose of registration was signed by " Khalak Singh with his own pen." " Khalak Singh, General Agent, on behalf of Musammat Lachmin, guardian of Jai Singh, minor," and " Jangli Singh with his own pen." It states that " Khalak Singh is the General Agent of Musammat Lachmin, under power-of-attorney registered on the 18th of November, 1884, and has authority to mortgage, &c." The forms used in the second deed, that of the 19th of September, 1890, are substantially the same, except that as to Jai Singh the execution is " Jai Singh, minor, under guardianship of Musammat Lachmin and the agency of Khalak Singh," Lachmin's name not otherwise appearing, and the registration corresponds.

At the times when the two deeds were executed the first respondent, Khalak Singh, was undoubtedly a man of full age and was the *karta* of the family. Jangli Singh, the second respondent, appears to have been between eighteen and twenty-one, and therefore of full age if the general rule of Hindu law was applicable to his case. The third brother, Jai Singh, was admittedly a minor.

With regard to the object for which the first and principal loan was raised, it is clear that almost the whole of it was borrowed to pay off, and was employed in paying off, pressing claims against the family property, so that to this extent necessity is clearly shown. And both Courts in India have so found. As to two small sums, however, of Rs. 90-4 and Rs. 215-8, the Appellate Court in India held that there was no evidence of necessity or of inquiry on behalf of the lender. And this view appears to be correct. The Appellate Court in India thus [415] reduced the amount advanced under the first and principal mortgage deed for which necessity was established to Rs. 9,690-7-6, a figure which their Lordships accept as correct.

As to the second mortgage, that for Rs. 1,000, the case is not so clear. There is evidence to show that the family had long been in a somewhat embarrassed condition, and had difficulty in meeting the necessary family expenses. There is evidence, too, that this difficulty was in some years aggravated by floods and drought. And there is the evidence of the witness Durga, who speaks no doubt in very general terms, but who says what, if true, to a large extent covers the case, that the Rs. 1,000 was borrowed, " of which Rs. 500 or Rs. 600 was paid in Government revenue and other due expenses were met by it. Out of that Rs. 150 were spent in contracting a marriage for Jai Singh. Of the same money a pair of bullocks was bought for Rs. 128." As to the Rs. 150 for the marriage this witness is confirmed by the next. The first Court accepted this evidence; the Appellate Court was not satisfied with it. Their Lordships agree with the first Court to the extent of Rs. 778, the sums specifically mentioned, but they think the reference to other expenses too vague for them to place any reliance upon it. The witness, Durga, though cross-examined about many

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things, was not cross examined upon this point And the respondent, Khalak, the *karta* of the family and the actual borrower of the money, though h was not called to contradict Durga has been sufficiently proved that the . the loans, was borrowed for family purposes and in case of necessity

The *karta* of an undivided Mitakshara family, with the concurrence of the adult members of the family, can mortgage family property for family purposes in case of necessity, so as to charge the property as against all the members of the family At first sight, therefore, it would seem that the appellant is clearly entitled to the usual mortgage decree against all the respondents in respect of all the amounts which, as already stated, their Lordships hold to have been borrowed on grounds of necessity But a difficulty was raised in India on the ground [416] that on the face of the mortgage deeds it is shown that one at least of the three brothers constituting the family was a minor, that the mother had obtained a certificate of guardianship (presumably of property), that one at least of the mortgage deeds was executed in her name with others, and that she as guardian could not (by reason of Act XL of 1858, section 18, and Act VIII of 1890, sections 29 and 30) make a mortgage of her ward s property without the sanction of the Court, which admittedly was not obtained The Appellate Court in India gave effect to this objection, considering that the mortgages were mortgages of a guardian and were invalid for want of the sanction of the Court

Their Lordships are unable to concur in this view It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant s interest in the property of an undivided Mitakshara family And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property And applying these observations to the present case their Lordships think that the mortgages under consideration were not mortgages by the guardian, assuming the mother to have been a guardian, but mortgages by the family, entered into by the *karta* of the family with the concurrence of Jangli, the only other adult member of the family, if indeed he was an adult And this leads up to the only remaining question in the case If it be true that the respondents' mother was appointed guardian of the second respondent as well as of the third (as seems to have been assumed in India), that appointment might, under Act IX of 1875, section 3, have the effect of prolonging the minority of that respondent until he attained twenty one The effect of this, if it were accepted, would be very trifling, it would only affect that respondent s liability to a personal decree for the two small sums of Rs 90 4 and Rs 215 8 advanced under the first and principal mortgage, and for Rs 222 under the second mortgage, but as to which necessity has not been established As to this it seems sufficient to say that the second respondent is now of full age [417] and able to bring his case before the Court, that at the time of the mortgages in (. to the general Hindu law, that he(. person of full age, and that if there . im from liability it was for him to show them, which he has failed to do. It follows that the

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appellant is entitled to a mortgage decree against the property under the first mortgage, and to similar relief under the second mortgage, to the extent above indicated as to each. He is further entitled to a money decree against the first two respondents personally in respect of the two sums of Rs. 90-4 and Rs. 215-8 excluded from the security of the first deed, and Rs. 222 under the second deed.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed; that the decree of the Court of the Judicial Commissioner ought to be discharged with costs; that the decree of the Court of the Subordinate Judge ought to be varied by substituting for the sum therein declared to be due to the plaintiff a sum made of Rs. 10,468-7-6 principal, and interest in accordance with the two mortgages respectively and the costs throughout; that the period of redemption ought to be extended to six months from the date of His Majesty's order on the appeal; that there ought to be an order against the first two respondents personally for Rs. 527-12-0 and interest; and that the case ought to be remitted to the Judicial Commissioner to ascertain the precise amount payable on the above footing.

The respondents must pay the appellant's costs of this appeal exclusive of the costs of restoring the same, and in view of the great delay which took place in the prosecution of the appeal their Lordships direct that the appellant only be allowed such costs as he would have incurred if he had prosecuted his appeal with due diligence.

Appeal allowed.

Solicitor for the appellant—Messrs. *T. L. Wilson and Co.*

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25 A. 413 (=23 A. W. N. 74.)

[413] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

SALIQ-UN-NISSA (*Plaintiff*) *v.* MATI AHMAD AND OTHERS (*Defendants*).*
[17th March, 1903.]

Muhammadan law—Shias—Waqf—Words necessary to constitute a valid waqf.

Held that according to the Muhammadan law applicable to the Shia sect the use of the word "*Waqf*" to create a valid *Waqf* is not essential, but other words purporting to effect a transfer may, when read together with surrounding circumstances, be sufficient to create a valid *Waqf*.

[Ref. 52 P. W. R. 1908=78 P. L. R. 1908].

THE plaintiff in the suit out of which this appeal arose claimed possession of certain zamindari property and a portion of a house under the following circumstances. The property claimed had been in his lifetime the property of the father of one Musammat Razia Khatun. The plaintiff alleged that upon the death of Razia Khatun, which occurred in September, 1895, one-half of the property in question descended to Momin Ali, the husband of the plaintiff, and also of Razia Khatun, and the other half to two aunts of the said Razia Khatun. The plaintiff set up a title under a sale-deed executed in her favour by Momin Ali in

* Second Appeal No 18 of 1901, from a decree of Babu Sheo Prasad, Officiating Subordinate Judge of Shahjahanpur, dated the 20th of August, 1900, confirming a decree of Babu Deoki Nandan Lal, Munsif of West Budaun, dated the 6th of March, 1900.

October, 1895 The suit was resisted by one of the defendants, Mati Ahmad, who was in possession of the property as *mutawalli* under a deed, which he alleged to be a deed of *waqf*, executed in the year 1894, by Musammat Razia Khatun A translation of this deed is set forth in the judgment of the High Court The Court of first instance (Munsif of West Budaon), dismissed the suit The plaintiff appealed, and her appeal was dismissed by the lower appellate Court (Subordinate Judge of Shahjahanpur) From this decree the plaintiff appealed to the High Court

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APPELLATE CIVIL

25 A. 418= 23 A. W N 75

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr *Karamat Husain*, for the respondents

BLAIR and BANERJI, JJ —One question, and one only, is raised in this appeal The appellant denies that a certain document executed by the deceased Musammat Razia Khatun did, under the circumstances, establish or create a valid *waqf* [419] within the meaning of the Muhammadan law as applied to the Shia sect The document in question has been translated for our perusal, and the substantial accuracy of the translation has not been impugned The document is in the following terms —

"By a will Maulvi Muhammad Aziz Ali, deceased, father of me, the executant, set apart during his life time one third of the entire property owned and possessed by him, which was in existence at that time, for the expenses of the mourning of Imam Husain (may he remain in peace!), and appointed his sister's son, Mati Ahmad, son of Maulvi Muhammad Kamal Ahmad, sect Shaikh, resident of Badaun, as manager and superintendent Out of the entire estate of my deceased father about a half devolved on me, and now there remain a 2½ biswa *zamindari* (share) in mauza Mongra, pargana Azmabad, tahsil Dataganj, seven *sihams* out of the entire assumed 15 *sihams*, dwelling house and *diwan khana*, situate in mohalla Kucha Shaikh Sad Ali, deceased, bounded as below, forming part of the estate of my aforesaid deceased father, which are at present in possession of me, the executant, and are worth Rs 2,000, and this 2½ biswa share aforesaid is one third of my aforesaid half share, and according to the will of (my) deceased father, I have been up to this day using (the income) thereof in meeting the religious expenses, *i e*, the expenses of the mourning of the aforesaid Janab Saiyedushshuhada (may he remain in peace!) and with the advice of Mati Ahmad Now I wish to execute a document in respect of this In order that the said (will) may always be acted upon, I, the executant, in accordance with the will of (my) deceased father shall, during my lifetime, be the manager acting with the advice of Mati Ahmad aforesaid Mati Ahmad or his representative, or I, shall have no sort of power to make a transfer After me Mati Ahmad and his legal representatives shall be the *maliks* (owners) and managers according to the aforesaid will The manager shall have power to spend in any way he may think proper the profits (remaining) after deducting the necessary expenses thereon for religious purposes, *i e*, the mourning of the aforesaid Janab (Imam Husain), and to use the house for purposes of mourning meetings and his residence I [420] shall have no objection to nor deviate from this I shall have mutation of names effected in the revenue department "

After prolonged consideration of the authorities brought before us by Mr *Mujtaba*, and also by Maulvi *Karamat Husain*, the point to which Mr *Mujtaba* finally confined himself was this He contended

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that a transfer must be by express words, even though the nature of the transaction might be gathered from the surrounding circumstances; and he contended that no such express words of transfer were to be found in the document in question. To the position which he took up, it seems to us that he was inevitably driven by the authorities cited. We have had laid before us a passage from Jami-ul-Shattat, Book on *Waqf*, page 163, Teheran edition. We have also had passages translated from Jawahir-ul-Kalam, Book on *Waqf*, Teheran edition, folio 560, and also from Masalik, Book on *Waqfs*. In our opinion the drift of those authorities is, in spite of difference of expressions, identical. It seems to be settled law that the use of the word "*waqf*" to create a valid *waqf* is not essential; but other words purporting to effect a transfer may, when read together with surrounding circumstances, be sufficient to create a valid *waqf*. That has been accepted by Mr. Baillie in his well-known book on Moohummudan Law, Imameea Code, page 211 and succeeding pages. It has also been accepted and, one might fairly say, amplified by Mr. Justice Ameer Ali in his book on Muhammadan Law, Vol. I, p. 390. The result is that what is really essential for the creation of a *waqf* is that the words of transfer should be direct, express and explicit. Now in this case, although every expression used points to a total expropriation of herself, by the maker of the document in question, though the purpose to which the income of the property is to be appropriated is quite manifest, and though the maker of the document describes herself as taking under its provisions nothing, but simply the position of a manager of the property without power of alienation, it is contended that in the *tamliknama* in question there are no express words of transfer so as to validate this document as creating a *waqf* under the Shia law. The executant appears to have been under a mistaken impression that her predecessor in title had made a [421] will, under which, had it been legal, a *waqf* would have been constituted. It has been found that nothing amounting to a will had been made, but that it was his desire that his property should be used for the purposes of a *waqf*, and it is not denied that such a use of the property did take place. The executant of the deed in question, in our opinion, though using no express words of transfer, expresses with abundant clearness her intention to perpetuate the state of things existing in relation to the property in the hands of her predecessor. It is recited in the document that that predecessor had set apart a certain portion of his property for purposes which she desired should still be served out of the profits of the same property. In our opinion that is a sufficient expression of her desire to transfer absolutely, beyond recall and without power of alienation, every proprietary interest which she had in this property. Our view upon that matter is reinforced by the fact that she speaks of herself as intending to occupy towards that property the position merely of a manager. Under these circumstances we are of opinion that the document in question does create a valid *waqf* under the Shia law, and that this appeal should be, as it is, dismissed with costs.

Appeal dismissed.

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25 A. 421 (=23 A. W N. 83)

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APPELLATE CIVIL.

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

25 A 421= 23 A W N. 83

BHAGWAN DAS (*Defendant*) v MOHAN LAL (*Plaintiff*) *
[19th March, 1903]

Pre emption—Wajib ul arz—Assignment of mortgagee rights by mortgagee in possession —Sale to stranger who before suit brought becomes a co sharer

Held that the assignment of mortgagee rights in a share in a village by a co sharer mortgagee in possession to a stranger is not a transfer of any part of the mortgagee's '*haqqiyat*' in the village, and will not give rise to any right of the nature of pre emption in the absence of express provisions relative to mortgagees in the village *wajib-ul arz* *Nand Lal* v *Bansi* (1) referred to

Held also that if a stranger purchases a share in a village in respect of which a right of pre emption subsists in favour of co sharers, but subsequently to such purchase, and before any suit for pre emption is brought in respect of such share becomes himself, apart altogether from the purchase [422] in dispute, a co sharer in the village, he cannot be ousted by any co sharer not having superior pre emptive rights to himself *Serh Mal* v *Hukam Singh* (2) followed *Ram Gopal* v *Piari Lal* (3) referred to

[Fol 29 All 125=3 A L J 794=1907 A W N 313 Ref 7 A L J 77, 7 A L J 344 31 All 530 4 I C 179 134 P W R 1908 Dist 28 All 642= 3 A L J 426=1906 A W N 164 4 A L J 351=1907 A W N 110]

BY a registered sale deed, dated the 13th of September, 1898, the trustees, as they described themselves, of a banking firm styled Badri Das Ram Ratan, purporting to be empowered in that respect by a registered deed of trust, dated the 25th of February, 1898, sold to one Bhagwan Das certain property of their *cestuis qui trustent*, which they described as "all the zamindari property in mauza Semra, pargana Itmadpur, district Agra, and the property held under mortgage, whatever it may be, which belongs to the firm at Agra called after the name of Sah Ram Ratan Badri Das, of which all the partners in the firm are proprietors" The property thus disposed of consisted of shares in certain pattis of two thoks—Karu and Karma—in the village of Semra, and of the rights of mortgagees in possession with respect to other shares

By two conveyances, each dated the 4th of May 1899, Bhagwan Das acquired by purchase from co sharers in the village named, in the one case Tota Ram and Dal Chand, and in the other case Tika Ram, absolute possession as owner of certain areas of land in two *pattis* of *thok* Karu and in three *pattis* of *thok* Karma When Bhagwan Das made these latter purchases he was admittedly a 'stranger' in the village, but nevertheless no attempt was made by any one to claim a right of pre emption in respect of either purchase

The *wajib-ul arz* of Semra gave successive rights of pre emption in the case of a co sharer desiring to sell his share, *first*, to a relative being a co sharer descended from a common ancestor, *secondly*, to co sharers in the patti in which the share about to be sold is situate, *thirdly*, to co-sharers in another patti in the same thok, and *fourthly*, to the co sharers in another *thok*

On the 29th of May, 1899, the suit out of which this appeal arose was filed by one Mohan Lal In this suit the plaintiff claimed a right of

* First Appeal No 234 of 1900 from a decree of Munshi Raj Nath Prasad, Subordinate Judge of Agra dated the 19th of September, 1900

(1) (1897) I L R 20 All. 19
(2) (1897) I L R 20 All 100
(3) (1899) I L R 21 All 441

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pre-emption in respect of the zamindari and mortgagee rights conveyed to Bhagwan Das by the sale-deed mentioned above of the 13th of September, 1898. There were [423] other pleas raised by Bhagwan Das in defence to the suit, but the principal plea was that the defendant by reason of his purchase of the share of Tika Ram was himself a co-sharer of equal status with the plaintiff.

The Court of first instance (Subordinate Judge of Agra), held that the plaintiff had shown himself entitled to a decree, but inasmuch as there was another similar suit for pre-emption of the same property pending before him, in which plaintiffs had equal claims with Mohan Lal, he divided the property between the rival pre-emptors.

From this decree the defendant Bhagwan Das appealed to the High Court.

Pandit *Moti Lal Nehru* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J. and BURKITT, J.—This is an appeal by the vendee defendant in a pre-emption suit against a decree of the Subordinate Judge of Agra, by which the claim of the pre-emptor was decreed in part. We have also before us a connected appeal against a rival pre-emptor, one Ganga Prasad. The Subordinate Judge has divided the pre-empted property between the two pre-emptors plaintiffs.

The pre-empted property is situate in mauza Semra, in the district of Agra. The vendors are certain trustees acting on behalf of the proprietors of a banking firm styled Badri Das Ram Ratan. The village in which the property in suit is situate is divided into *thoks*, which again are sub-divided into *pattis* within which are situate many holdings comprising each a number of fields. These holdings are locally known as "*kabzas*." This case concerns only two—Karu and Karma—of the *thoks*. The vendors did not possess a whole *thok*, or even a whole *patti*. They were proprietors of shares in some of the *pattis*, and also were mortgagees in possession of some other shares in some of the *pattis* belonging to other zamindars of the village.

By a registered sale-deed, dated September 13th, 1898, the vendors, purporting to be empowered in that respect by a "registered instrument of trust" dated February 25th, 1898, in order [424] to "liquidate the debt of the creditors of the firm" of their *cestuis qui trustent*, whom they describe as the "Sahjis proprietors of the firm at Agra," transferred by sale "all the zamindari property in mauza Semra, pargana Itmadpur, district Agra, and the property held under mortgage, whatever it may be, which belongs to the firm at Agra, called after the name of Sah Ram Ratan Badri Das, of which all the partners of the firm are proprietors"; to the defendant (appellant) Lala Bhagwan Das, proprietor of the firm of Jagannath Bhagwan Das in consideration of Rs. 17,000. This sum the instrument acknowledges to be due from the firm of Badri Das Ram Ratan to the firm of which the vendee Bhagwan Das was proprietor. The same instrument as part of the consideration transfers to the vendee "the arrears (of rent), *takavi* debt of the amount due under decrees which are due to us by the tenants and *pattidars* of mauza Semra," but from this transfer it excepts certain debts to be disposed of by another instrument. Finally, the vendors authorize their vendee to recover the debts due to them from tenants, and declare that they have put him into possession of the property sold to him.

The plaintiff respondent Sah Mohan Lal instituted this suit to pre empt the landed property conveyed by the abovementioned sale deed His suit was filed on May 29th, 1899 By his plaint he complained that the defendants vendors, in violation of the terms of the *wajib ul arz* and despite of the desire and readiness of the plaintiff "to purchase", had sold the property in suit to a stranger He alleged that the consideration mentioned in the deed was fictitious and contrary to facts He adds that he does not desire to pre empt "the arrears of rent and revenue, and those due under decrees," the value of which he puts at Rs 5,000, and alleging that the "market value of the proprietary and mortgagee rights is Rs 10,000,' he prays to be "put in proprietary possession, and as mortgagee of the property sold and specified in two lists, on payment of Rs 10,000, or whatever sum may be determined by the Court "

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Another suit praying for similar relief was instituted by the rival pre emptor, Ganga Prasad, on June 6th, 1899

[425] It is unnecessary to notice any of the written statements put in by the defendants, except that filed by the vendee, Bhagwan Das, who is the appellant here In his written statement he denies that the sale was contrary to the *wajib ul arz* or in despite of the pre emptor's readiness to purchase, he denies that the consideration for the sale had been overstated, he says the property in suit had been formed into a separate *mahal*, and that therefore the plaintiff had no longer any right to sue This last plea refers no doubt to a partition which had effect from July, 1902, which will be noticed later on Next, the appellant pleaded that he "is a co sharer in *patti* Bhup by reason of his purchase of the share of Tika Ram," and that therefore his status was the same as that of the pre-emptor, Sah Mohan Lal This is the plea to which the arguments of the learned advocates for the parties were mainly directed at the hearing of this appeal Finally, after reiterating his assertion that no part of the sale consideration was fictitious, and giving details as to the respective values of the proprietary and mortgagee interests sold and of the arrears, he pleaded that the plaintiff did certain acts which amounted to a refusal to purchase the property at the price asked by the vendors. This last plea, we may here say, was overruled by the Court below, and though the decision was questioned on that point in the memorandum of appeal, no argument respecting it was addressed to us at the hearing The case put forward by the rival pre emptor appellant, Ganga Ram, in the other suit is much the same The two appeals were argued together

Another and all important fact in the case is, that by two conveyances, each dated May 4th, 1899 (which date, it is to be noted, is anterior to the institution both of this suit and of Ganga Prasad's suit) the appellant Bhagwan Das acquired by purchase from co-sharers, named in one case Tota Ram and Dalchand, and in the other case Tika Ram, absolute possession as owner of certain areas of land in *patti* Sukhdeo Silra and Sukhdeo Nagla Nib of *thok* Karu and in *patti* Bhup and *patti* Sajan and another *patti* of *thok* Karma in mauza Semra And it is admitted on all hands that though, when he made these purchases, the appellant was a "stranger," no attempt was made by [426] anyone to pre empt the sales It therefore follows that from May 4th, 1899, the appellant was a co sharer in *pattis* Bhup and Sajan of *thok* Karma, and in *pattis* Sukhdeo Silra and Sukhdeo Nagla Nib of *thok* Karu, and further that he acquired that status without opposition from any co-sharer (in-

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cluding the plaintiffs in these two suits) entitled to pre-empt his purchase.

The *wajib-ul-arz* of Semra, which governs both parties to this litigation, gives successive pre-emptive rights in the case of a share-holder being willing to sell his share in the mauza—(1) to a relative, being a co-sharer descended from a common ancestor; (2) to co-sharers in the *patti* in which the share about to be sold is situate; (3) to co-sharers in another *patti* in the same *thok*; (4) to the co-sharers in another *thok*; and (5) to a stranger on refusal by all the persons successively entitled to take.

Now, it will be noticed that this *wajib-ul-arz* does not provide that if any co-sharer mortgage his share even to a stranger, any other co-sharer shall have a right to take over that mortgage on repaying the mortgage-money to the mortgagee. It does not provide for any right of pre-mortgage. But it was contended that when the vendors here disposed of their interests in the village to the appellant, they, in the words of the *wajib-ul-arz*, sold their "*haqqiyat*"; that that "*haqqiyat*" included the shares they held under mortgage; that as to those shares also they were in the position of share-holders, and that therefore a right of pre-emption (or rather of pre-mortgage) accrued to the plaintiffs in respect of those mortgaged shares. We are unable to concur in the contention that the shares belonging to other co-sharers, which these vendors held in mortgage, constituted any portion of the vendor's "*haqqiyat*" in the mauza or that *in respect of those mortgaged shares* the vendors could be considered to be co-sharers. This question was decided by a Bench of three Judges of this Court (of which one of us was a member) in the case of *Nand Lal* v. *Bansi* (1). It was therein held that a mortgagee in possession as such of the share of a co-sharer does not *thereby* become a co-sharer, and that an assignment by him of his mortgage does not give rise **[427]** to any pre-emptive right. It makes no difference in principle that in the case first cited the mortgagee was "a stranger," and that in the present case he was a co-sharer, the contention here being that by virtue of their holding certain shares in mortgage the vendors became co-sharers *in respect of those shares*. And, further, we would point out that what the vendors have done in this case is nothing more than an assignment of a debt secured on land. They have not mortgaged any land to the appellant; they have simply sold to him their interest in a debt due to them by their mortgagors as security for the repayment of which the latter had (years ago) mortgaged certain land. It is to us perfectly clear that a conveyance of the vendor's "*haqqiyat*" only in the village would not have passed their interest in this debt secured by mortgages on other shares unless it had been mentioned in the conveyance as intended to pass. The mortgage debt then was not a part of the "*haqqiyat*," and it is the transfer of the latter which gives rise to a right of pre-emption. We have no hesitation in holding that an assignment of a debt is not liable to be pre-empted under the terms of the *wajib-ul-arz*. This matter does not appear to have been raised in the arguments before the learned Subordinate Judge. At any rate, he does not refer to it in his judgment. It is, however, distinctly raised in the fourth paragraph of the memorandum of appeal, and as the appeal was filed in December, 1900, the respondents cannot complain of having been taken by surprise.

We must, for the above reasons, hold that the Court was wrong in giving respondents a pre-emption decree in respect of these mortgaged

(1) (1897) I. L. R. 20 All. 19.

shares, and that, as far as they are concerned, the appeal must be allowed and the suit dismissed 1903 MARCH 19

Next, we have to consider whether the plaintiffs respondents had at the date of suit any right of pre emption against the appellant in respect of the property as to which the vendors made an absolute sale to him on September 13th, 1898 APPELLATE CIVIL

On this matter the learned advocate for the appellant contended that by reason of a perfect partition, by virtue of which all the shares in dispute in this part of the case were allotted to the appellant, no suit for pre emption can be maintained against the appellant The learned advocate relied on the ruling in [428] *Ram Gopal* v *Piari Lal* (1) In that case it was held that where a plaintiff in a suit for pre emption based on the provisions of the *wajib ul arz* during the pendency of the suit lost by partition the pre emptive right which under those provisions he had possessed when he instituted the suit, his claim could not be maintained The learned Chief Justice is reported to have said (at p 445 of the report) —" There is nothing, therefore, which compels us to look exclusively to the date of the institution of the suit, and to disregard all that had since happened, and confirm the decree for pre emption, although at the date of the decree the plaintiff was not entitled to pre emption according to the terms of the *wajib ul arz* ' Now, in that case the plaintiff had lost his pre emptive right *before decree*, and consequently the learned advocate admitted that he was (in order to make that case applicable to this appeal) compelled to ask us to extend considerably the principle deducible from it It will be useful to set forth certain dates as to this partition The application for perfect partition was made, we are told, by the respondent pre emptor, Sah Mohan Lal, some time before the sale of September 13th, 1898 The *tarz taqsim* or partition proceeding was drawn up on June 24th, 1899, namely, subsequent to the institution of this and of the connected suit and subsequent to the date (May 4th, 1899), on which the appellant became by purchase a share holder in the village After various proceedings in the Revenue Court the partition was confirmed by the Collector some time in 1901, and took effect from July 1st, 1902 It was from the latter date only that the pre emptive rights of the parties to the partition lapsed by the creation of new *mahals* This and the connected suit were decided by the Subordinate Judge on September 19th, 1900 Therefore whatever pre emptive rights the plaintiffs pre emptors may have possessed at the date of the institution of this and of the connected suit, they continued to possess unimpaired at the date of the decree The learned advocate admits that if the two appeals had come on for hearing in this Court before July, 1902, he could not have used this argument, but contends that inasmuch as the position of the parties was changed on July 1st, 1902, that [429] alteration had the effect of nullifying the decrees passed in September, 1900 His argument went the length of contending that the decrees, which *ex hypothesi* were good decrees when passed, were vitiated by an event which happened nearly two years afterwards This he contended was a position which was logically deducible from the principle laid down in the case cited above, though he admits that his contention would require us considerably to extend the rule therein stated Now all we consider it necessary to say is, that in that case the alteration in the position of the plaintiff took place before decree,

25 A 421= 23 A W N. 83.

(1) (1899) I L. R. 21 All. 441.

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and not as here long afterwards, and we certainly are not inclined to extend the rule in the way desired by the learned advocate. We overrule this plea.

Next, it was contended that when the plaintiffs in this and in the connected suit instituted their suits they had no pre-emptive rights as against the appellant. Now, there can be no possible doubt that on the execution of the sale-deed of September 13th, 1898 the plaintiffs under the terms of the *wajib-ul-arz* did acquire a right to pre-empt the sale of the shares in dispute in this part of the case, inasmuch as they were co-sharers, and the purchaser the appellant did not come under any of the four categories of pre-emptors mentioned above. He was a stranger to the village, and on purchase of a share in it he was liable to be pre-empted by anyone who came within any of these four categories, and who had not refused to purchase. But for the appellant it is contended that before the plaintiff's suits he, on May 4th, 1899, had become by purchase (without opposition from the respondents) a co-sharer, not merely in the village, but also in the *thoks*, and some of the *pattis* in which the disputed shares are situate. Such undeniably was the case. He contends that as a co-sharer he is on the same level as the plaintiffs respondents, and being such cannot be pre-empted. As tersely put by the learned advocate for the appellant, the question is whether one co-sharer is to be allowed to retain lands he has purchased or is he to be compelled to sell them to another co-sharer? On the other hand, the learned advocate for the respondent takes his stand on the undoubted accrual to his clients of a cause of action immediately on the execution of the sale-deed of September 18th, [430] 1898, and he contends that nothing which may have happened between that date and the date of the institution of their suits can have the effect of invalidating or impairing that cause of action. The appellant's purchase on May 4th, 1899, cannot, he urges, have retrospective effect, so as to annul the respondent's cause of action.

As bearing on this question the case of *Serh Mal* v. *Hukam Singh* (1) was referred to on both sides. It has, in our opinion, an important bearing on this case. In that case a co-sharer had, contrary to the provisions of the *waib-ul-arz*, sold a share in the village to a stranger. Another co-sharer instituted a suit for pre-emption. But before the plaint in that suit was filed the stranger conveyed the share to a third co-sharer, who possessed pre-emptive rights under the *wajib-ul-arz*. In that case the learned Chief Justice, who delivered the judgment of the Court, is reported to have said :—"On a sale to a stranger each shareholder of equal right has at the moment such a sale is effected an equal right to pre-empt the whole property sold." And again :—"Until suit has been brought by a co-sharer for pre-emption of the property sold to a stranger, another co-sharer can purchase from the stranger the share which had been sold to the stranger;" and it was held that the co-sharer who had purchased from the stranger *before suit* was entitled to retain possession of the share. The facts of this case certainly are not on all fours with those of the appeal now before us. But we think the principle is applicable. That principle seems to us to be that where a share has in violation of the provisions of the *wajib-ul-arz* been sold to a stranger, if before the institution of a suit for pre-emption that share has found its way into the hands of a co-sharer whose rights of pre-emption

(1) (1897) I. L. R. 20 All. 100.

as such are equal to those of the plaintiffs in a suit for pre emption subsequently instituted, then the pre emptor's suit will fail The reason of the rule seems to be that, as the object and cause of the institution of pre emptive rights is the desire to keep strangers excluded from the co-parcenary body, that reason and object cannot justify a pre emptive suit by one co sharer against another, to compel the latter to surrender a share over which his pre emptive rights are on the [431] same level as those of the plaintiff So here, we do not think that it makes any difference in the application of the principle that when the appellant acquired the shares in dispute on September 13th, 1898, he was *not then a co-sharer* *He had acquired that status before the date* of the institution of either of these two suits He was on that date a co sharer in the village, and as such entitled to all the rights (including that of pre emption) appertaining to that status If the shares in dispute here had been sold not to appellant but to some third party, a stranger to the village proprietary body, the appellant in right of his purchases of May 4th 1899, would have been entitled to pre empt them For the above reasons we hold that where the plaintiffs respondents and the appellants are on the same level in respect of any of the lands comprised in the disputed property, the plaintiffs are not entitled to pre emption in respect of these lands

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[The remainder of the judgment dealing merely with questions of fact is not reported —ED]

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25 A 431 (=23 A W. N. 92)

APPELLATE CIVIL

Before Mr Justice Blair and Mr Justice Banerji

MANOHAR DAS (*Defendant*) v RAM AUTAR PANDE (*Plaintiff*)*
[19th March, 1903]

Civil Procedure Code, section 492—Act No IX of 1872 (Indian Contract Act), section 23 —Temporary injunction—Civil Procedure Code, sections 276, 295—Application for rateable share in proceeds of sale not equivalent to an attachment

injunction under sec-
her under section 23 of
and London Bank, Ltd.,

he Code of Civil Pro
property attached by
nt to an attachment,
and will be no bar to the judgment-debtor privately selling the property attached for the benefit of the attaching creditor *Ganga Din* v *Khushali* (2) and *Durga Churn Rai Chowdhry* v *Monmohini Dasi* (3) followed *Sorabji Edulji Warden* v *Gobind Ramji* (4) dissented from

[Ref 47 I C 778=35 M L J 96 (alienation during pendency of temporary injunction), Ref 28 Mad 380=15 M L J 202, 148 P W R. 1908=81 P R 1908, 7 M L J 143=5 Ind. Cas 97=33 Mad. 429=20 M L J 330, 25 I C 180 62 I C 167 65 I C 220]

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* Second Appeal No 264 of 1901, from a decree of Nawab Muhammad Ishaq Khan, District Judge of Mirzapur, dated the 15th of December, 1900, confirming a decree of Babu Jatendro Mohan Bose, Munsif of Mirzapur, dated the 19th of July, 1900

(1) (1887) I L R 9 All 497
(2) (1885) I L R 7 All 702
(3) (1888) I L R 15 Cal 771.
(4) (1891) I L R 16 Bom. 91

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THE facts of this case are as follows:—One Manohar Das, on the 12th of June 1898, obtained a simple money decree [432] against Mahadeo Singh. During the pendency of the suit in which that decree was passed, Manohar Das obtained from the Court an *ad interim* injunction under clause (*b*) of section 492 of the Code of Civil Procedure forbidding Mahadeo Singh to alienate his property. This injunction was issued on the 20th of May 1898. It appears that one Anant Gir had also obtained a money decree against Mahadeo Singh, and in execution thereof had caused certain property, including the property now in dispute, to be attached. Manohar Das took out execution of his decree and prayed that under section 295 of the Code of Civil Procedure he might be given a rateable share of the assets which might be realized in execution of Anant Gir's decree. Whilst the attachment obtained by Anant Gir was subsisting, the judgment-debtor sold the property in suit to one Ram Autar Pande on the 20th of June, 1899. The purchaser paid to Anant Gir the amount of the decree, and Anant Gir having certified the payment to the Court, satisfaction of the decree was duly recorded and the execution case was struck off the file. Thereupon Manohar Das caused the property purchased by Ram Autar Pande to be attached in execution of his own decree. Ram Autar preferred a claim under section 278 of the Code of Civil Procedure, but it was dismissed. He accordingly filed a suit under section 283 of the Code. The Court of first instance (Munsif of Mirzapur) gave the plaintiff a decree declaring the property in suit not liable to attachment and sale in execution of the defendant's decree, and the lower appellate Court (District Judge of Mirzapur) dismissed the defendant's appeal therefrom. The defendant appealed to the High Court.

Munshi *Ratan Chand*, for the appellant.

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the respondent.

BLAIR and BANERJI, JJ.—This appeal arises out of a suit brought by the plaintiff respondent under the following circumstances. The appellant Manohar Das obtained a simple money decree against one Mahadeo Singh, on the 12th of June, 1898. During the pendency of the suit in which that decree was passed, Manohar Das obtained from the Court an *ad interim* [433] injunction under clause (*b*) of section 492 of the Code of Civil Procedure, forbidding Mahadeo Singh to alienate his property. This injunction was issued on the 20th of May, 1898. It appears that one Anant Gir had also obtained a money decree against Mahadeo Singh, and in execution thereof had caused certain property including the property now in dispute, to be attached. Manohar Das took out execution of his decree, and prayed that he should be given, under section 295 of the Code of Civil Procedure, a rateable share of the assets which might be realized in execution of Anant Gir's decree. Whilst the attachment obtained by Anant Gir was subsisting, Mahadeo Singh sold the property in suit to the plaintiff on the 20th of June, 1899. The plaintiff paid to Anant Gir the amount of the decree, and Anant Gir having certified the payment to the Court, satisfaction of the decree was duly recorded and the execution case was struck off the file. Thereupon Manohar Das caused the property purchased by the plaintiff to be attached in execution of his own decree. The plaintiff preferred a claim under section 278 of the Code of Civil Procedure, but it was dismissed. He has consequently brought the present suit under section 283 of the Code of Civil Procedure. He has obtained a decree from both the lower Courts.

The first contention raised on behalf of the appellant Manohar Das is, that the sale in favour of the plaintiff is void, inasmuch as it was effected after the issue of the *ad interim* injunction to which we have referred above This question is concluded by the ruling of this Court in *The Delhi and London Bank Limited* v *Ram Narain* (1) In that case a plea similar to the one before us, was raised, and on precisely the same grounds Reference was also made to the provisions of section 23 of the Contract Act This Court held that the effect of a temporary injunction granted under section 492 (*b*) was not to make a subsequent alienation of the property illegal and void within the meaning of section 23 of the Contract Act We agree with this ruling and with the reasons on which it is based This disposes of the first contention urged on behalf of the appellant

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[434] It is next urged that the sale in favour of the plaintiff was void as against the appellant by reason of the provisions of section 276 of the Code of Civil Procedure This point also is concluded by authority We may refer to the case of *Ganga Din* v *Khushali* (2), which was followed by the Calcutta High Court in the case of *Durga Churn Rai Chowdhry* v *Monmohini Dasi* (3) The learned vakil for the appellant has relied upon the ruling of the Bombay High Court in *Sorabji Edulji Warden* v *Gobind Ramji* (4) in which a contrary view was held, but we prefer to follow the ruling of this Court, which, in our opinion correctly lays down the law on the subject The words 'shall be void as against all claims enforceable under the attachment in section 276 of the Code of Civil Procedure cannot, in our judgment, include the claim of a person who has not caused the property of the judgment debtor to be attached, but has simply asked for a rateable share of the assets which might be realized by the sale of the property of the judgment debtor Those words have been, in our judgment, rightly interpreted to mean the claim of the person who has obtained an attachment They were evidently added to the section in order to remove the ambiguity which existed in the corresponding section of Act No VIII of 1859 The claim of a person who applies for a rateable distribution of the assets is, in our opinion, not a claim which is enforceable under the attachment placed upon the property at the instance of another judgment creditor It is manifest that if the claim of the attaching creditor be discharged, and his decree be recorded as satisfied, the attachment obtained by him must necessarily come to an end In that case there would be no sale in pursuance of the attachment, and no assets would be realized which might be rateably distributed Therefore the claim of a person who has applied for a rateable share in assets which might or might not be realized cannot be regarded as a claim enforceable under the attachment In this view, as Anant Gir s decree was satisfied by the plaintiff, the sale in favour of the plaintiff was not void as against the present appellant

[435] The appellant next contends that the plaint in the case is defective, inasmuch as it was not signed by the plaintiff *himself* This contention overlooks the provisions of the proviso to section 51 of the Code of Civil Procedure, under which a plaint may be signed by a person other than the plaintiff who may have been duly authorized in that behalf, if the plaintiff is by reason of absence or for other good cause

(1) (188?) I L R ? All 1?7
(2) (188?) I L R 7 All 702
(3) (1888) I L R 1? Cal ?71
(4) (1891) I L R 16 Bom ?1

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unable to sign the plaint. In the present case both the Courts below have found that by reason of absence the plaintiff himself was unable to sign the plaint. It was consequently signed with the permission of the Court by a person duly authorized by the plaintiff in that behalf.

A further plea has been raised on behalf of the appellant to the effect that the sale in favour of the plaintiff is a fraudulent transaction under section 53 of the Transfer of Property Act. As the Court below has found that the plaintiff is a transferee in good faith, and for consideration, and that is a finding of fact which cannot be impugned in second appeal, section 53 has no application.

The last contention of the appellant, that full consideration for the sale was not paid by the plaintiff, is disposed of by the finding of the lower Court that non-payment of consideration has not been proved and that it has not been established that the consideration was inadequate.

The appeal therefore fails, and is dismissed with costs.

Appeal dismissed.

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25 A. 435 (=23 A. W. N. 93.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

JHAMMAN KUNWAR (*Plaintiff*) v. TILOKI (*Defendant*).*
[31st March, 1903].

Act No. XV of 1877 (*Indian Limitation Act*), *Schedule II, Article* 111—*Limitation—Suit by a Hindu entitled to possession of immoveable property on the death of a Hindu female.*

One Hazari Lal died in 1856 possessed of certain immoveable property and leaving a son, Jawahir Lal and a widow, Chunni surviving him. Jawahir Lal died in 1861, leaving a widow, Tarsa and a daughter, Jhamman Kunwar. After Jawahir Lal's death the widows, Chunni and Tarsa, divided the property between them, and Chunni's share, after passing through the hands of Chandan, [436] the daughter of Hazari Lal, came into the possession of Nand Lal and Duli Chand, the two sons of Chandan. Nand Lal and Duli Chand in 1876 sold their interest to one Jaidip Rai, who in turn made a gift thereof to his wife, Tiloki. Tarsa died in 1900 and in 1901 Jhamman Kunwar filed a suit for the recovery of the immoveable property of Hazari Lal.

Held that the suit was governed as to limitation by article 141 of the second schedule to the Indian Limitation Act, 1877, and was not barred by limitation. *Runchordas Vandravandas* v. *Parvatibai* (1), *Ram Kali* v. *Kedar Nath* (2) and *Amrit Dhar* v. *Bindesri Prasad* (3) followed. *Mussummat Lachhan Kunwar* v. *Anant Singh* (4) distinguished. *Hanuman Prasad Singh* v. *Bhagauti Prasad* (5) and *Tika Ram* v. *Shama Charan* (6), referred to.

[Fol. 1905 A. W. N. 68=27 All. 494; 18 I. C. 948; Dist. 18 I. C. 811; 11 A. L. J. 179; Ref. 6 C. L. J. 490; 90 P. R. 1906=91 P. L. R. 1907; 3 N. L. R. 35; 7 A. L. J. 337; 32 All. 392; 18 M. L. T. 226=30 I. C. 991= 2 L. W. 751.]

IN the suit out of which this appeal arose the plaintiff claimed possession of immoveable property which had in his lifetime belonged to one Hazari Lal. Hazari Lal died on the 7th of October 1856, leaving a widow, Musammat Chunni and a son, Jawahir Lal, who died on the 26th of June 1861, leaving a daughter, Musammat Jhamman Kunwar,

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* First Appeal No. 175 of 1901 from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 8th of July 1901.

(1) (1899) I. L. R. 23 Bom 725.
(2) (1892) I. L. R. 14 All. 156.
(3) (1901) I. L. R. 23 All. 448.
(4) (1894) L. R. 22 I. A. 25.
(5) (1897) I. L. R. 19 All. 357.
(6) (1897) I. L. R. 20 All. 42.

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the plaintiff in the suit Jawahir Lal also left a widow, Musammat Tarsa, who died without issue in July, 1900 Upon the death of Jawahir Lal the property in dispute seems to have come into the possession of the widows, Musammat Chunni and Musammat Tarsa, that is to say, their names were recorded in the record of rights as the owners of it Upon the death of Jawahir Lal in 1861 an arrangement was entered into between Musammat Tarsa and Musammat Chunni, whereby half the property was allowed to remain in the possession of Musammat Chunni, the other half being retained by Musammat Tarsa The share which was so enjoyed by Musammat Chunni eventually came into the hands of her grandsons Nand Lal and Duli Chand, the sons of Musammat Chandan, a daughter of Hazari Lal Nand Lal and Duli Chand, in 1876, sold their interest to one Jaidip Ram, and he in turn made a gift of it to his wife, the defendant, Musammat Tiloki The plaintiff, Musammat Jhamman Kunwar, claimed the property as reversionary heir of Hazari Lal and as having become entitled to it on the death of Musammat Tarsa The Court of first instance (Subordinate Judge of Bareilly) dismissed the plaintiff's suit, holding [437] that it was barred by limitation The plaintiff accordingly appealed to the High Court

Pandit *Sundar Lal* and Babu *Sital Prasad Ghosh*, for the appellant

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru* (for whom Munshi *Gulzari Lal*), for the respondent

STANLEY, C J —The question for our determination in this appeal appears to us to be concluded by the decision of a Full Bench of this Court in the case of *Ram Kali* v *Kedar Nath* (1) The property in dispute formerly belonged to one Hazari Lal, who died on the 7th of October, 1856, leaving a widow, Musammat Chunni, and a son, Jawahir Lal, who died on the 26th of June, 1861, leaving a daughter, Musammat Jhamman Kunwar, who is the plaintiff in the present suit Jawahir Lal left a widow, Musammat Tarsa, who died without issue in the month of July, 1900 It appears that on the death of Jawahir Lal the property in dispute, which belonged to Hazari Lal, came into the possession of the widows, Musammat Chunni and Musammat Tarsa, that is, their names were recorded in the record of rights as owners of it Upon the death of Jawahir Lal in 1861 an arrangement was entered into between Musammat Tarsa and Musammat Chuni, whereby half of the property was allowed to remain in the possession of Musammat Chunni, the other half being retained by Musammat Tarsa The share which was so enjoyed by Musammat Chunni eventually came into the hands of her grandsons, Nand Lal and Duli Chand, the sons of Musammat Chandan, a daughter of Hazari Lal Nand Lal and Duli Chand in 1876 sold their interest to one Jaidip Ram, and he in turn made a gift of it to his wife, the defendant Musammat Tiloki The plaintiff, Musammat Jhamman Kunwar, claims the property which belonged to Hazari Lal as reversionary heir of Hazari Lal, and as having become entitled to it on the death of Musammat Tarsa

It appears to us, as we have said, that the question is concluded by the decision of the Full Bench of this Court in the case of *Ram Kali* v *Kedar Nath* (1) In that case the daughter of a separated Hindu, who was entitled to succeed [438] to her father's immoveable property upon his widow's death, instituted a suit afer the widow's death for posses

(1) (1892) I L R 14 All 156

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sion of the property against certain persons, who, upon the death of the father, had obtained possession of the property, and held it adversely to the widow. It was held by the Full Bench that article 141 of the second schedule to the Limitation Act was applicable, and that limitation ran from the date of the widow's death. The article to which we have referred fixes as the period from which limitation runs against a Hindu or Muhammadan entitled to possession on the death of a Hindu or Muhammadan female, the death of the female. It runs as follows :—"Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the the death of a Hindu or Muhammadan female.—When the female dies." The decision of the Full Bench in this case, it was held in a subsequent case, was impliedly overruled by their Lordships of the Privy Council in the case of *Lachhan Kunwar* v. *Anant Singh* (1). This was so held by a Bench of this High Court in the case of *Tika Ram* v. *Shama Charan* (2). The Court there accepted the view which was expressed by one of the members of this Bench in the earlier case of *Hanuman Prasad Singh* v. *Bhagauti Prasad* (3). In the case of *Lachhan Kunwar* v. *Anant Singh* (1), a Hindu widow took possession of her husband's (Mangal Singh's) estate during the lifetime of his son, or of his son's widow, asserting a preferential title to the property, and retained adverse possession for over twelve years. A suit was brought by the son's widow, and the reversionary heirs, both of Mangal Singh and of the son, to recover possession of the property. It was held by their Lordships that since the widow took possession claiming absolute title, after the lapse of the statutory period of twelve years a suit by the reversionary heirs of the husband was barred. This ruling was supposed to have impliedly overruled the earlier decision of the Full Bench of this Court to which we have referred, but this does not on close examination appear to be the case. The question came before a Bench of this Court in the case of *Amrit Dhar* v. *Bindesri Prasad* (4), in which it was **[439]** pointed out that the decision in the Privy Council case of *Lachhan Kunwar* v. *Anant Singh*, (1) did not overrule the decision of the Full Bench of this Court, and that this is so, appears to us clear from a later decision of the Privy Council in the case of *Runchordas Vandravandas* v. *Parvatibai* (5). In that case it was held by their Lordships that article 141 was the article applicable to a plaintiff who claimed the immoveable property of a Hindu on the death of his surviving widow, the plaintiff's right being derived, not from or through the widows, but through their husband on the death of the surviving widow, and that a suit could be brought by such reversioner for possession of immoveable property within twelve years from the date of the death of the surviving widow, although she may have been out of possession for more than twelve years. The case of *Lachhan Kunwar* v. *Anant Singh* (1) was cited to their Lordships, but no reference is made to it in the judgment, and from the fact that no reference is made, it may be inferred that their Lordships did not consider that the decision they were then pronouncing was inconsistent with their decision in it. For these reasons we are of opinion that the article of limitation which governs the present case is article 141, and that therefore the plaintiff is not precluded by limitation from maintaining her claim. The result is that the appeal

(1) (1894) L. R. 22 I. A. 25.
(2) (1897) I. L. R. 20 All. 42.
(3) (1897) I. L. R. 19 All. 357.
(4) (1901) I. L. R. 23 All. 448.
(5) (1899) I. L. R. 23 Bom. 725.

must be allowed As no question now remains to be disposed of, the plaintiff s claim is allowed in full with costs in all Courts

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BURKITT, J —To the judgment which has just been delivered by the learned Chief Justice on behalf of this Bench, I desire to add a few words with reference to the cases of *Ram Kali* v *Kedar Nath* (1) and *Hanuman Prasad Singh* v *Bhagauti Prasad* (2) In my judgment in the latter of those two cases I expressed the opinion that it was not easy to reconcile the decision in *Ram Kali* v *Kedar Nath* (1) with that of their Lordships of the Privy Council in *Lachhan Kunwar* v *Anant Singh* (3), and that probably the decision in *Ram Kali* v *Kedar Nath* (1) might have to be reconsidered [440] During the course of the argument of this appeal I have had an opportunity of considering my judgment in *Hanuman Prasad Singh's* case, and have come to the conclusion that the judgment of their Lordships of the Privy Council in *Lachhan Kunwar s* case does not overrule the decision of the Full Bench of this Court in *Ram Kali* v *Kedar Nath* (1) A different rule of limitation was, I find, applied in each case The facts of *Lachhan Kunwar s* case are set out in the judgment of this Court in *Amritdhar* v *Bindesri Prasad* (4) In one not material matter there is a slight inaccuracy In *Lachhan Kunwar s* case the claimants (appellants) other than Lachhan Kunwar, claimed both as reversionary heirs of Pahlad Singh and as reversionary heirs of his father, Mangal Singh, and contended that the succession opened to them on the death of the father's widow Jit Kunwar, who, according to them, had held the limited estate of a Hindu widow It was held that Jit Kunwar being a person who by law had not a scrap of title to the possession of the property had by 25 years adverse possession acquired an absolute title barring all reversioners When, therefore, persons claiming to be her husband s reversioner sued after her death to eject her transferees, it was held that this suit was barred because she had held adversely to the true heirs, and had not merely held the limited estate of a Hindu widow As those persons claimed as reversionary heirs of her husband, Mangal Singh, alleging that their right to succeed had accrued on the death of his widow, *prima facie* the rule of limitation applicable to their case was article No 141 of the second schedule of the Limitation Act of 1877 But on the finding as to Jit Kunwar s usurpation and adverse possession the article which became applicable was article No 144, as no right of succession opened out to those persons on her death To the case of Pahlad s widow, Lachhan Kunwar and to the claims made by the other plaintiffs as reversioners to Pahlad, article 141 was not applicable, Pahlad Singh s widow being alive *In the Full Bench case of this Court Ram Kali* v *Kedar Nath* (1) the facts were that on the death of a separated Hindu a nephew who had no title usurped possession of his uncle s property to the exclusion of the widow, the true [441] heir He and his son successively remained in adverse possession during the widow s lifetime, a period of more than twelve years On suit by the daughter, on her mother's death, it was held that the rule of limitation applicable was article 141, which was said to be naturally applicable to it The facts of the two cases are so similar that when writing my judgment in *Hanuman Prasad Singh* v *Bhagauti Prasad* (2), I lost sight of the fact that while in Lachhan Kunwar s case article 144

(1) (1892) I L R 14 All 156
(2) (1897) I L R 19 All 357
(3) (1894) L R 22 I A 25
(4) (1901) I L R 23 All 448

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of the Limitation Act was applied, in the Full Bench case of this Court article 141 was held to be applicable. This mistake caused me to consider these two cases to be inconsistent one with the other. In view of the latest ruling of their Lordships of the Privy Council in *Runchordas Vandravandas* v. *Parvatibai* (1), it is unnecessary for me to express any further opinion on this matter.

Appeal decreed.

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25 A. 441 (=23 A. W. N. 100.)

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

SARAN AND OTHERS (*Judgment-debtors*) v. BHAGWAN (*Decree-holder*).* [31st March, 1903.]

Civil Procedure Code, sections 583 and 244—Execution of decree—Application to recover money realized in execution of a decree subsequently set aside.

In execution of a decree obtained *ex parte* the decree-holders realized from their judgment-debtor some Rs. 1,300. The judgment-debtor applied under section 108 of the Code of Civil Procedure to have the decree set aside. His application was at first dismissed, but on appeal the *ex parte* decree was set aside. The suit was re-heard, and was ultimately dismissed. Thereupon the successful defendant applied to the Court which had executed the decree against him for restitution of the money ralized in execution of that decree.

Held that the defendant's proper remedy was that which he had sought, namely, by application in execution and not by separate suit. *Dhan Kunwar* v. *Mahtab Singh* (2) followed.

[Ref. 1906 A. W. N. 171= 28 All. 665=3 A. L. J. 55 (;29 All. 348=1907 A. W. N. 90=4 A. L. J. 188.]

IN this case Gajraj Kalwar and others obtained a decree against one Bhagwan Kalwar *ex parte*. The decree-holders put that decree into execution and realized a sum of Rs. 1,300 from Bhagwan. The judgment debtor applied under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. The first Court rejected the application, but in appeal it was granted. The *ex parte* decree was accordingly set aside [442] and the suit re-heard, and in the result dismissed. Thereupon Bhagwan applied to the Court which had executed the decree against him for restitution of the amount which had been realized from him in execution of that decree. The representatives of the decree-holders, Saran and others, raised various objections, but the Court of first instance (Subordinate Judge of Gorakhpur) dismissed them. An appeal was preferred to the District Judge, but that was also dismissed. The objectors then came in second appeal to the High Court.

Mr. *Karamat Husain*, for the appellants.

Munshi *Kalindi Prasad*, for the respondent.

BLAIR and BANERJI, JJ.—Mr. *Karamat Husain*, for the appellants, has relied upon a ground of appeal, the substance of which his clients have never tried to avail themselves of in the Court of first instance or in the lower appellate Court. The predecessors in title of the appellants

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* Second Appeal No 1085 of 1902, from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 5th of September 1902, confirming an order of Maulvi Muhammad Shafi Khan, Subordinate Judge of Gorakhpur, dated the 14th of July 1902.

(1) (1899) I. L. R. 23 Bom. 725. (2) (1899) I. L. R. 22 All. 79.

obtained an *ex parte* decree against the respondent, Bhagwan Kalwar They put that decree into execution and realized Rs 1,300 Bhagwan applied under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside The first Court rejected the application, but the Court of appeal granted it The *ex parte* decree was accordingly set aside The case was heard, and in the result dismissed Thereupon Bhagwan Kalwar applied to the Court which had executed the *ex parte* decree for restitution of the money realized in execution of that decree Mr. *Karamat Husain*, for the appellants, argues that he could not succeed by application to the execution Court, but that the respondent here, the defendant in the original suit, can obtain restitution by institution of a new suit This matter has already been before a Bench of this Court, which held, in the case of *Dhan Kunwar* v. *Mahtab Singh* (1), that it was competent to a judgment debtor, by application under section 244 of the Code of Civil Procedure, to recover a surplus improperly realized by the decree holder We see no reason to dissent from that ruling The principle involved in that case is indistinguishable from the principle involved in this case

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The appeal is dismissed with costs

Appeal dismissed.

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25 A 443 (=23 A W N. 99)

[443] APPELLATE CIVIL

Before Mr. Justice Blair and Mr Justice Banerji

TAMESHAR PRASAD AND ANOTHER (*Judgment debtors*) v THAKUR PRASAD AND OTHERS (*Purchasers of decree*) * [31st March, 1903.]

Execution of decree—Civil Procedure Code, sections 232 and 295—Sale of decree and transfer for execution to another Court—Application by transferees for rateable distribution of assets—Court to which such application should be made

A decree was transferred for execution from Mirzapur to Gorakhpur, the decree holder also sold his [illegible] upon made an application for [illegible] for a rateable share of the a[illegible] [illegible]dgment-debtor Upon this [illegible]e judgment-debtors and the [illegible] put in an appearance, and [illegible] is to be allowed a rateable share of the assets in Bindesri Prasad's case, let this case be put with that case"

[illegible]

Das (2) and *Amar Chundra Banerjee* v *Guru Prosunno Mukerjee* (3) referred to

[Ref 1 C L J. 315]

IN this case one Maharaj Raja Ram Misir obtained from the Court of the Subordinate Judge of Mirzapur a decree against Tameshar Prasad

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* Second Appeal No 717 of 1901, from an order of W Tudball, Esq, District Judge of Gorakhpur, dated the 27th of June 1901, confirming an order of Munshi Anant Prasad, Subordinate Judge of Gorakhpur, dated the 9th of March 1901

(1) (1899) I L. R 22 All 79

(2) (1894) I L. R 16 All 483

(3) (1900) I L. R 27 Cal. 488.

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and others, residents of Gorakhpur. The decree having been transferred for execution to Gorakhpur, the decree-holder sold it to Thakur Prasad and others, who were residents of that place. The transferees thereupon applied for execution to the Court of the Subordinate Judge of Gorakhpur, and prayed for a rateable share of the assets which might be realized in execution of a decree held by one Bindesri Prasad against the same judgment-debtors. Upon that application the following order was made :—"The judgment-debtors and the transferors both received notice, but none of them put in an appearance, [444] and no objections were filed. As the prayer in this case is to be allowed a rateable share in the assets in Bindesri Prasad's case, let this case be put up with that case." The transferees had made no application to the Court which passed the decree. The names of the transferees having been substituted by the Gorakhpur Court for that of the original decree-holder, they made a further application for execution. To this the judgment-debtors took various objections, which were, however, overruled by the Subordinate Judge. On appeal by the judgment-debtors to the District Judge that Court held that the whole of the proceedings in the first Court were void for want of jurisdiction, and that no appeal lay, and accordingly dismissed the appeal. Against this order the judgment-debtors appealed to the High Court.

Munshi *Jang Bahadur Lal*, for the appellants.

The Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

BLAIR and BANERJI, JJ.—This appeal arises out of an application for execution made by the transferees of a decree. The decree was made by the Sobordinate Judge of Mirzapur. As the property against which execution was sought was in the district of Gorakhpur, the decree was sent to the Gorakhpur Court for execution. The decree-holder transferred his decree to the present respondents. Thereupon the respondents made an application for execution of the decree, and prayed for a rateable share of the assets which might be realized in execution of a decree held by one Bindesri Prasad against the same judgment-debtors. Upon that application an order was made upon the 2nd of April, 1900, couched in the following terms :—" The judgment-debtors and the transferors both received notice, but none of them put in an appearance, and no objections were filed. As the prayer in this case is to be allowed a rateable share of the assets in Bindesri Prasad's case, let this case be put up with that case." No application had been made by the transferees respondents to the Court which made the decree. It is to that Court, and not to the Court executing the decree, that an application could rightly be made and the transferees placed on the record. This is manifest from the terms of section 232, which provides that "a transferee may apply for its [445] execution to the Court which passed it." The Court, therefore, executing the decree had no jurisdiction to pass any orders in execution upon the application of the transferees. It has been objected by the respondents that the order of the 2nd of April 1900, which indeed is an order of adjournment, should be taken to operate as *res judicata*, so as to prevent the judgment-debtors from questioning the right of the transferees to make an application for execution to the Court to which the decree had been transferred for execution. Apart altogether from the question whether the first order, if order it be, was made without jurisdiction, it is manifest to us, upon the terms of that order, that it did not, in express terms or by necessary

implication, adjudicate upon the right of the transferees applicants In our opinion it reserved that question as well as the question of rateable distribution for the hearing of the case Therefore the case on which the respondents rely does not apply

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The learned Judge of the lower appellate Court further held that the Court of first instance having no jurisdiction to entertain the . . . . from the order made by that Court . . . . point the other way The order made . . . . . ee was an order made under section 244 of the Code of Civil Procedure, and as such an appeal did lie, such an order being a decree within the meaning of section 2 of the same Code On this point the cases reported in I L R, 16 All 483, and in I L R. 27 Cal 488 are authorities

The result is that we allow this appeal and dismiss the application made by the respondents with costs in all Courts

Appeal decreed

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25 A. 446 (=23 A. W. N 150)

[446] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt

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DINA NATH AND OTHERS (*Plaintiffs*) v. LACHMI NARAIN AND OTHERS (*Defendants*) * [1st April, 1903]

Mortgage—Act No. IV of 1882 (Transfer of Property Act), section 91—Purchase of part of the mortgaged property by a third party—Suit by mortgagees to recover from such purchaser a rateable proportion of the mortgage debt

. . . . . . a deed . . . . sale of . . . . or sale . . . . . . .end to more than half. In this suit the mortgagees obtained a decree for sale of one-half of the mortgaged property on the 19th of June, 1893 In 1892 one Madan Lal, in execution of a simple money decree against one of the mortgagors, attached the mortgaged shares in two of the villages, the subject of the mortgage, and in 1894 caused half of those shares to be brought to sale and purchased them himself The mortgagees, although they had not made Madan Lal a party to their suit for sale, sought to execute the decree which they had obtained against the shares purchased by Madan Lal Ultimately Madan Lal obtained a decree, declaring that the property purchased by him was not liable in execution of the decree held by the mortgagees on their mortgage, ... villages, ... stranger . . . . meanwhi' . . . . by the sale of that part of the mortgaged property which had been brought to sale in execution of their decree, they asked for payment of the balance due to them or rather of such portion thereof as was thought to be commensurate with the value of the shares purchased by Madan Lal, and failing payment, for sale of those shares

Held, that the suit was not . . . . (whatever might have been . . . . redeem the whole property . . . . impleaded in the mortgagees' original suit for sale) were not bound in this suit to give Madan Lal, or his representatives, an opportunity to redeem the whole property The plaintiffs, on the other hand, were not entitled, to the detriment of Madan Lal, or his representatives, to set up the plea that

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* First Appeal No 15 of 1901 from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 22nd of November 1900

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their mortgage was only valid as to a moiety of the property included in it, and thus to saddle the shares purchased by Madan Lal with a double portion of the mortgage debt; but the defendants were entitled to have an account taken of the respective values of the whole of the four parcels hypothecated under the bond of March, 1883, and could redeem their own two parcels upon [447] paying that portion of the mortgage debt which might be found to be proportionate to the value of their parcels. *Dip Narain Singh* v. *Hira Singh* (1) and *Delhi and London Bank* v. *Bhikari Das* (2) referred to.

[Ref: 26 All. 72; 20 A. L. J. 583.]

THE facts of this case are as follows:—

One Bhup Singh died possessed of certain immoveable property and leaving a widow Musammat Sheobaran Kunwar and two sons, Baldeo Singh and Hira Singh, him surviving. Out of the property left by Bhup Singh Sheobaran Kunwar and Baldeo Singh by a deed of the 31st of March 1883, mortgaged to Dina Nath and Mangni Ram a 10 biswa share in each of the villages Bamrauli, Dhakia and Ghanshampur, and a 3 biswa 6½ biswansi share in the village Tilsanda. To this mortgage Hira Singh, the second son of Bhup Singh, was not a party.

On the 5th of May, 1890, one Madan Lal obtained a money decree against Baldeo Singh, and in August, 1892, he attached, with other property, 10 biswas of each of the villages Bamrauli and Dhakia, and on the 29th of July, 1894, purchased at a sale in execution of his decree a 5 biswa share in each of these villages.

On the 27th of October, 1892, Dina Nath and the representatives of Mangni Ram, who had died meanwhile, instituted a suit for sale on their mortgage of the 31st of March, 1883, but to this suit they did not make Madan Lal a party. In this suit they asked for sale of one-half only of the mortgaged property on the ground that, Hira Singh not having joined in the mortgage, the mortgagors were not entitled to deal with more than one-half. On the 29th of June, 1893, the mortgagees obtained a decree under section 88 of the Transfer of Property Act for the sale of one-half of the mortgaged property in satisfaction of their debt, which then amounted to Rs. 7,624-1-9. The mortgagees next applied for an order absolute for sale under section 89 of the Act, and to that proceeding they made Madan Lal a party, though, as mentioned above, he had not been a party to the suit. Madan Lal filed an objection in respect of the property which he had purchased, and on the 17th of August, 1895, his objection was allowed, but on appeal to the High Court that Court passed an order absolute for sale, and the decree-holders caused one-half of the mortgaged property [448] to be advertised for sale. Madan Lal objected to the sale, but his objection was disallowed, and he subsequently brought a suit for a declaration that the property which he had purchased was not liable to be sold under the decree of the 29th of June, 1893, and a decree was passed in his favour on the 19th of January, 1897. Under the decree of the 29th of June, 1893, Tilsanda was sold, and was purchased by a stranger on the 20th of September, 1898. A 5 biswa share in Ghanshampur was also sold, and was purchased by the plaintiffs for Rs. 1,625.

The suit out of which the present appeal arose was brought by Dina Nath and the representatives of Mangni Ram against the representatives of Madan Lal, who was then dead, for sale of the 5 biswa share in each of the villages Bamrauli and Dhakia which had been purchased by Madan

(1) (1897) I. L. R. 19 All. 527. (2) (1901) I. L. R. 24 All. 185.

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Lal in default of payment of the amount claimed to be due on foot of the plaintiff's mortgage after making certain deductions The plaintiffs alleged that they were entitled under their mortgage to a sum of Rs 17,999 11 0 for principal and compound interest Out of that sum they allowed Rs 1,615 as the proportionate share of the mortgage debt for which the village of Ghanshampur, which was purchased by them was liable, and also Rs 322, the amount which was realized by the sale of Tilsanda As according to the plaintiffs the value of the remaining property did not exceed Rs 1,100, they formally relinquished Rs 5,062 11-0 of their claim and asked for a decree for Rs 11,000, to be recovered, if necessary, by sale of the shares purchased by Madan Lal

The main defences of the principal defendants were that the plaintiffs had knowledge of Madan Lal's attachment when they instituted their suit on the 27th of October, 1892, and as Madan Lal was not made a party to that suit the decree obtained therein was not binding on him, and he was entitled to redeem the whole of the mortgaged property, that the plaintiffs wrongly released from their mortgage a moiety of the mortgaged property, and also did not join the purchaser of Tilsanda as a party to the suit, and that the suit was therefore not maintainable, also that, inasmuch as the plaintiffs had themselves purchased a portion of the mortgaged property, the defendants [449] are only responsible for a rateable share of the mortgage debt proportionate to the value of the shares of the villages of Bamrauli and Dhakia purchased by Madan Lal, and that they have a right to redeem those shares on payment of such rateable share

The Court of first instance (Subordinate Judge of Bareilly) found that the entire property which belonged to Bhup Singh was included in the mortgage, and that Baldeo Singh and Musammat Sheobaran Kunwar mortgaged the property for payment of Government revenue and other expenses connected with the property, and that there was nothing to justify the plaintiffs act in abandoning the security of one half of the mortgaged property, that Nar Singh, the son of Hira Singh, who is dead, would not necessarily have succeeded in evading responsibility for a debt which had been incurred by his uncle and grandmother for the protection of his share in the estate, and that by their conduct the plaintiffs had deprived the defendants, in case they redeem, of the benefit of a moiety of the mortgaged property He further held that the defendants had a right to insist on redemption of the entire mortgaged property, and that the plaintiffs decree of the 19th of June, 1893, was not binding on the defendants, that the latter were not bound to recognize the purchase of Ghanshampur by the plaintiff under that decree, and that Ghanshampur ought to have been included in the property which by their suit the plaintiffs seek to sell He also held that the purchaser of the village Tilsanda had a right to redeem the entire mortgaged property, and was a necessary party to the suit under section 85 of the Transfer of Property Act For these reasons he dismissed the plaintiffs' suit Against this decree the plaintiffs appealed to the High Court

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellants

The Hon'ble Mr. *Conlan* and Mr *A E. Ryves*, for the respondents.

STANLEY, C J —This is an appeal from a decree of the Subordinate Judge of Bareilly dismissing the suit of the plaintiffs, which was brought to realize a portion, of the money secured by a mortgage by sale

a sum of Rs 1,625 The plaintiffs' present suit is as mortgagees for sale of the 5 biswa shares of each of the villages of Bamrauli and Dhakia, which were purchased by Madan Lal, in default of payment by the respondents of the amount claimed to be due on foot of the plaintiffs' mortgage after making certain allowances Madan Lal being dead, his sons are sued as representing him In their plaint the plaintiffs allege that they are entitled under their mortgage to a sum of Rs 17,999 11 0 for principal and compound interest Out of that sum they allow a sum of Rs 1,615, as the proportionate share of the mortgage debt for which the village of Ghanshampur which was purchased by them was liable, and also Rs 322, the amount which was realized by the sale of mauza Tilsanda As the value of the remaining property is said by them not to exceed Rs 11,000, they relinquish a portion of their claim and sue for the recovery of Rs 11,000 only, and this sum they seek to recover, if necessary, by a sale of the shares of the two villages which were purchased by Madan Lal

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[452] The main contention before us on behalf of the appellants was, that the only defence which Madan Lal or his representatives could have to the suit was that they were liable only to pay so much of the mortgage debt as was properly chargeable on the shares of the two villages which Madan Lal had purchased, that they are not entitled to redeem all the mortgaged property, that the rule of law against breaking up the integrity of a mortgage is a rule aiming at the protection of the mortgagee, and does not apply to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property, and that if the suit was defective for want of parties or otherwise the Court ought not to have dismissed the claim without giving the plaintiffs an opportunity of amending the plaint

On the part of the respondents the contention was, that so soon as Madan Lal obtained execution of his money decree by attachment of the mortgagors' interest in two of the mortgaged villages, he became entitled to redeem the entire of the mortgaged property, and that the plaintiffs cannot succeed in a suit for foreclosure against the respondents, inasmuch as they are not in a position to transfer to the respondents the entire of the mortgaged property, including the village of Tilsanda, which had been sold under their decree to a stranger, and further, that the plaintiffs by excluding from their claim in the suit which they instituted against Baldeo Singh and Tara Singh on the 27th of October, 1892, a moiety of the mortgaged property, had rendered themselves incapable of conveying the moiety so excluded, and therefore cannot maintain this suit, that the plaintiffs had notice of the interest of Madan Lal before they brought their suit in 1892, and had wilfully neglected to implead him, as they were bound to do under the provisions of section 85 of the Transfer of Property Act, and must take the consequences of their neglect

Let us see what the position and rights of the parties were at the date of the suit in 1892 Madan Lal having obtained execution by attachment of the mortgagor's interest in the mortgaged property or a part of it, became entitled under the provision of section 91 of the Transfer of Property Act to redeem the mortgaged property, or to institute a suit for the redemption of it The right to which he was so entitled was a right on [453] payment or tender of the mortgage money to require the appellants to deliver their mortgage deed to him and to place him in their

the mortgagor's title created by the mortgage is removed, and satisfactory evidence of its removal is provided The mortgagor, in my opinion, who does not enforce his right under the section, abandons a valuable protection given to him by statute Whether or not, however, an actual retransfer is essential in case of redemption, it seems to me clear in such a case that the plaintiffs appellants ought to be in a position to transfer the entire mortgaged property to the party redeeming, so that such a party may have the full benefit of the mortgage I should have had no hesitation, therefore, in holding that at any time after the attachment by Madan Lal of the mortgagor's interest in part of the mortgage property, but before the sale was had in execution of his decree, he was entitled to redeem the whole of the mortgaged property, and that the mostgagees would have been bound to [455] transfer, or at least be in a position to transfer, all the mortgaged property to him In that case Madan Lal would in his turn have been liable to be redeemed by the mortgagors, or the parties representing them If in fact Madan Lal had taken no further step in execution of his decree than the attachment of the part of the mortgaged property, *Mr Conlan's* argument on behalf of the respondents would, in my opinion, have been unanswerable The matter, however, did not rest there, for Madan Lal sold a 5 biswa share in each of the two villages Bamrauli and Dhakia in execution of his decree, and purchased these shares himself on the 20th of July, 1894 He thus acquired the equity of redemption in these shares, and as regards them stepped into the shoes of the mortgagor, the shares so purchased still remaining subject to the plaintiffs' mortgage What was the effect of this purchase? Madan Lal as between himself and the mortgagees became liable to pay the entire of the mortgage debt, but if he did so, he would have been in a position to claim contribution from the owners of the remaining parts of the mortgaged property, including the mortgagees, who by the purchase of the village of Ghanshampur had become the owners of the equity of redemption in this part of the mortgaged property How under such circumstances are the rights of the parties to be fairly adjusted? Where several properties are mortgaged to secure one debt, each property is liable to contribute rateably to the debt, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage (Transfer of Property Act, section 82) Where several mortgagees (and also the *prior mortgagee*), as in this case, are also part owners of the equity of redemption, the practice in England in a suit by the prior mortgagee for the recovery of his debt appears to be to direct by the judgment that, upon payment to the first mortgagee of all that is due to him by the second, the former shall convey the whole estate subject to his right to redeem the part in which he has acquired the *equity of redemption* The second or other subsequent mortgagee will be redeemed in his turn by the first mortgagee being owner of part of the equity as well as by the owner of the residue of the equity on payment [456] by each of a part of the mortgage debt proportionate to his share and upon redemption the estate is conveyed to them in the proportions in which they were entitled Mr Fisher thinks it doubtful whether the *owner* of the residue of the equity of redemption "ought not to have a conveyance of all, subject to the right of the first mortgagee to redeem his share of the equity again upon payment of a proportion, on the principle that the mortgagee must

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applicable to this country A mortgagee cannot abandon part of his security to the detriment of a subsequent incumbrancer who is called upon to redeem his security The decision in the case of *Sheo Prasad* v *Behari Lal* (1) is not an authority for such a proposition There is no means in the present suit in the absence of the alleged owners of the other moiety, of enquiring into and determining the question of title The mortgagees [458] accepted it, and they cannot be heard now to dispute its validity Consequently in estimating the proportionate share of the mortgage debt for which the respondents are liable, the amount must be ascertained by reference to the value of the entire of the shares with which the mortgage purports to deal It must not be assumed that the sums for which the plaintiffs have given credit in their plaint in respect of the villages of Ghanshampur and Tilsanda accurately represent the value of these shares It may be that having regard to the circum stances under which the property was sold the price fell far short of the actual value This will be a matter for inquiry and determination If the appellants had in the plaint expressed their willingness to bring into account in estimating the respondents liability, the value of the moiety of the property which they had abandoned, and also the value of the villages of Ghanshampur and Tilsanda, their claim in point of form would, I think, have been unobjectionable I do not think that in that case an objection for want of parties could reasonably have been made If they had confined themselves in their claim to a demand from the respondents of a fair proportion of the mortgage debt, the claim does not appear to me to be otherwise objectionable At first I was disposed to think that the suit was not maintainable, but the able argument of Pandit *Moti Lal Nehru* has satisfied me that this is not so and that the decree of the learned Subordinate Judge dismissing the plaintiffs suit cannot be upheld The plaintiffs, although they have erred as to the true basis of their rights, are none the less I think entitled to maintain their claim in part It would be inequitable to hold that an attaching creditor who has sold property which to his knowledge was subject to a mortgage, and purchased it himself, can escape payment of a fair proportion of the debt secured by that mortgage, merely because the mortgagees have abandoned their claim to part of the mortgaged property on the ground that the title to it was defective, and have sold a portion to a stranger who is not impleaded in the suit

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There appears to me to be no substance in the argument advanced on behalf of the respondents based on the suggested hardship of asking the respondents in this suit to pay Rs 11,000, [459] when at the date of the institution of the plaintiff s former suit the respondents might have redeemed the plaintiff s debt by payment of about Rs 7,000 The answer to it is, that there was nothing to prevent the respondents from redeeming the plaintiffs' mortgage at any time

If then the fair proportion payable by the respondents can be ascer tained, as it undoubtedly can be, in this suit, and the value of Ghansham pur and Tilsanda and the moiety of the mortgaged property which was abandoned by the mortgagees is taken into account, as it ought to be, in ascertaining the portion of the mortgage which should be charged upon the property of the respondents, the objection raised as to the frame of the suit becomes merely technical

(1) Weekly Notes 1902, p 203 (=25 All 79)

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The respondents, in fact, in their written statement put forward the plea that they were only liable to pay a proportionate share of the mortgage debt.

For these reasons I would allow the appeal, set aside the decree of the learned Subordinate Judge, and remand the case to him for determination of the rights of the parties in accordance with the view which I have expressed. As the litigation has been largely due to the neglect of the appellants to observe the provisions of section 85 of the Transfer of Property Act, and the appellants have only partially succeeded in their appeal, I think that the parties respectively should abide their own costs of this appeal, and also the costs in the Court below, and that all other costs should abide the event.

BURKITT, J.—This is an appeal in a suit for sale on a hypothecation bond. The Subordinate Judge dismissed the suit holding that it "cannot succeed in the shape in which it has been brought."

The plaintiffs appeal. Omitting all unnecessary matters, the facts of the case are as follows :—Musammat Sheobaran and her son, Baldeo (now deceased and represented by his son, Tara) borrowed Rs. 3,000 from the plaintiffs on March 31st, 1883, which they promised to repay on demand. As security for the debt they hypothecated to the plaintiffs their shares in four villages to which I shall subsequently refer. The borrowers covenanted with the plaintiffs that those shares were "owned and [460] possessed by us without participation or question on the part of anyone else, together with all rights and interests, &c."

The plaintiffs instituted a suit for sale (in default of payment of the amount due) on the bond on October 29th, 1892, impleading as defendants Baldeo, one of their debtors and his son, Tara. Musammat Sheobaran appears to have died previously. In their prayer for relief they asked for sale (in default of payment) of one moiety only of the hypothecated shares in each of the four villages, because, as they alleged, their debtors had no title to hypothecate more than a moiety. A decree for sale to the extent prayed for was made on June 29th, 1893.

Meanwhile one Madan Lal had obtained a simple money decree against Baldeo, one of the plaintiffs, mortgagors, and in execution of that decree he in August, 1892, attached his judgment-debtor's interest in mauzas Bamrauli and Dhakia, which were two of the villages comprised in the plaintiffs' hypothecation bond of March 31st, 1883. Eventually, on July 20th, 1894, Madan Lal in execution of his decree purchased a five-biswa share in Bamrauli, and a five-biswa share in Dhakia, being one-half of his debtor's interest in those villages. Some infructuous proceedings took place in execution of the decree of June 29th, 1893, and finally Madan Lal obtained a decree declaring that the five-biswa shares he had purchased in Bamrauli and in Dhakia were not liable to sale under the above-mentioned decree. The plaintiffs, however, proceeded to sell the remaining two hypothecated villages to the extent directed by their decree of June 29th, 1893, they themselves purchasing one village (Ghanshampur) and a third party purchasing Tilsanda. The declaratory decree which Madan Lal had obtained did not purport to affect either of those villages.

Now, in the course of the arguments urged by the learned counsel for the respondents, very great stress was laid on the fact that Madan Lal was not impleaded as a defendant in the plaintiff's suit of October 29th, 1892, so as to give him an opportunity of redeeming, if he

so desired. It was contended that he might then have redeemed the whole of the property which was hypothecated on March 31st, 1883, for little more than Rs 7,000, while he, or rather his representatives, are now [461] called on to pay Rs 11,000 to redeem a portion of it I cannot see much foundation for the contention that Madan Lal was unfairly treated The present suit was instituted in consequence of the decree obtained by Madan Lal which declared that five biswas of Baldeo s shares in Bamrauli and Dhakia were not liable to be sold under the plaintiffs decree of June 29th, 1893 In it the plaintiffs have impleaded as defendants the representatives of Madan Lal, and the representatives of the executants of the hypothecation bond of March 31st, 1893 They give credit for the sums of Rs 1,615 and Rs 322 as being the amount of the loan chargeable rateably to Ghanshampur and Tilsanda (the village mentioned above as having been purchased by a third party), they formally relinquish Rs 5,062 11 0 out of their claim for money due on the bond of March 31st, 1883, and pray for a decree for Rs 11,000 against both sets of defendants and in default for sale of a moiety of the shares in Bamrauli and in Dhakia hypothecated in the bond mentioned above Briefly put, they offer to the representatives of Madan Lal an opportunity of redeeming the five biswas in Bamrauli and Dhakia by paying Rs 11,000

Now before going further it is necessary to consider what was the position of Madan Lal under the circumstances narrated above He first came into touch with this property when, in August 1892, he attached Baldeo s shares in the two villages in execution of his money decree, and on July 20th, 1894, he, by purchase in execution, acquired the equity of redemption in respect of five biswas in each village When he made his purchase he knew (or must be taken to have known) that the property which he purchased was subject to the plaintiffs hypothecation or simple mortgage By his purchase he acquired the right to obtain an absolute title to those two parcels of five biswas by redeeming the plaintiff's prior lien But under section 60 of the Transfer of Property Act, as those parcels were with other parcels of property security for a single debt the plaintiffs, the holders of that security, were entitled to refuse to allow it to be broken up by being redeemed piece meal, and to call on Mohan Lal to redeem the whole security or none Had Madan Lal then adopted that course, had he sued to [462] redeem the whole hypothecated property as permitted by section 91 of the Transfer of Property Act, I do not see how his suit could have been resisted If he had succeeded he would thereby have acquired an absolute title to Baldeo s shares in Bamrauli and in Dhakia, and would have held the shares in Ghanshampur and Tilsanda as mortgagee, subject to the plaintiffs right to redeem them on repayment of a proportionate amount of the mortgage debt, as decided in *Delhi and London Bank* v *Bhikari Das* (1) Madan Lal, however, did not adopt that course He is therefore I think not entitled to enforce his equity of redemption He made no attempt whatever to complain that by accumulation of interest between 1893 (or 1894) and 1899 the sum chargeable on his shares has very much increased Now as to the position of the plaintiffs appellants As between mortgagor and mortgagee the latter is entitled to make any one of several parcels of land mortgaged to secure one debt responsible, if he so chooses, for the whole of the debt The case is different, however, when a third party, as in

(1) (1901) I L R 24 All 185

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this case a purchaser of a portion of the mortgaged property, is concerned. When such a party is impleaded (as provided by section 85 of the Transfer of Property Act, so as to give him an opportunity of redeeming his portion of the equity of redemption) in a suit on the mortgage brought to recover the mortgage debt by sale of the security, he can acquire an absolute title to the portion of the property he had purchased only by paying to the prior mortgagee the amount of the mortgage debt which is proportionately chargeable to the fractional portion of the mortgaged property he had purchased, if the first mortgagee, in the case of several parcels of lands being security for a single debt, allow him to adopt that course, and in case of refusal by paying the amount due on the whole mortgage. He can thus effectually enforce the equity of redemption he possesses over the parcels he has purchased.

It was very strenuously and ably contended by the learned counsel for the respondents that the appellants here were bound to "bring in" (and ask for a decree for sale of) the whole of the mortgaged property, so as to give the respondents an [463] opportunity of redeeming *the whole.* I know of no authority for such a proposition other than the rule in section 85 of the Transfer of Property Act. If this were a suit by the respondents (the representatives of Madan Lal) as *plaintiffs* to redeem, and so acquire an absolute title to the portion of the mortgaged property which Madan Lal had purchased, the mortgagees would certainly have been entitled to compel them to redeem *the whole* mortgage, if it had not already been broken up. But such is not the case here. In this suit the mortgagees are plaintiffs, and their position is that as to two parcels out of the mortgaged property they have been paid off the portion of the mortgage debt attributable to those parcels, and they now call on the respondents to pay off the portion of the debt which is attributable to their two parcels, and in default of such payment they ask that the two parcels be sold. I am unable to see anything either contrary to law or unjust to the respondents in a suit so framed. It gives to the latter an opportunity of acquiring that which the law gives them, namely, a right to obtain an absolute title to their parcels on paying the amount of the mortgage debt chargeable on those parcels. To the *frame* of the suit I can see no objection, but no doubt an important question (to be noticed hereafter) arises as to whether the respondents are not entitled to have the mortgage debt calculated rateably on the whole mortgaged property, and not on one-half of it only, as the appellants contend. It may be that both in that matter and in the amount they have credited as being the proportionate amounts of the mortgage debt attributable to Ghanshampur and to Tilsanda the appellants are wrong. That, however, is a matter which does not affect the frame of the suit, and is not a reason why the suit should be dismissed as not being maintainable.

It was contended for the respondents that the appellants were legally bound to have given Madan Lal an opportunity of redeeming the whole of the mortgage by impleading him as a party to their suit of October 29th, 1892. In the memorandum of appeal a plea was taken to the effect that the plaintiffs had no knowledge of Madan Lal's interest. The learned advocate for the appellants did not press that matter. He said [464] there was no evidence on record to prove such knowledge, but he would not press the question as he considered it to be immaterial. I fail to understand how the point was immaterial. It seems to me to be the

most important question in the case Anyhow it must now be taken that the appellants ought to have impleaded Madan Lal in that suit, and that they did not so implead him But are they bound in the present suit to give his representatives an opportunity of redeeming the whole mortgage? I think not under the circumstances Madan Lal certainly on his purchase in July, 1894 (and probably on levying the attachment in August, 1892), had his remedy in his own hands As already pointed out, if he desired to acquire an absolute title to Baldeo's shares, over which he possessed the equity of redemption, he could have sued the mortgagees for redemption But the mortgagees (the appellants) could not compel him to redeem, and I think that by the present suit, which gives Madan Lal's representatives an opportunity of redeeming their shares in Bamrauli and Dhakia, the appellants have done all they were bound to do Assuming that the power of redemption conferred on persons in the position of Madan Lal by section 91 of the Transfer of Property Act amounts to an unrestricted "right" to redeem the whole mortgaged property, and that the "right" does not depend on a refusal by the first mortgagees under *the last clause of section 60 of the Act* to allow their mortgage to be redeemed piece meal, still it is a right which must be exercised by such persons as *plaintiffs* in a suit instituted for redemption of the mortgaged property Unless in the case provided for by section 85 of the Transfer of Property Act, or in a suit by the first mortgagees for sale of *the whole* of the mortgaged property, that right cannot be exercised by a defendant It cannot be exercised by him in a suit like the present, in which he is called on to contribute his rateable share of the mortgage debt on pain of forfeiting his equity of redemption in a portion of the mortgaged property He is not entitled to say that the mortgagees *must* institute a suit for sale of the whole of the mortgaged property, and so give him an opportunity of redeeming the whole I would also point out that all that such a person can gain by his success in such a [465] suit is an absolute title to his own (perhaps very small) portion of the mortgaged property *plus* the risk, if not the certainty, of being involved in further litigation respecting those portions of the mortgaged property redeemed by him over which he had not held any equity of redemption *Delhi and London Bank* v *Bhikari Das* (1) As to this matter I will only again remark that when Madan Lal had an opportunity of instituting a suit to enforce this right of redeeming the whole of the mortgage he did not avail himself of it

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No little argument was addressed to us at the hearing of this appeal by the learned counsel for the respondents as to the effect of the rule of the English law of mortgage, that a mortgagee when enforcing his mortgage by foreclosure must be in a position to reconvey to his mortgagor *the whole* of the mortgaged property The contention, as I understood it, was that as the plaintiffs by selling a portion of the mortgaged property, had put it out of their power to reconvey Tilsanda to the *respondents*, they were not entitled to enforce their mortgage Why the appellants should be in a position to reconvey Tilsanda to the *respondents* I do not quite understand The latter were not the mortgagors of, and had no concern whatever with, Tilsanda The representatives of the *mortgagors*, though nominally parties, have not appeared in this suit There is no plea on *their* behalf that the appellants ought to be in a position to reconvey Tilsanda to them In my opinion this rule has no bearing on the

(1) (1901) I L R 24 All 165

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present case, and is quite inapplicable to its facts. An English mortgage is in form an absolute conveyance from the mortgagor to the mortgagee with a covenant for reconveyance on certain terms. In this case there is *no conveyance* whatever from the mortgagors to the mortgagees. There is nothing more than a bond acknowledging the receipt as a loan of a certain sum of money, a promise to repay the money with interest on demand, and a hypothecation of four parcels of immoveable property as security for repayment. The creditor's remedy, if the loan be not repaid, is by sale of the property hypothecated to him, and not by foreclosure as in the English cases to which we have been referred. There is nothing in this case which the [466] mortgagees could reconvey to the mortgagors in case of redemption by the latter. In fact it is the respondents, the representatives of Madan Lal, and not the mortgagees who are in possession of the shares in Bamrauli and in Dhakia. The mortgagees appellants are not in possession of any portion of the mortgaged property as mortgagees. As to the shares in Ghanshampur, they purchased them in execution of their decree of June 29th, 1893, and they hold as absolute owners. To such a case the English rule is wholly inapplicable, and this case is typical of an immense proportion of mortgage suits in these Provinces, "English mortgages," as defined in the Transfer of Property Act, being almost unknown.

Only one other question remains for decision. The plaintiffs appellants have brought into Court (or rather have given credit for) two sums of money which, according to them, represent the amount of the mortgage debt rateably attributable to Ghanshampur and Tilsanda, *i.e.*, to one-half of the interest in those villages which was hypothecated under the bond of March 31st, 1883. They have not given credit for or brought into Court any sum in respect of the other moiety of those parcels, or in respect of the moiety of the hypothecated shares in Bamrauli and Dhakia, which was not purchased by Madan Lal. They say that their debtors had no title to hypothecate more than one-half of the four parcels which they professed to hypothecate. I cannot accept this contention, the effect of which is to make the respondents liable to pay at least twice as much of the mortgage debt as would be attributable to the parcels they have purchased. In accordance with the rule laid down in section 82 of the Transfer of Property Act, I hold that each of the parcels of property hypothecated under the bond of March, 1883, is liable as between the appellants and the respondents to be charged with a fraction of the mortgage debt proportionate to its value. I cannot allow the appellants to say that the hypothecation was valid as to one moiety only, and that the whole of the mortgage debt is chargeable on that moiety. If this litigation were confined to the mortgagors and mortgagees there might perhaps be something to be said for the appellants, though there is evidence on the record to show that the executants of the bond of March, [467] 1883, had power to hypothecate all four parcels, the money having been borrowed by the head of the family for the purpose of paying Government revenue. But, be that as it may (the dispute here being between mortgagees and subsequent purchasers of the portion of the equity of redemption), the respondents here are, in my opinion, unquestionably entitled to have an account taken of the respective value of the whole of the four parcels hypothecated under the bond of March, 1883, and can redeem their own two parcels on paying that portion of

the mortgage debt which may be found to be proportionate to the value of their parcels They are liable to contribute to the mortgage debt in the proportion which the value of their parcels bears to the value of all the parcels comprised in the hypothecation bond

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There should be no difficulty in ascertaining those respective values It is quite unnecessary to make the purchaser of Tilsanda a party to this suit He is in no way concerned with the amount which the respondents may have to pay for redemption of their parcels, and I do not suggest that any order whatever should be made against him He has no concern with the valuation of Tilsanda for the purposes of *this suit* The valuation is to be made as between the appellants and respondents only When the respective values as directed above shall have been ascertained, and when the representatives of Madan Lal shall have paid to the appellants the amount so found rateably due from them on account of their share of the mortgage debt, the result will be that their parcels in Bamrauli and Dhakia will stand redeemed automatically, and the respondents will at once without any further proceedings acquire an absolute title to those parcels They are already in possession of them

For the above reasons I would allow this appeal, and, setting aside the decree of the lower Court, I would remand the suit to that Court under section 562 of the Code of Civil Procedure for decision on the merits in accordance with the principles laid down above

I would direct that the parties should bear their own costs of this appeal and in the lower Court Future costs to follow the event

[468] By the Court —The order of the Court is, that the appeal be allowed, the decree of the Court below set aside, and the case remanded to the lower Court with directions to re admit the suit under its original number in the register, and proceed to determine it on the merits, regard being had to the views expressed in the judgments of this Court

Appeal decreed and cause remanded

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25 A 468 (=13 M L J 339=5 Bom L R 823=7 C W N. 831=30 I A 202= 8 Sar 465)

PRIVY COUNCIL

Present:

Lord Macnaghten Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser

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Sheo Shankar Lal and another (*Plaintiffs*) v Debi Sahai (*Defendant*) [6th and 10th February and 24th June, 1903]

[*On appeal from the High Court of Judicature at Allahabad*]

Hindu Law—Mitakshara—Stridhan—Property inherited by a female from a female—Benares School of Law

Under the Hindu law of the Benares school property which a woman has taken by inheritance from a female is not her stridhan in such a sense that on her death it passes to her stridhan heirs in the female line to the exclusion of males (1)

In this case her sons were held entitled to succeed to such property in preference to her daughter

(1) See *Sheo Partab Bahadur Singh* v *The Allahabad Bank* Post p 476

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25 A. 468=
13 M. L. J.
330=5 Bom.
L. R. 828=7
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30 I. A.
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465.

[Ref. 28 Mad. 1 ; 31 Bom. 453=9 Bom. L. R. 834 ; 4 A. L. J. 673=1907 A. W. N. 206 ; 32 Bom. 59=9 Bom. L. R. 130 ; 10 O. C. 159 ; 34 All. 234 ; 32 All. 253 ; 33 Cal. 23 ; Fol. 25 All. 476=7 C. W. N. 840=13 M. L. J. 336=5 Bom. L. R. 883=30 I. A. 29 ; 22 I. C. 518=20 C. W. N. 627 ; 43 Cal. 64 ; 50 I. C. 935=17 A. L. J. 306=41 All. 283 ; 22 I. C. 518 ; Dist. 30 Bom. 229=7 Bom. L. R. 936 ; 7 A. L. J. 269 ; Fol. 17 M. L. T. 363=2 L. W. 415=28 M. L. J. 495.]

APPEAL from a judgment and decree (19th May, 1900) of the High Court at Allahabad, which reversed a decree (7th December, 1897) of the Subordinate Judge of Gorakhpur, who had decreed the appellants' suit.

The suit was brought to recover property which had admittedly descended as stridhan from one Jadunath Kunwari to her daughter Jagarnath, whose sons claimed the property as heirs of their mother and grandmother. Jagarnath left also a daughter, and the defence was that she, and not her brothers the plaintiffs, was the nearest heir, and that consequently they had no right to maintain the suit. This involved the question of law, whether according to Benares law, by which the family was governed, the property on the death of Jagarnath descended as stridhan and went to her daughter, or whether it lost its [469] character of stridhan and descended according to the ordinary rule of inheritance to her sons the plaintiffs.

The Subordinate Judge held that the plaintiffs were entitled to it; but that decision was reversed by the High Court (BURKITT and AIKMAN, JJ.) on appeal and the suit was dismissed with costs.

For the purposes of this appeal the facts are sufficiently stated in the judgment appealed from, which is reported in I. L. R. 22 All. 353.

On this appeal, which was heard *ex parte*, Mr. *J. D. Mayne* for the appellants contended that property inherited by a female from a female was not her stridhan, nor would it on her death descend as her stridhan would do. Property *inherited* by a woman was, it was submitted, not stridhan at all. It had been so held by the High Courts of Bengal, Madras and Bombay, and there was no ground for drawing any distinction between property inherited by a woman from a male, and property inherited by a woman from a female, even in cases governed by the Mitakshara Law. Property which had once descended as stridhan no longer remained so, but descended, on the death of the woman who took it, according to the ordinary rules of inheritance. The High Court therefore were wrong in deciding, as they had done, entirely on the text of the Mitakshara that the property in dispute in this case was stridhan and descended to the daughter of the owner in preference to the appellants. The following authorities were referred to in the course of the argument:—Mitakshara, Chap. II, section XI, para. 2, Mayne's Hindu Law and Usage, 6th ed., para. 675, p. 875: 5th ed., para. 627, p. 742, 1 Strange's Hindu Law, ed. 1830, pp. 139, 278, *Thakoor Deyhee* v. *Rai Baluk Ram* (1), *Bhugwandeen Doobey* v. *Myna Baee* (2), *Chotay Lall* v. *Chunnoo Lall* (3), *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (4), Manu, Chap. IX, verses 131 and 192—195, Stokes' Hindu Law Books, p. 366, Mitakshara, Chap. I, section 1, para, 8, West and Bühler's Hindu Law, pp. 146, 303, Dr. Jolly's Tagore Law Lectures, p. 46, Daya

(1) (1866) 11 Moore's I. A. 139.
(2) (1867) 11 Moore's I. A. 487.
(3) (1874) 14 B. L. R. 235 (237), and on appeal (1876) L. R. 6 I. A. 15 ; I. L. R. 4 Cal. 744.
(4) (1881) L. R. 8 I. A. 99 ; I. L. R. 3 Mad. 290.

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[470] Krama Sangraha, Chap II, section 3, para 6, Stokes' Hindu Law Books, p 493, 1 Macnaghten s Hindu Law, Chap III, p 38, *Srinath Gangopadhya* v *Sarbamangala Debi* (1), *Prankissen Laha* v *Noyanmoney Dassee* (2), *Huri Doyal Singh Sarmana* v *Grish Chunder Mukerjee* (3), *Sengamalathammal* v *Valayuda Mudali* (4), *Prankishen Sing* v *Bhagwutee* (5), 1 Morley s Digest, 335, *Venkataramakrishna Rau* v *Bhujanga Rau* (6) *Virasangappa Shetti* v *Rudrappa Shetti* (7), *Bhaskar Trimbak Acharya* v *Mahadev Ramji* (8), *Tuljoram Morarji* v *Mathuradas* (9), *Judoonath Sircar* v *Bussunt Coomar Roy Chowdhry* (10), Dayabhaga, Chap I, section 2, and Chap IV, section 3, Devala (Translation by Krishnasami Iyer, a Madras vakil, 1867), p 134, Dayavibhaga by Madhaviya Varadaraja, p 43 (referring to Manu, v 193, Chap IX), Viramitrodaya, pl 219, pp 1, 3, Vivada Chintamani (by Prosonno Coomar Tagore, 2nd ed , Madras, 1865), p 266, Vyavahara Mayukha, Chap IV, section 10, pl 24, 26, 28, *Vijiarangam* v *Lakshuman* (11), *Bai Narmada* v *Bhakwantrai* (12), *Manilal Rewadat* v *Bai Rewa* (13)

1903, *June 24th* —The judgment of their Lordships was delivered by SIR ARTHUR WILSON

The property which is the subject matter of this appeal formerly belonged to two brothers, Bhawani and Basant, and on the death of the former to the latter alone Basant s two widows succeeded him, but by arrangement amongst themselves the property was divided between them and the widows of Bhawani Both the widows of Basant died in 1861, and the title then passed to Hanwant and Hanuman, somewhat distant cousins of Bhawani and Basant, as the nearest male heirs of Basant Of these Hanwant died in 1865, leaving a son, Debi, and on the 8th of September 1866, Hanuman and Debi executed a deed of gift by which they gave the property absolutely to Jadunath, [471] the daughter of Bhawani by his elder widow, who was then living Dilla, the younger widow of Bhawani, was likewise alive, and claimed rights in the property of part of it There were also male relatives who claimed to be nearer heirs than Hanwant and Hanuman Much litigation naturally ensued, but it is not now necessary to trace its course Jadunath died in 1879, and her daughter Jagarnath succeeded to her rights Jagarnath died in 1896, leaving sons, the present plaintiffs, and a married daughter

The plaintiffs brought the present suit in the Court of the Subordinate Judge of Gorakhpur, claiming to have become entitled to the property in dispute on the death of their mother in 1896 The defendant, who is a brother of Dilla, the younger widow of Bhawani, acquired whatever rights he ever had by virtue of a transfer to him from Dilla , and as she died in 1895, any right of his then came to an end Apart, however, from any right in himself, the defendant was entitled to rely upon any defect he could find in the plaintiffs' title Many issues were raised, all of which were disposed of in India in such a manner as

(1) (1868)2 B L R A C 144 (151) 10 W R 488
(2) (1879) I L R 5 Cal 222 (225)
(3) (1890) I L R 17 Cal 911 (916)
(4) (1867) 3 Mad H C Rep 312
(5) (1793) 1 S D A Sel Rep 3 (4)
(6) (1895) I L R 19 Mad 107 (109 110)
(7) (1895) I L R 19 Mad 110 (118)
(8) (1869) 6 Bom H C Rep O C J (18)
(9) (1881) I L R 5 Bom 662 (670)
(10) (1873) 11 B L R 286
(11) (1871) 8 Bom H C Rep O C 244 (257)
(12) (1888) I L R 12 Bom 505
(13) (1892) I L R 17 Bom 758

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25 A. 468=13 M. L. J. 330=5 Bom. L. R. 828=7 C.W.N. 831=30 I. A. 202=8 Sar. 465.

to entitle the plaintiffs to succeed, except one upon which the High Court dismissed their suit.

The point referred to is this. The defendant raised the objection that as a sister of the plaintiffs was in existence, she, not they, was the heir of their mother's property. The plaintiffs met this by saying that "the plaintiffs do not deny the existence of a married sister, but her existence does not prejudice their claims." On this admission an issue, which was wholly one of law, was raised, "whether the plaintiffs are entitled to maintain the present suit while the daughter of Jagarnath Kunwari exists." Upon this issue the Courts have differed, the Judge of first instance having decided it in the plaintiffs' favour and given them a decree, while the High Court on appeal took a different view of the law, and dismissed the suit. Against that dismissal the present appeal has been brought.

It is clear upon the above statement that Jadunath acquired the property by gift, and that on her death her daughter Jagarnath succeeded to it by inheritance. The precise question therefore arising for decision is whether, under the Hindu law of the [472] Benares school, property which a woman has taken by inheritance from a female is her *stridhan* in such a sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males.

Their Lordships regret that they are called upon to decide this question upon an appeal heard *ex parte*. But Mr. *Mayne*, in his able and exhaustive argument, for which their Lordships are much indebted to him, called their attention to the authorities and arguments bearing upon the matter, upon one side and the other, so fully as greatly to relieve their Lordships from the difficulty which they would otherwise have felt. And since that argument hey have had an opportunity of considering the judgment of the Judicial Commissioners of Oudh upon a very similar question, in a case in which judgment is about to be delivered. It is, however, to be regretted that the question has to be decided in a suit to which the plaintiffs' sister, in whom the preferable right is alleged to exist, is no party.

During the voluminous discussions, ancient and modern, which have arisen with regard to the separate property of women under Hindu law, its qualities its kinds and its lines of descent, the question has constantly been found in the forefront, what is *stridhan?* The Bengal school of lawyers have always limited the use of the term narrowly, applying it exclusively, or nearly exclusively, to the kinds of woman's property enumerated in the primitive sacred texts. The author of the Mitakshara and some other authors seem to apply the term broadly to every kind of property which a woman can possess, from whatever source it may be derived. Their Lordships do not propose to dwell upon this particular question. It may perhaps be regarded as one mainly of phraseology, not necessarily involving, however it be answered, much distinction in the subtance of the law; for most of the old commentators recognise with regard to the property of a woman, whether called *stridhan* or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition.

The question of subtance is how the property descends in a case like the present. As to this the decision of the High Court was based upon the text of the Mitakshara, which [473] seems to make all property taken by a woman by inheritance her *stridhan* with all the incidents

which belong to that kind of absolute property, and to make it descend as such, primarily to females, and in the special line prescribed for *stridhan* strictly so called

It cannot now be contended that the rule thus derived from the Mitakshara is law as to inherited property generally The case of *Thakoor Deyhee* v *Rai Baluk Ram* (1), *Bhugwandeen Doobey* v *Myna Baee* (2) and *Chotay Lall* v *Chunnoo Lall* (3), all of them Benares cases, as well as *Mutta Vaduganadha Tevar* v *Dorasinga Tevar* (4) and *Raja Chelikani Venkayyamma Garu* v *Raja Chelikani Venkataramanayyamma* (5), place it beyond doubt that property inherited by a woman from a male is not her absolute property, and passes on her death, not to her *stridhan* heirs, but to the heirs of the male person from whom she inherited it

As to the descent of property inherited by a female from a female, there has not been any such conclusive ruling of this Committee There has been, however, a remarkable concurrence of opinion in India among judges, text writers, and pure scholars, to the effect that no distinction can be drawn, consistently with the text of the Mitakshara, between what has been inherited from a male and what has been inherited from a female, a suggestion to the contrary made by Mr *Mayne* has not been received with favour On this point it is sufficient to refer to the judgments of West, J, in *Vijiarangam* v *Lakshuman* (6), Telang, J, in *Manilal Rewadat* v *Bai Rewa* (7) and Best and Ayyar, JJ, in *Virasangappa Shetti* v *Rudrappa Shetti* (8) Banerjee's Tagore Lectures, 1878, p 286, West and Buhler, 3rd edit, p 272 and Jolly's Tagore Lectures, 1883, p 243

In Bengal it is well settled law that property inherited from a woman by a woman does not on the death of the latter pass as [474] her *stridhan* The rule has often been expressed by saying that what has once descended as *stridhan* does not so descend again The authorities have been collected and reviewed in *Hari Doyal Singh Sarmana* v *Grish Chunder Mukerjee* (9)

In Madras, where the Mitakshara is approved, but also other treatises (especially the Smriti Chandrika, which differs much from the text of the Mitakshara with regard to woman's property), the view has been accepted that what a woman has inherited from a woman is not *stridhan* for the purposes of inheritance, *Venkataramakrishna Rau* v *Bhujanga Rau* (10), *Virasangappa Shetti* v *Rudrappa Shetti* (8)

With regard to Bombay, wherever the Mayukha is accepted it is held that its rules govern the descent of woman's property And these rules differ widely from the text of the Mitakshara, and exclude the idea that what has passed by inheritance from a woman to a woman goes on the death of the latter to the special line of heirs with a preference for females, who would succeed to it if it were her *stridhan* proper *Vijia*

(1) (1866) 11 Moore's I A 139
(2) (1867) 11 Moore's I A 487
(3) (1876) L R 6 I A 15 I L R 1 Cal 744
(4) (1881) L R 8 I A 99 I L R. Mad 200
(5) (1902) L R 29 I A 156 I L R 25 Mad 678
(6) (1871) 8 Bom H C Rep O C 244 at p 272
(7) (1892) I L R 17 Bom 759 at p 761
(8) (1895) I L R 19 Mad 110, at p 118
(9) (1890) I L R 17 Cal 911 at p 916
(10) (1895) I L R 19 Mad 107

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25 A. 468=13 M. L. J. 330=5 Bom. L. R. 828=7 C.W.N. 831=30 I. A. 202=8 Sar. 465.

rangam v. *Lakshuman* (1), *Bai Narmada* v. *Bhagwantrai* (2), *Manilal Rewadat* v. *Bai Rewa* (3).

Under the Benares law their Lordships are not aware of any direct judicial decision on the precise question now to be disposed of. But they do not feel any hesitation as to the answer which ought to be given to it. On the one hand stands the text of the Mitakshara, which, taken literally, seems to make all property inherited by a woman a part of her *stridhan*, inheritable from her according to the rules applicable to her *stridhan* in the strictest sense of the term. On the other hand, it has already been decided that the rule seemingly laid down in the Mitakshara as to the descent of property taken by inheritance is not the Benares law so far as concerns property inherited from males. The decisions to that effect were based upon no narrow grounds. Their Lordships examined the primitive texts upon which the Mitakshara purports to be based; they considered the fundamental principles of the Hindu law; they reviewed [476] the judicial decisions bearing upon the questions before them; they gave such weight as could properly be given to the very conflicting opinions of numerous pandits, and they arrived at their conclusions without hesitation. And it is difficult to see how any other rule can be applied to what has been inherited from females. Reference has already been made to the striking concurrence of opinion in India against the admissibility of any distinction between the two cases.

What authority there is bearing directly upon the question points in the same direction. Macnaghten in his Hindu Law, Vol. I., p. 38, applies the rule that what has once passed by inheritance as *stridhan* does not so pass a second time, to the Mitakshara law as well as to that of Bengal. And as his work was based upon an exhaustive examination of the cases which had actually come before the Courts in Bengal and of the opinions of pandits given with reference to those cases, it is valuable evidence of the law as it was actually understood and applied at the time to which it relates. Moreover, the Mitakshara law with which he was brought into contact was necessarily that of the Northern schools. In *Chotay Lall* v. *Chunnoo Lall*, (4) [the Benares case subsequently affirmed by this Committee (5)] Pontifex, J., stated the law in the same way.

Their Lordships are therefore unable to agree with the High Court in thinking that the property now in question was the *stridhan* of Jagarnath devolving as such upon the plaintiffs' married sister in preference to them. And this is sufficient to dispose of the present case.

Their Lordships will humbly advise His Majesty that the decree of the High Court be set aside with costs, and that of the Subordinate Judge affirmed.

The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant—Messrs. *T. L. Wilson & Co.*

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(1) (1871) 8 Bom. H. C. Rep. O. C. 244, at p. 260.
(2) (1888) I. L. R. 12 Bom. 505.
(3) (1892) I. L. R. 17 Bom. 758.
(4) (1874) 14 B. L. R. 235.
(5) (1876) L. R. 6 I. A. 15; I. L. R. 4 Cal. 744.

25 A 476 (=7 C W N 840=13 M L J 336=5 Bom L R 833=30 I A 209=8 Sar 535)

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25 A 476=7 C W N 840=13 M L J 336=5 Bom L R 833=30 I A 209=8 Sar 535

[476] PRIVY COUNCIL

PRESENT:

Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, and Sir Arthur Wilson

SHEO PARTAB BAHADUR SINGH (*Defendant No* 1) v THE ALLAHABAD BANK (*Plaintiff*) AND ANOTHER (*Defendant No* 2)
[8th, 12th and 13th, May and 24th June, 1903]

[*On appeal from the Court of the Judicial Commissioner of Oudh*]

Hindu Law—Mitakshara—Stridhan—Property inherited by a female from a female—Benares School of law—Property taken as heir of a taluqdar under the Oudh Estates Act (I of 1869)—Act I of 1869, sections 2 and 11—Power of alienation over property so inherited

Under the Hindu Law of the Benares School there is no distinction as to the nature of the estate taken, between property inherited by a woman from a male and property inherited by her from a female In both cases she takes it not absolutely as her stridhan, but for a qualified estate alienable only under the conditions applicable to such an estate and with reverter after her death to the heirs of her predecessor in title (1)

A woman succeeded to property as heir of her mother, a taluqdar, under the Oudh Estates Act (I of 1869) *Held* that notwithstanding the terms of section 2 which defines an "heir as" a person who inherits property otherwise than as a widow" under the Act, and the provisions of section 11, she had no power of alienation greater than, and irrespective of her interest under the Hindu Law the Judicial Committee, in accordance with the [illegible] unwilling notwithstan[illegible] onstruction on it which [illegible] the detriment of those [illegible]

In this case it was held that, apart from any grounds of necessity, she could not alienate the property beyond her own lifetime, and a mortgage of it made by her was declared to be inoperative on her death against the property in the hands of the heir to whom it had reverted

[Ref [illegible] 32 Bom 59=9 Bom L R 1305, [illegible] L J 306=41 All 233, Rel 22 [illegible] inherited by woman from [illegible]

APPEAL from a decree (27th July 1899) of the Court of the Judicial Commissioner of Oudh, which affirmed a decree (27th February 1897) of the Subordinate Judge of Partabgarh, decreeing the first respondent's suit

The suit was brought on the 19th of February 1894 against the appellant and a number of other defendants on a registered mortgage deed, dated the 14th of November 1881, executed by one Janki Kunwar, to the plaintiffs of her zamindari property, consisting of two taluqas of Pawansi and Bahlopur, to secure Rs 1,75,000 with interest thereon at 9 per cent per annum

The facts were that the taluqa of Pawansi in Oudh originally belonged to one Mahpal Singh, who died in 1852 53 leaving a widow Kablas Kunwar, and a daughter, Janki Kunwar, [477] who was afterwards married to Bijai Bahadur Singh At the time of the annexation of Oudh Pawansi was in the possession of Kablas Kunwar, the second sum

(1) See *Sheo Shankar Lal* v *Debi Sahai Ante* p 468

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mary settlement was made with her; a sanad was subsequently granted to her; and on the preparation of the list of taluqdars under section 8 of Act I of 1869 her name was entered in Nos. 1 and 2 of the said lists. She died in August 1872 and the disputes which arose as to the succession to her estate were finally determined by a judgment of the Privy Council in the case of *Brij Indar Bahadur Singh* v. *Janki Koer* (1). That judgment decided that Kablas Kunwar was a taluqdar within the meaning of Act I of 1869; that she had a permanent heritable and transferable interest in the said estate; and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act. To determine the next heir of Kablas Kunwar recourse was had to clause 11 of that section, which provides that in default of the persons named in the preceding clauses the estate shall descend "to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe" of the deceased taluqdar were subject: and the Judicial Committee were of opinion that the estate having been granted to Kablas Kunwar as a gift from the British Government, under the ordinary Hindu Law of the Mitakshara, it became her "*stridhan*" or peculiar property, and that the next heir to her *stridhan* by the said law was her daughter Janki Kunwar, who thus became the sole proprietor of Pawansi.

The other property mortgaged to the plaintiff Bank was the taluqdari estate of Bahlopur, which was owned and possessed as a taluqdar within the meaning of Act I of 1869 by Bijai Bahadur Singh, the husband of Janki Kunwar. On the 1st of November 1879 he executed a deed of gift of the estate in favour of his wife, who was placed in possession and had her name recorded as owner in the Government Revenue Registers. In 1881 Janki Kunwar was thus the owner of both the estates of Pawansi and Bahlopur.

On the 14th of November 1881 Janki Kunwar borrowed from the plaintiff Bank Rs. 1,75,000, and as security for repayment [478] mortgaged both Pawansi and Bahlopur. The deed provided for payment by half yearly instalments with interest and compound interest calculated at 9 per cent. per annum. It also provided that the Bank should be entitled to sue for the whole amount due in case of default in the payment of any instalment, and that in case the whole sum could not be recovered from Pawansi, the Bank might "recover its demand from Bahlopur also."

Janki Kunwar died on the 15th of December 1888. There were two claimants to the Pawansi estate, Shankar Bakhsh Singh and Sitla Bakhsh Singh. The Revenue authorities decided in favour of the former and placed him in possession of the estate. On his death his son, Sheo Partab Bahadur Singh succeeded him. Sitla Bakhsh Singh sued him to recover possession of the estate; he died pending the suit, and his great-grandson Jagdish Narain Singh was substituted for him. This litigation terminated in favour of Sheo Partab Bahadur Singh by a judgment of the Privy Council, dated the 23rd of March 1901, in the case of *Jagdish Bahadur* v. *Sheo Partab Singh* (2). There were also two claimants for the Bahlopur estate, the respondent Bhairon Bakhsh Singh, and one Chitpal Singh. The Revenue Court decided in favour of the former and placed him in possession of the estate. Chitpal Singh sued him to recover possession and that litigation is still pending.

(1) (1877) L. R. 5 I. A. 1.
(2) (1901) L. R. 28 I. A. 100; I. L. R. 23 All. 369.

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No payments having been made after the death of Janki Kunwar, the Allahabad Bank brought their suit as above stated, for the amount due on the mortgage, making (amongst others) the claimants to the Pawansi and Bahlopur estates defendants

The defendant Sheo Partab Bahadur Singh pleaded that Janki Kunwar, by succession to her mother, acquired in Pawansi only an estate for life and had no power to transfer it for a longer period, and that on her death the plaintiff Bank had no claim on the estate

The pleas of the other defendants are not now material

The only material issue in this appeal is the 6th—"was Janki Kunwar competent to mortgage taluqa Pawansi in such a way as to make it binding beyond her own lifetime?

[479] On this issue the Subordinate Judge was of opinion that Janki Kunwar acquired an absolute estate with power of transfer as heir of her mother Kablas Kunwar, both by virtue of the provisions of Act I of 1869 as heir of a taluqdar, and also under the ordinary Hindu Law of the *Mitakshara* School He therefore gave the plaintiff Bank a decree for sale in accordance with section 88 of the Transfer of Property Act (IV of 1882)

From that decision the defendant Sheo Partab Bahadur Singh alone appealed to the Court of the Judicial Commissioner of Oudh That Court decided that under the Hindu Law of the *Mitakshara* School a woman who succeeds as heir to her mother's *stridhan* takes an absolute and not a qualified estate and considered that having come to this conclusion it was not necessary to express an opinion on the construction of Act I of 1869 The Judicial Commissioners passed a decree dismissing the appeal with costs

The material portion of the judgment was as follows —

The decisions of the Judicial Committee are consequently to the effect that property inherited by a widow from her husband and by a daughter from her father, is not, according to the law of the Benares School *stridhan* but is property in which the widow and daughter respectively have a qualified interest and which upon the death of the holder, devolves upon the heirs of the last full owner, *i e*, of the husband and father respectively

But the question in this case is whether property inherited by a daughter from her mother, that is to say, from a female and not from a male is *stridhan* Such property is undoubtedly *stridhan* according to the definition in the *Mitakshara* Is there any valid reason for holding that as in the case of property inherited from a male it should be excluded from the descriptions of *stridhan* given in the *Mitakshara*?

The learned advocate for the defendant referred to and relied upon the following cases of property inherited by a female from a female —

(1) *Prankishen Sing* v *Bhagwutee* (1) It was held that property given by a Hindu to his daughter on the occasion of her marriage was *stridhan* and passed to her daughter on her death but it was not the *stridhan* of the daughter, and upon her death it would not go to her daughter, but to the brother of her mother This was a *Bengal* case and from the note annexed to the report of the case appears to have been decided in accordance with the *Dayabhaga*

(2) *Sengamalathammal* v *Valayuda Mudali* (2) It was held that the mother's *stridhan* passing by inheritance to her daughter did not become [480] the *stridhan* of the daughter The learned Judges observed that though according to the *Mitakshara* property acquired by inheritance was classed as *stridhan* this was contrary to all the authorities in the other schools of Hindu Law, and was not supported by the Smriti Chandrika It was questioned in a previous judgment of the Court, where the Bengal authorities were followed These authorities were against the view that property inherited from a mother was *stridhan* Sir W Macnaghten's Principles of

(1) (1793) 1 S D A Sel Rep 3
(2) (1867) 3 Mad H C Rep 312

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Hindu Law were referred to (p. 38), as also the decision in *Prankishen Sing* v. *Bhagwutee* (1). Reference was also made to the *Dayakrama Sangraha*, chapter 2, section 3, paragraph 6, and to the substitution in the *Mitakshara* of the words "and also property which she may have acquired by inheritance, purchase, partition, seizure and finding" for the words "any other (separate acquisition)" which would properly be construed to mean "any other *of the same kind*." It was pointed out that all property which a woman derived by inheritance could not be classed as *stridhan*, for in Southern India, as elsewhere, property which a widow inherited from her husband could not so descend. "Finding then how narrow is the basis of authority upon which the proposition rests, and how clear and concurrent are all the other authorities, including even the Smriti Chandrika, against it, we have arrived at the conclusion that according to Hindu Law, property acquired by inheritance is not to be classed as *stridhan* in Southern India, any more than in any other parts of the country."

(3) *Srinath Gangopadhya* v. *Sarbamangala Debi* (2). It was held that where a woman's separate property had once devolved as *stridhan* upon an heir, it no longer devolved as *stridhan*, but according to the ordinary rules of Hindu Law. This was a case governed by the Bengal School of law.

(4) *Bhooban Mohan Banerji* v. *Muddun Mohan Singh* (3). It was held that according to Hindu Law a daughter had a qualified estate in the property inherited by her from her mother or father which she could enjoy during her life, but which she must not dispose of or incumber to the prejudice of the next heirs except for recognised necessity; and that *stridhan* which had once devolved ceased to be ranked as such and was after devolution governed by the ordinary rules and subject to the restrictions imposed upon female takers of property by inheritance. This case was mainly decided upon the authorities of the Dayabhaga and Dayakrama Sangraha (Bengal School), and reference was made to Sir W. Macnaghten and to *Sengamalathammal* v. *Valayuda Mudali* (4).

(5) *Prankissen Laha* v. *Noyamoney Dassee* (5). It was held that what a daughter inherited from her mother did not become her *stridhan*. Wilson, J. observed:—"The other suggestion is that the words apply to the estate which Siromoney would have had if she had taken by inheritance from her mother. As to this the Law is not quite so well settled. The only authority that I am aware of upon the law in Bengal on the point is to the effect that a daughter [481] who takes by inheritance from her mother takes a qualified estate, and that on the daughter's death the heir of the mother succeeds (*Prankishen Sing* v. *Bhagwutee* (1)). One thing at any rate is well settled that when a daughter inherits from a mother what she takes does not become her "*stridhan*."

(6) *Huri Doyal Singh Sarmana* v. *Grish Chunder Mukerjee* (6). It was held that *stridhan* inherited by a daughter from her mother passed on the daughter's death to the person who would be the next heir to the mother's *stridhan*. This case was also governed by the Hindu Law of the Bengal School. The proposition embodied in the finding was held to be fairly deducible from certain passages in the Dayabhaga and Dayakrama Sangraha. It was clear that there was not the slightest indication that inherited property would in the opinion of the author of the Dayabhaga rank as *stridhan*. In the Dayakrama Sangraha, Srikrishna said that heritable wealth did not form a woman's peculiar property. Reference was made to Chapter II, section 3, paragraph 6 of the Dayakrama Sangraha, which deals with succession to the separate property of a woman when received at her nuptials, as clearly showing that on the death of a daughter who inherited her mother's *stridhan* the property passed, not to her heirs but to the next heirs of the mother. Reference was also made to Macnaghten, Vyavastha Darpana, *Prankishen Sing* v. *Bhagwutee* (1), *Bhooban Mohan Banerji* v. *Muddun Mohan Singh* (3) and *Prankishan Laha* v. *Noyamoney Dassee* (5).

(7) *Virasangappa Shetti* v. *Rudrappa Shetti* (7). The ruling in *Sengamalathammal* v. *Valayuda Mudali* (4), was followed in this case.

From this review of the judicial decisions referred to by the learned advocate for the defendant, it will be seen that they all refer to cases which arose in Bengal or Madras, and which were governed by the Bengal or Dravida School of Hindu law. The interpretation placed by Vignanesvara on the word "*adya*" ("and the rest") so

(1) (1793) 1 S. D. A. Sel. Rep. 3.
(2) (1868) 2 B. L. R. A. C. 144; 10 W. R. 488.
(3) (1877) 1 Shome's Rep. 3.
(4) (1867) 3 Mad. H. C. Rep. 312.
(5) (1879) I. L. R. 5 Cal. 222.
(6) (1890) I. L. R. 17 Cal. 911.
(7) (1895) I. L. R. 19 Mad. 110.

as to include property acquired by inheritance, &c has not been accepted by the commentators whose works are of authority in these schools These decisions cannot, therefore, it seems to me, be accepted as authorities for the proposition that in the territories governed by the law of the Benares School property inherited by a female from a female is not *stridhan*

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The authoritative commentary on Hindu Law in the Benares School is the *Mitakshara* According to that authority property inherited by a woman is *stridhan* The Viramitrodaya does not, it seems, dissent from the definition of *stridhan* given in the *Mitakshara* Presumably, therefore, property inherited by a daughter from her mother is *stridhan* under the Benares School of Hindu Law

It is true that their Lordships of the Privy Council have limited the meaning of the term *stridhan*, ... the Benares Law pro ...

that the author did not intend to limit his definition to the particular kinds of property therein enumerated, and that this was clear from the subsequent paragraphs 2, 3 and 4 As the estate did not come to Kablas Kunwar by inheritance, they did not consider it necessary to determine whether immoveable property acquired by a woman by inheritance was "woman's property' *Brij Indar Bahadur Singh* v *Janki Koer* (1) It appears, therefore, from this decision that Vignanesvara's amplification of Yajnavalkya's text was accepted by their Lordships in regard to property granted or given to a woman by a stranger

The grounds upon which their Lordships decided that property inherited by a widow from her husband was not *stridhan*, are not, it seems to me, applicable to ... Manu, Katya- ... s enjoyment ... revious cases ... her Western ...

some other person than him

The question of the estate taken by a daughter as heir to her father, their Lordships stated, was not *res integra*, and they agreed that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions unless it was manifestly opposed to law and reason

Having regard therefore to the principle enunciated by the Judicial Committee that the duty of a European Judge who is under the obligation to administer Hindu Law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, that inherited property is *stridhan* according to the *Mitakshara*, the highest authority in the Benares School of Law, [483] that the texts of Narada and Katyayana quoted by their Lordships in *Bhugwandeen Dooley* v *Myna Baee* (2) do not touch property inherited by a daughter from her mother, that no passage in the *Mitakshara* or in any other commentary of ... was referred to which supported the contention ... on the

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heirs of her mother; that paragraph 30 of section 11, chapter 2 of the *Mitakshara* distinctly provides for the succession of uterine brothers to the *regularly inherited* property of a betrothed damsel, and consequently refers to property inherited by a woman from a person other than her father; that the Judicial Committee have accepted in regard to *gifts* from strangers, the explanation given in the *Mitakshara* of Yajnavalkya's expression "and any other (separate acquisition);" that no judicial decision was brought to the notice of the Court, in which it was decided that under the Benares School of Law property inherited by a daughter from her mother was not *stridhan*; and that there are special texts dealing with the nature of and succession to the estate inherited by a widow from her husband, I am of opinion that upon the authority of the *Mitakshara* property inherited by a daughter from her mother must be held to be *stridhan* under the Benares School of Law devolving on the death of the daughter upon her heirs, and not upon the heirs of her mother.

The Pawansi estate was therefore the property or *stridhan* of Rani Janki Kunwar. On her death it devolved as *stridhan* upon her heirs, that (*sic*) is to say, upon the kinsmen of her deceased husband, and not upon the heirs of her mother, or father, and therefore not upon the defendant Sheo Partab Bahadur Singh. Any alienation of the property made by her could not consequently be to the prejudice of the defendant.

As regards the nature of the interest taken by a woman in property inherited from a female and her power of alienation, the *Mitakshara* is silent. It would seem, however, that such property not being *Sandayika* is subject to the control of the husband, for the Viramitrodaya cites the following text of Manu, (IX, 199)—"A woman should never expend money belonging to her family which is common to (her and) many, nor even her own (separate property), without the consent of her lord." The subjection of the wife to marital control in regard to such property is in accordance with the general policy of the *Mitakshara*.

When the mortgage in favour of the Allahabad Bank was effected by Rani Janki Kunwar in 1881, her husband Bijai Bahadur was alive. He predeceased her. It is admitted by the learned advocate for the defendant that he attested the deed of mortgage, and it may be presumed that the mortgage was effected with his consent. It is not denied that there were decrees for large sums against Bijai Bahadur at the time that the mortgage was effected, and that in satisfaction of these decrees Rs. 1,63,000 were paid into Court after the execution of the mortgage. It appears also that when Rani Janki Kunwar accepted from her husband the gift of the Bahlopur estate she agreed to discharge the debts due by him.

[484] Under the circumstances, I am of opinion that the transfer made by Rani Janki Kunwar in 1881 in favour of the Allahabad Bank is valid, and binding on the defendant Sheo Partab Bahadur Singh, who, I may add, was not entitled under Hindu Law to succeed to the property upon the death of Janki Kunwar. Janki Kunwar being the heir of a taluqdar, the succession to her estate is governed by clause 11 of section 22 of Act I of 1869, that is to say, the estate descended "to such persons as would have been entitled to succeed under the ordinary law to which persons of the religion and tribe of such taluqdar or grantee, heir or legatee are subject." The property being *stridhan*, it descended under the special rules of inheritance applicable to such property under the *Mitakshara* to her deceased husband's kinsmen. As I am of opinion that under the ordinary Hindu Law the alienation made by Janki Kunwar with the consent of her husband is valid, it is unnecessary to consider whether, as she inherited the property on the death of her mother Kablas Kunwar under the provisions of section 22, clause 11 of Act I of 1869, she took, apart from Hindu Law, an absolute estate in it by virtue of these provisions read with section 11 and the definition of heir" in section 2 of the Act."

From that decision the defendant Sheo Partab Bahadur Singh appealed to His Majesty in Council.

On this appeal,

Mr. *J. D. Mayne* and Mr. *H. Cowell*, for the appellant contended that neither under the provisions of the Oudh Estates Act (I of 1869), nor under the ordinary Hindu Law by which she succeeded to the estate of Pawansi, did Janki Kunwar acquire any power of transfer beyond her own right and interest in it. That interest was not affected by the terms of Act I of 1869, whether or not she was an "heir" within the

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meaning of section 2 As to the power of disposal of property by zamindars, reference was made to section 11 of the Act, and to section 8, Bengal Regulation I of 1793, and section 8 of Madras Regulation XXV of 1802 as being the sources of the later legislation in Act I of 1869 and the cases of *Brij Indar Bahadur Singh* v *Janki Koer* (1), *Jagdish Bahadur* v *Sheo Partab Singh* (2), *Narindar Bahadur Singh* v *Achal Ram* (3) and *Ran Bijai Bahadur Singh* v *Jagatpal Singh* (4) were cited

As to the right and interest taken by Janki Kunwar in the estate under the Hindu law, it was contended that she took it not as *stridhan*, but under the ordinary law succeeded to an interest [485] in it similar to that taken by a widow, that is, an interest limited to her life, on her death the heirs of her mother succeeding to the estate She had therefore no power to mortgage it beyond her own life time After being once *stridhan* the estate descended to the heirs of the woman, Kablas Kunwar, from whom it originally descended It could only descend as *stridhan* if the text of the *Mitakshara*, chapter II, section XI, paragraph 2, were strictly applied, and this had wrongly been done by both the Courts below That it could not be done in all cases of property inherited by a woman had been laid down by the Privy Council in *Thakoor Deyhee* v *Baluk Ram* (5), *Bhugwandeen Doobey* v *Myna Baee* (6) and *Chotay Lall* v *Chunnoo Lall* (7), which decided that property inherited by a woman from a male was not *stridhan*, and there was no reason for any distinction between such property and property inherited by a female from a female Reference was made to *Prankishen Sing* v *Bhagwutee* (8), *Srinath Gangopadhya* v *Sarbamangala Debi* (9), *Sengamalathammal* v *Valayuda Mudali* (10), *Bhoobun Mohun Banerji* v *Muddun Mohun Singh* (11), *Prankissen Laha* v *Noyanmoney Dassee* (12), *Hari Doyal Singh Sarmana* v *Grish Chander Mukerji* (13), *Chotay Lall* v *Chunnoo Lall* (7), *Venkatarama Krishna Rau* v *Bhujanga Rau* (14), and *Virasangappa Shetti* v *Rudrappa Shetti* (15) From these authorities the following propositions it was submitted, could be deduced first that what a woman inherited from a woman was not *stridhan* in her hands, second, that she took only a qualified estate, and had consequently a restricted power over the property taken, third, that she did not become a stock of descent, fourth, that on her death the property reverted to the heirs of the woman from whom it originally descended

Mr *De Gruyther*, for the respondents, contended that on the construction of the Oudh Estates Act (I of 1869), Janki Kunwar as the heir of a taluqdar took an absolute and alienable estate in [486] Pawansi In the definition of an 'heir' in section 2 the only exception was a widow the word "heir" therefore would include a person taking as a daughter: she took the estate under the special provisions of the Act (section 22, clause 11) and section 11 gave her full power of alienation

(1) (1877) L R 5 I A 1
(2) (1901) L R 28 I A 100, I L R 23 All 369
(3) (1893) L R 20 I A 77, I L R 20 Cal 649
(4) (1890) L R 17 I A 173, I L R 18 Cal 111
(5) (1866) 11 Moore's I A 139
(6) (1867) 11 Moore's I A 487
(7) (1876) L R 6 I A 15, I L R 4 Cal 744
(8) (1793) 1 S D A Sel Rep 8
(9) (1868) 2 B L R A C 144, 10 W R 488
(10) (1867) 3 Mad. H C R 312
(11) (1877) 1 Shome's Rep. 8
(12) (1879) I L R 5 Cal 222
(13) (1890) I L R 17 Cal 911
(14) (1895) I L R 19 Mad. 107
(15) (1895) I L R 19 Mad. 110

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over it. Act I of 1869, sections 3 and 15, and *Brij Indar Bahadur Singh* v. *Janki Koer* (1), *Ran Bijai Bahadur Singh* v. *Jagatpal Singh* (2), *Jagdish Bahadur* v. *Sheo Partab Singh* (3), and *Jagatpal Singh* v. *Jageshar Baksh Singh* (4) were referred to. Janki Kunwar became under the provisions of the Act a fresh stock of descent.

As to the interest Janki Kunwar took in the estate by the Hindu Law, it was contended that under the *Mitakshara*, chapter II, section XI, paragraph 2 (Stokes' Hindu Law Books, 458) it was her *stridhan* as property inherited by her from her mother. Whatever restrictions have been put upon the interpretation of this text by judicial decision as to property inherited by a woman from a male, there is no decision that property inherited by a female from a female is not *stridhan*. That question, it was submitted, should be decided on the text of the *Mitakshara* : if it was there laid down that such property was *stridhan*, it was not material to show that the *Mitakshara* might be wrong. The right of a woman to hold property at all was of modern origin and was not considered to any extent in the early treatises of Manu and Yajnavalkya. But this case was governed by the *Mitakshara*, a much later treatise. A woman's power of holding property has increased and it has been held that she can acquire by adverse possession an absolute estate in property, the descent of which was governed by *Mitakshara* Law. *Sham Koer* v. *Dah Koer* (5) and *The Collector of Madura* v. *Mootoo Ramalinga Sathupathi* (6) were cited as to what the sources of Hindu Law were, and in what districts they respectively prevailed. Other texts of the *Mitakshara* showed that property acquired by a woman by inheritance was her *stridhan*. *Mitak* **[487]** *shara*, chapter II, section XI, verses 9, 25, 30, 31, 32 and 33. Those treatises which differ from the *Mitakshara* as to what was *stridhan* do not apply to Oudh. *Bhugwandeen Doobey* v. *Myna Baee* (7) was referred to. The doctrine of reverter is the result of the case law on the subject, the first reported case being *Prankishen Sing* v. *Bhagwutee* (8), which and the cases following it were, it was contended, wrongly decided so far as *Mitakshara* Law was concerned. The following decisions, and treatises on which they were supposed to be based, were referred to to show that, at any rate in cases of property inherited by a female from a female, the doctrine of reverter had been wrongly applied. Dayabhaga, chapter IV, section 2, verse 3 (Stokes' Hindu Law Books, 243), *Srinath Gangopadhya* v. *Sarbamangala Debi* (9), Dayabhaga, chapter IV, section 1, paragraphs 1 and 19 (Stokes 235), Dayabhaga, chapter IV, section 1, paragraphs 8, 9 and 23, (Stokes 237), Dayakrama Sangraha, chapter II, section 2, paragraph 28 (Stokes 487, 490), *Judoonath Sircar* v. *Bussunt Coomar Roy Chowdhry* (10), Vyavahara Mayukha, chapter IV, section 10, paragraphs 7, 24, 25, 26 (Stokes 98) ; Macnaghten's Hindu Law 38, *Bachiraju* v. *Venkatappadu* (11), *Sengamalathammal* v. *Valayuda Mudali* (12), *Venkataramakrishna Rau* v. *Bhujanga Rau* (14) ; *Virasan-*

(1) (1877) L. R. 5 I. A. 1.
(2) (1890) L. R. 17 I. A. 173 ; I. L. R. 18 Cal. 111.
(3) (1901) L. R. 28 I. A. 100 ; I. L. R. 23 All. 369.
(4) (1902) L. R. 30 I.A. 27; I. L. R. 25 All. 143.
(5) (1902) L. R. 29 I. A. 132 ; I. L. R. 29 Cal. 664.
(6) (1867) 12 Moore's I. A. 397 (435).
(7) (1867) 11 Moore's I. A. 487 (512, 513).
(8) (1793) 1 S. D. A. Sel. Rep. 3.
(9) (1868) 2 B. L. R. A. C. 144 ; 10 W. R. 488.
(10) (1873) 11 B. L. R. 286.
(11) (1865) 2 Mad. H. C. Rep. 402.
(12) (1867) 3 Mad. H. C. Rep. 312.
(13) (1895) I. L. R. 19 Mad. 107.

gappa Shetti v Rudrappa Shetti (1), Dayabhaga, chapter IV, section 1, paragraphs 18, 19, 20 (Stokes 240), Vyavastha Chandrika (Translation by Shama Charan Sircar) 505, Dayabhaga, chapter IV, section 1, paragraphs 7 and 12, Prankissen Laha v Noyanmoney Dassee (2), Huri Doyal Singh Sarmana v. Grish Chunder Mukerji (3), Dayakrama Sangraha, chapter II, section 3, paragraphs 1 to 6 (Stokes 492, 493), Mayne's Hindu Law and Usage, 6th edition 33, Bhoobun Mohun Banerji v Muddun Mohun Singh (4), Thakoor Deyhee v Baluk Ram (5), Bhugwandeen Doobey v Myna Baee (6) [488] Jolly's Tagore Law Lectures 248, Manilal Rewadat v Bai Rewa (7) and other Bombay cases there cited, Chotay Lal v Chunnoo Lal (8) and Chiddu v Naubat (9)

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Janki Kunwar therefore, it was submitted, took an absolute estate in Pawansi, and had full power to mortgage it as she had done to the respondents The suit, therefore, had been rightly decreed against the appellant by both the Courts below

Mr *Mayne* in reply referred to *Mitakshara*, chapter II, section XI, paragraphs 26, 27, 28, 29 and 30 (Stokes 465), Dayabhaga, chapter IV, section 3, paragraph 7 (Stokes 253), Vyavahara Mayukha, chapter IV, section 10, paragraphs 33, 34 (Stokes 106), *Bachiraju* v *Venkatappadu* (10) and the note by Macnaghten to the case of *Prankishen Sing* v *Bhagwutee* (11)

1903, *June* 24 —The judgment of their Lordships was delivered by SIR ARTHUR WILSON :—

On the 14th of November 1881, Janki Kunwar, a Hindu lady governed by the Hindu Law of the Benares School, executed a mortgage deed in favour of the present respondents, the Allahabad Bank, by which she purported to charge, first, her zamindari Pawansi, and secondly, in case Pawansi should be insufficient, another property, to secure the repayment by instalments of a sum advanced by the Bank, with interest

Janki Kunwar having died in the meantime, the Bank on the 19th of February 1894 filed a suit in the Court of the Subordinate Judge of Partabgarh to enforce the mortgage deed A number of persons were made defendants to the suit, but of these it is only necessary now to mention the first defendant, the present appellant, Sheo Partab Bahadur Singh, who had succeeded to the zamindari of Pawansi on the death of Janki Kunwar, and who is now in possession of it The plaint alleged that he was the heir of Janki Kunwar The present appellant in his written statement said that Janki Kunwar held Pawansi as a Hindu daughter, without power of alienation, that he himself was not Janki's representative, and that no transfer by her could affect him Issues were settled, of which it is sufficient [489] to mention the 6th —"Was Rani Janki Kunwar competent to mortgage taluqa Pawansi in such a way as to make it binding beyond her life time ?

The history of Pawansi, so far as it is necessary to notice it, is this At the time of the annexation of Oudh, in which it lies, Kablas Kunwar, the mother of Janki, was in possession of it The summary settlement

(1) (1895) I L R 19 Mad 110 (111, 117)
(2) (1879) I L R 5 Cal 222
(3) (1890) I L R 17 Cal 911
(4) (1877) 1 Shome's Rep. 3
(5) (1866) 11 Moore's I A 139 (173, 174)
(6) (1867) 11 Moore's I A 487 (505, 512)
(7) (1892) I L R 17 Bom 758
(8) (1876) L R 6 I A 15, I L R 4 Cal 744
(9) (1901) I L R 24 All 67
(10) (1865) 2 Mad. H C Rep 402
(11) (1793) 1 S D A Sel Rep 8

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was made with her, a *sanad* was granted to her, and she was entered in lists 1 and 2 under section 8 of the Oudh Estates Act, 1869 (Act I of 1869). After her death in August 1872, disputes arose as to the succession to her property, and litigation ensued, which ended in a judgment of this Committee, by which it was decided that Kablas Kunwar had taken a permanent heritable and transferable right in Pawansi, and that on her death it had passed to her daughter and only child Janki; *Brij Indar Bahadur Singh* v. *Janki Koer* (1).

After the death of Janki Kunwar controversy again arose as to the succession, and again the litigation was carried to this Committee; *Jagdish Bahadur* v. *Sheo Partab Singh* (2). In that litigation no one claimed to be entitled as *stridhan* heir of Janki. The suit was framed upon the assumption that upon the death of Janki the property did not pass to any heir of hers, but reverted to the heirs of an earlier generation. In the judgment it is said (at page 106 of the report in 28 I. A.):—"It is not disputed that the succession must be to the heirs of her (Janki's) father," presumably as the *stridhan* heirs of her mother in the absence of lineal heirs of the latter.

The question then which their Lordships have to decide is whether Janki Kunwar had power to mortgage Pawansi absolutely, or whether her power to do so was limited to her own life-time?

The case for the plaintiff Bank was put upon two grounds:—first, that under the Oudh Estates Act of 1869, Janki Kunwar, as heir of a taluqdar or grantee, had express statutory power to alienate the whole estate, whatever the extent of her own interest might be; secondly, that, apart from the Act, under the Hindu Law of the Benares School, she having inherited what [490] had been her mother's *stridhan*, held it as her own *stridhan*, with full power of alienation. The Subordinate Judge decided in favour of the plaintiff Bank, the now respondent, upon both grounds, and made a decree in its favour. The Judicial Commissioners on appeal expressed no opinion upon the first question, but on the second question agreed with the first Court and affirmed its decree. Against this decision the present appellant alone has appealed, and the appeal therefore relates only to Pawansi.

With regard to the first question, there can be no doubt that Kablas Kunwar, the mother of Janki, was a taluqdar or grantee under Act I of 1869, and the portions of the Act material to the present question are:—

"Section 2.—'Estate' means the taluqa or immoveable property acquired or held by a taluqdar or grantee. . . .

"'Heir' means a person who inherits property otherwise than as a widow under the special provisions of this Act.

"Section 11.—Subject to the provisions of this Act and to all the conditions under which the estate was conferred by the British Government, every taluqdar and grantee, and every heir and legatee of the taluqdar and grantee, of sound mind and not a minor, shall be competent to transfer the whole or any portion of his estate or of his right and interest therein, during his life-time, by sale, exchange, mortgage, lease or gift, and to bequeath by his will to any person the whole or any portion of such estate, right, and interest."

The contention was that every heir, whether absolute or qualified,

(1) (1877) L. R. 5 I. A. 1. (2) (1901) L. R. 28 I. A. 100; I. L. R. 23 All. 369.

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of a taluqdar or grantee (and it would seem to follow, every legatee, how ever limited his interest) has an absolute power to alienate the whole estate If section 11 had stood alone the question would hardly have been arguable A power to an heir to alienate "his estate or his right and interest therein would certainly have meant his estate, if he owned the estate, or his right and interest therein, if he owned less than the estate But the argument was based upon the words ' otherwise than as a widow in the definition of an heir It was argued that the insertion of these words indicated an intention to give to [491] all heirs other than widows some power which widows do not possess It is useless to speculate why the words referred to were inserted in the definition, but their Lordships think that much clearer language would have to be shown to justify them in saying that the Legislature has departed so far from the ordinary principles of law as to empower people to alienate what may not belong to them And the decisions of this Committee in former cases seem to lend support to this rather than to the contrary view In a series of cases it has been held that notwith standing the strong language of the Act, and in particular the enactment in section 10 that the Courts are to accept the lists framed under the Act as conclusive that the persons included in them are taluqdars or grantees, and those of section 11, the Courts may nevertheless go behind the Act to the extent at least of recognising trusts and may give effect to beneficial titles distinct from the statutory title under the Act It may be sufficient to refer to *Hurpurshad* v *Sheo Dyal* (1) and *Seth Jaidial* v *Seth Sita Ram* (2) From what was said in the last mentioned case (at page 228 of the report in 8 I A), it would appear that, if the facts had been such as to require it, their Lordships would have granted an injunction restraining a taluqdar recorded as such under the Act from attempting to alienate the estate to the detriment of those beneficially interested

The question which remains is whether, apart from the provisions of the Act Janki, being governed by the Hindu Law of the Benares School had power to alienate absolutely the taluqa of Pawansi which she inherit ed from her mother The question thus arising is not the same question as that with which their Lordships had to deal in the case of *Sheo Shan kar Lal* v *Debi Sahai*, in which judgment has just been delivered but it is very closely connected with it Each case has to do with the estate of a woman under Benares law in property inherited from a woman The former case referred to the descent of such property the present raises the question whether it is the absolute property of the last holder in such a sense that, apart from any grounds of necessity, she could alienate it beyond her lifetime

[492] In the present case their Lordships have had the advantage of hearing a full argument upon both sides The argument for the appel lant was to the effect that the alleged power of the lady to alienate in the present case could be based only upon the literal interpretation of the *Mitakshara*, which seems to make all property inherited by a woman her *stridhan* in the strict sense of the term with all the incidents of such property, including the free power of alienation, that that view of the Bena res law had already been negatived by this Committee in the case of property inherited from a male, that inheritance from males and that from females could not be differently treated, and that the authorities in

(1) (1876) L R 3 I A 259 (2) (1881) L R 8 I A 215

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most parts of India were to the effect that what a woman has inherited from a woman she does not hold as her absolute and alienable estate, but for a qualified estate, with reverter after her death to the heirs of her predecessor in title. The argument on the other side was based strictly upon the text of the *Mitakshara*; but it was contended that a distinction should properly be drawn between property inherited from males and that inherited from females; and an endeavour was made to show that the decisions in various provinces in India applying the doctrine of reverter to such cases were wrong.

On the present point, as on that arising in the previous case, it is too late to contend for the literal meaning of the *Mitakshara* to the full extent. The previous decisions of this Committee have established that, under the Benares law, what a woman takes by inheritance from a male she takes not absolutely, but for a qualified estate alienable only under the conditions applicable to such an estate.

The reasons given by their Lordships in the judgment just delivered for declining to draw a distinction between property inherited from a male and that inherited from a female seem to them to apply to the present case. As to the argument directed against the application of the doctrine of reverter in such cases as the present, their Lordships are of opinion that that doctrine is too well established in India generally to be now overthrown. The question may be different in those parts of Bombay which are governed by the Mayukha. An exact examination of the [493] terms of that treatise seems to have led to some diversities of view in the Bombay High Court, which need not now be considered.

Their Lordships will humbly advise His Majesty that the decree of the Subordinate Judge and that of the Judicial Commissioners ought to be set aside so far as they affect the property of the present appellant, and that instead thereof the suit ought to that extent to be dismissed with costs in both Courts. The respondent Bank will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants:—Messrs. *T. L. Wilson & Co.*

Solicitors for the first respondent (The Allahabad Bank):—Messrs. *Ranken Ford, Ford, & Chester.*

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25 A. 493 (=23 A. W. N. 95.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BAHAL RAI AND OTHERS (*Defendants*) *v.* SUMER CHAND AND ANOTHER (*Plaintiffs*).* [1st April, 1903.]

Act No. V of 1888 (*Inventions and Designs Act*), *section* 51—"*Proprietor*" *of a design-Publication of design in British India.*

In 1899 the plaintiffs got a design for a curtain registered under the Inventions and Designs Act, 1888, as being the proprietors thereof. In 1901 they sued the defendants for damages for imitating this design. The defendants proved that they were making the curtains which were alleged to be an imitation of the plaintiffs' registered design for a Bombay firm, and also that the design had been sent to the Bombay firm from a firm in London in 1897, that is, before the plaintiffs' design was registered, in order that curtains of

* First Appeal No. 173 of 1901 from a decree of H. F. D. Pennington, Esq., District Judge of Fatehgarh, dated the 3rd of May 1901.

similar design might be manufactured in India and sent back to London for sale The plaintiffs failed to prove that they had either invented the design, or had purchased it from the inventor

Held that the sending of the design by the London firm to the firm in

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THE suit out of which this appeal arose was brought to recover damages for the alleged infringement of the plaintiffs' right in a certain design for curtains The plaintiffs alleged [494] that they had invented the design in question and got it registered according to the rules framed under Act No V of 1888, and they charged the defendants with having dishonestly imitated that design The defendants in their written statement alleged that the design in question was an imitation of an old pattern known as the "Italian design," and denied that the plaintiffs were entitled to have that design registered or to sue for an infringement of it So far as the plaintiffs were concerned, the evidence of one of them, Sumer Chand, showed that the design was received by them from London in the year 1898, from whom was not stated, but it was in no sense invented by the plaintiffs or either of them The evidence for the defendants on the other hand established the following facts In the year 1897, a year, that is, before the receipt of the design by the plaintiffs, one Jehangir Framji, a Parsee merchant carrying on business in Bombay, received a design similar to the design in question from his firm in London, with instructions to have curtains made in accordance with the design and sent to London for sale Owing to press of work, Framji did not at once have the curtains made, but laid the design aside until towards the end of 1899, when he gave instructions to the defendants to print curtains from the design after making certain alterations The defendants never saw the design which was sent to the plaintiffs The design on the curtain, which was alleged to be an infringement of the plaintiffs' registered design, was proved to have been copied from the design which had been received by Jehangir Framji from his London firm

The Court of first instance, notwithstanding the fact that the defendants had never seen the plaintiffs' design, nevertheless found that they had infringed the plaintiffs' rights by producing a curtain bearing a similar design to that of the plaintiffs' and accordingly issued an injunction as prayed for by the plaintiffs

Against this decree the defendants appealed to the High Court

Pandit *Sundar Lal*, for the appellants

Messrs *B E O Conor* and *S Sinha*, Babu *Jogindro Nath Chaudhri* and Munshi *Gulzari Lal*, for the respondents

[495] STANLEY, C J, and BURKITT, J —The suit out of which this appeal has arisen was brought by the plaintiffs to prevent the infringe- ... jungle scene In their ... great trouble and ex... ain and got it registered, and that the defendants dishonestly imitated that design The defendants in their written statement allege that the design in question is an imitation of an old pattern known as the "Italian design," and deny that the plaintiffs were entitled to have that design registered, or to sue for an infringement of it The evidence shows that the statement made by the

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plaintiffs in regard to the invention of this design was absolutely false, as they in no sense were the inventors of the design. According to the evidence of one of the plaintiffs, Sumer Chand, the design was received from London in the year 1898. It does not appear from whom, but it was in no sense invented by the plaintiffs or either of them. It also appears from the evidence that in the year 1897, a year before the receipt of the design by the plaintiffs, one Jehangir Framji, a Parsee merchant carrying on business in Bombay, received a design similar to the design in question from his firm in London, with instructions to have curtains made in accordance with the design and sent to London for sale. He says that owing to press of work he did not immediately have curtains made in accordance with these directions, but laid the design in question aside until towards the end of 1899, when he gave instructions to the defendants to print curtains from the design after making certain alterations. It is established by the evidence that the defendants never saw the plaintiff's design. The design on the curtain, which is alleged to be an infringement of the plaintiffs' registered design, is proved to have been copied from the design which was received by Jehangir Framji from his London firm. This the learned District Judge has found. The Court below came to the conclusion that, notwithstanding the fact that the defendants had never seen the plaintiffs' design, yet they could be found to have infringed the plaintiffs' rights by producing a curtain bearing a similar design to that of the [496] plaintiffs, and accordingly granted a perpetual injunction against them.

The section of the Inventions and Designs Act, namely, Act No. V of 1888, which empowers a proprietor of a design to obtain an order for its registration, is section 51. That section provides that "any person, whether a British subject or not, claiming to be the proprietor of any new and original design not previously published in British India, may apply to the Governor-General in Council for an order for the registration of the design." 'Proprietor' is defined in the preceding section of the Act as follows :—"The author of any new and original design shall be considered the 'proprietor' thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case that person shall be considered the 'proprietor,' and every person acquiring for a good or valuable consideration a new and original design, or the right to apply the same to an article, either exclusively of any other person or otherwise, and also every person on whom the property in the design, or the right to the application thereof, shall devolve, shall be considered the 'proprietor' of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise." From the words of this section it will be seen that the only person who is entitled to have a design registered under the Act is the proprietor for the time being of the design, and that the design must be a new and original design, and must not have been previously published in British India. It has been contended on behalf of the appellants in this case that none of these requirements are satisfied in the present case. In the first place, it is said that this design had been previously published in British India. This is proved by the evidence of the person to whom we have referred, namely, Jehangir Framji. He says that he received the design for the curtain, which is the subject-matter of the alleged infringement, from London in December 1897. He received it, he says, from his London firm, and it is of Italian manufacture. The object of

sending it to India was to have curtains manufactured of a similar design, but with certain alterations in the figures of animals, [497] so that it should be made to look like an Indian design This shows how Indian art may be degraded This evidence has been accepted by the learned District Judge, and we see no reason to doubt the truthfulness of it Now if this publication to Jehangir Framji constituted a publication in British India, it is clear that the plaintiffs had no right to have their design registered in this country in the year 1899 If a design is communicated to a person who is not in any confidential relation to the author or proprietor of the design, it would seem that such communication would constitute a publication, and form a bar to the subsequent registration of the design It is not shown that there was any confidential relationship whatever between Jehangir Framji, to whom the pattern was sent in 1897, and the author or proprietor of the design On looking at the curtains before us, which are exhibits in the case, it appears to us to be clear that the design in all is similar, and that the alterations in small details are, what we may call, colourable alterations, which do not affect in any way the material part, or ground work, of the design It is perfectly clear that all these designs have been derived from some common source, perhaps from a pattern of considerable antiquity It appears to us, therefore, that, as regards one of the essential matters which it was necessary for the plaintiffs to establish before they could enforce any privilege conferred by Act No V of 1888 was not proved, namely, the fact that their design had not previously been published in India In addition to this, however, the plaintiff must also be the "proprietor' of the design There is absolutely no evidence worth the name to establish this fact in favour of the plaintiffs The evidence of Sumer Chand is insufficient for that purpose Their case, we may repeat, was that they themselves invented the design But when Sumer Chand goes into the witness box his evidence is, that the pattern which has been registered was received from London with an order to the plaintiffs to prepare curtains of that pattern for the party who gave the order, and not to prepare curtains of the kind for anyone else He also, no doubt, says —"I had to pay the price of the design' What he exactly means by payment of the price of the [498] design, it is difficult to say He does not mention from whom he purchased the design, and the plaintiffs' learned counsel admits that it is not known who the author or proprietor of the design is This being so, the plaintiffs have failed to establish that they were the proprietors of the design within the meaning of the section to which we have referred A further requirement is, that the design shall be a new and original design It is perfectly manifest from the evidence that this design is not a new and original design The fact that it was in the possession of Jehangir Framji in 1897, two years before the registration of the design by the plaintiffs, is conclusive evidence on this point For these reasons we must allow the appeal, set aside the decree of the learned District Judge, and dismiss the suit with costs in both Courts

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We also discharge the injunction The objections which have been filed by the plaintiffs under section 561 of the Code of Civil Procedure fall to the ground, and are dismissed with costs, the suit having, on the merits, been decided against the plaintiffs

Appeal decreed

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FULL BENCH.

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FULL BENCH.

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Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Burkitt.

BALMAKUND (*Plaintiff*) *v.* DALU (*Defendant*).* [2nd April 1903.]

Practice—Pleadings—Failure of plaintiff to prove the whole case upon which he came into Court—Plaintiff entitled to succeed on case proved if sufficient to support a decree.

The plaintiff came into Court alleging (1) that he was the proprietor of a certain building, and (2) that he had leased a part of the said building to the defendant, who, however, refused to pay the rent agreed upon, and he sought to have the defendant ejected and to recover possession of tha portion of the building occupied by him. No specific issue dealing with the plaintiff's title was framed, but evidence as to title was given on both sides.

Held that even though the plaintiff had failed to make out his case as to the letting, he nevertheless should get a decree on his title unless the defendant could show a better one. The fact that no distinct issue as to the plaintiff's title had been framed could not be construed to the prejudice of the plaintiff inasmuch as the issue had in fact been tried, and it could not be said that the defendant had been in any way taken by surprise.

[499] *Abdul Gani* v. *Babni* (1) followed. *Haji Khan* v. *Baldeo Das* (2) referred to. *Naiku Khan* v. *Gayani Kuar* (3) overruled. *Lakshmibai* v. *Hari bin Ravji* (4), *Ramachandra* v. *Vasudev* (5) and *Bajrang Das* v. *Nand Lal* (6) distinguished.

[**Ref.** 10 C. L. J 538=6 M. L. T. 255=2 Ind. Cas. 346 ; 21 I. C. 560 ; 25 I. C. 280 60 I. C. 264 ; **Appr.** 1 N. L. R. 4 ; **Fol.** 12 O C. 183=3 Ind. Cas. 589 ; **Dis** 1904 A. W. N. 33=26 All. 331 ; **Ref.** 19 C. W. N. 1159.]

IN the suit out of which this appeal arose the plaintiff came in Court alleging that he was the owner of a certain cattle-shed which had built at his own expense ; that the defendant had rented from hi portion of this shed ; that after a while he had ceased to pay rent, that when the plaintiff asked him to vacate the shed he refused to d The plaintiff asked for two reliefs, (1) that a decree should be pa against the defendant for five months' arrears of rent for the shed (2) that the defendant should be ejected from the portion of the which he occupied, and the plaintiff put in possession. The defe traversed the allegations in the plaint. He pleaded that the pl was not the owner of the cattle-shed, and that he (the defendan been in proprietary and adverse possession of it " for several genera He also denied that he had rented " the land of the house " fr plaintiff. The Court of first instance (Munsif of Muttra) fram one issue, namely, whether the defendant had rented from the a part of the " nohra " in question. Notwithstanding this, evi to title was adduced on both sides, and the Munsif came to th sion that although the plaintiff had failed to prove the lease the cattle-shed to the defendant, there probably had been a lea sort, and in any case the cattle-shed belonged to the plain was entitled to eject the defendant therefrom. The Court decreed the plaintiff's claim for ejectment, but not for rent.

The defendant appealed. The lower appellate Court (Court Judge of Agra, with powers of a Subordinate Judge) he

* Appeal No. 48 of 1901 under section 10 of the Letters Patent.

(1) Weekly Notes, 1903, p. 18.
(2) Weekly Notes, 1901, p 188.
(3) (1893) I. L. R. 15 All. 186.
(4) (1872) 9 Bom. H
(5) (1886) I. L. R. 10
(6) Weekly Notes, 1

plaintiff could succeed only if he succeeded in proving the tenancy He could not succeed on any other ground which was not in issue between the parties The lower appellate Court agreed with the findings of the [500] Munsif that the plaintiff had failed to prove the lease to the defendant of part of the cattle shed and accordingly dismissed the plaintiff's claim altogether

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The plaintiff appealed to the High Court The appeal came first before a single Judge of the Court, who, in view of an apparent conflict between two rulings of the Court, made a reference to a Division Bench At the hearing the Judges composing the Bench were divided in opinion The decree therefore followed the judgment which agreed with the Court below, and the appeal was dismissed * Against this decree the plaintiff preferred an appeal under section 10 of the Letters Patent of the Court

Munshi *Haribans Sahai* (for whom Babu *Sital Prasad Ghosh*) for the appellant

Pandit *Sundar Lal*, for the respondent

STANLEY, C J —In this suit the plaintiff claimed to recover possession from the defendant of part of a cattle shed of the value of Rs 38, which is in the occupation of the defendant He also claimed in the suit to recover a sum of Rs 1 4 alleged to be arrears of rent due for the shed under a contract of tenancy entered into between him and the defendant It is well to see from the pleadings the nature of the case set up in the claim and also the nature of the defence which was filed by the defendant In his statement of claim the plaintiff in the first paragraph alleges that he is owner and in possession of a cattle shed which he had built *kachcha* and *pacca* at his own expense In the second paragraph he alleges that at the beginning of the month of Jeth, Sambat 1955, corresponding to June 1898, " the defendant leased from the plaintiff a portion of the said cattle shed on the West on a rent of 4 annas a month " for the accommodation of his cattle, and then he alleges that the defendant paid rent for a few months, but after that ceased to pay He further alleges that he requested the defendant to vacate the cattle shed, but that " he refused to do so and became ready to fight " The prayer of the claim is, first, to recover a sum of Rs 1-4 on account of rent, and, secondly, to recover possession of the western portion of the cattle shed, being the portion said to [501] be occupied by the defendant On this pleading two distinct claims are made, one for recovery of possession of the shed as owner, and the other for recovery of a trifling sum for rent alleged to be due in respect of a letting of a part of the shed which had been determined by notice to quit

The Court of first instance found that there was no satisfactory proof of any tenancy, and accordingly dismissed the plaintiff's claim for rent It found, however, that the plaintiff was the owner of the shed, and as such entitled to possession Comment has been made upon the fact that the only issue which was formally framed by the learned Munsif was the issue, whether or not the plaintiff let any portion of the cattle shed to the defendant In the pleadings, however, the question of title was raised between the parties, and evidence was given on both sides in support of their respective cases in regard to it The defendant in his written statement alleged that the plaintiff was not the owner of

* See Weekly Notes, 1901, p 157

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the shed, and that he, the defendant, did not take the land which formed the site of the shed on rent from the plaintiff. He also alleged that he (the defendant) was the absolute owner of the land occupied by the shed according to his share in the village site, and that he had been in proprietary and adverse possession of the shed in dispute for more than twelve years. It is obvious from this that the question of title to the property was definitely raised, and it is clear from the evidence in the case that this question was determined after an examination of the evidence which was adduced on both sides upon this question. The mere omission on the part of the Munsif to frame an issue upon this question, which was a material question in the case, and which was, as a matter of fact, tried and decided by him, appears to me not to be a matter to which any great importance can be attached. The question of title was clearly raised in the pleadings, and the evidence on both sides was directed to it. The defendant could not be, and was not, taken by surprise in regard to it.

On appeal the learned Subordinate Judge was of opinion that inasmuch as the only issue definitely raised in the case, as he thought, was the issue as to the tenancy, the issue as to title [502] could not legitimately be considered, and that inasmuch as the plaintiff had failed to prove the tenancy which he set up, the suit could not be maintained. Accordingly he overruled the decision of the Court of first instance, and dismissed the plaintiff's suit.

On appeal to the High Court (see Weekly Notes, 1901, page 157), the case was heard before my brothers Knox and Aikman, who differed in opinion. Mr. Justice Knox held, that, inasmuch as the plaintiff had failed to establish the case set up by him and had come to Court, as he says, on a false case, he was not entitled to any relief. Mr. Justice Aikman held that on the facts established the plaintiff was entitled to a decree for posssession, although he may have failed to prove the whole case set up by him. The result of this difference of opinion was that the decision of the lower appellate Court was upheld and the appeal dismissed. From that decision an appeal has been preferred under the Letters Patent.

The finding of the Munsif on the question of the alleged tenancy is as follows :—" I find that the plaintiff built the whole *nohra* (*i. e.*, the cattle-shed) two years ago. I also believe that the defendant keeps his cattle in the western part of it since Jeth last year. It is not proved to my satisfaction that the defendant contracted to pay 4 annas a month rent, or any rent at all, though it is probable that the quarters were hired to him—because the only alternative is that they were lent to him, but that is not pleaded, whereas there is evidence of the plaintiff's witnesses that they were hired." It does not follow from this finding that the plaintiff put forward any false case. He merely failed to establish to the satisfaction of the Court the letting of the shed stated in the plaint. It does not follow from that that the Court found that he had put forward a false case. It merely found that he had failed to establish his case in this respect. It appears to me that the finding upon this issue did not amount to a finding upon which the Court would be entitled to dismiss the plaintiff's suit *in toto*. In addition to the issue as to the letting of the shed there was the further issue, really, though not formally, knit between the parties, in regard to the ownership of the shed, and that issue the Munsif has found in favour of

[503] the plaintiff Reliance has been placed by the learned Advocate for the respondent upon a case in this High Court, which came before a Bench of which one of us was a member, namely, the case of *Naiku Khan* v *Gayani Kuar* (1) It is difficult to distinguish the facts of that case from the present case It was an ejectment suit The plaintiff respondent came into Court, alleging that she was the owner of a house occupied by the defendants appellants, that she had leased that house at a rent of Rs 3 per month to the defendants, and that the defendants after paying rent regularly to her for one year, had paid nothing in the second and third years She therefore sued for the possession of the house and Rs 72 rent for two years The defendants claimed the house as their own property In that case it was held that the plaintiff coming into Court on the allegation that she was the owner of the house, and that the defendants were her tenants at a certain rent, and having failed to prove the existence of the tenancy, could not be allowed to support her case on the plea that the defendants were trespassers, such plea having formed no part of the original case In that case, as in the present, as appears from the record of it, the plaintiff had served notice upon the defendants as her tenants to vacate the property alleged to have been leased to them This fact is not stated in the judgment The claim is treated as being one based upon tenancy, and upon a tenancy alone In their judgment the learned Judges say —" It is to be noticed that she (*i e*, the plaintiff) did not allege any alternative cause of action, such as, for example, that the defendants were trespassers " In the present case before us on appeal there is impliedly a statement as it seems to me that the defendant was a trespasser, inasmuch as it is expressly stated that notice was served upon him to vacate the cattle shed, but he *refused to do so* *Likewise in the case under review, from the fact that* notice was served upon the defendants to vacate the property there was an implied allegation that the defendants were in possession of it as trespassers The learned Judges in that case appear to me to have based their decision largely, if not entirely, upon the ruling in the case of *Lakshmibai* v *Hari bin Ravji* (2) [504] They say, towards the end of their judgment, referring to the rule laid down in that case, as follows —" In the rule of law so laid down we fully concur. Applying that rule to the present case, we are of opinion that the plaintiff, who came into Court on an untrue cause of action, and who endeavoured to support that cause of action by the evidence of witnesses whom the lower Courts disbelieved, cannot now be allowed to turn round and obtain a decree for the ejectment of the defendants as trespassers on the strength merely of her alleged proprietary title " I turn now to the case of *Lakshmibai* v *Hari bin Ravji*, (2) upon the ruling in which reliance was placed In that case a lessor sued to eject his tenant on the expiration of the term of the lease or for the breach of the conditions of the lease, and failed to prove the lease, and it was held that the lessor was not at liberty in the same suit ignoring the lease to fall back upon his general title, as though he had not set up and failed to prove the alleged lease, that the lessor must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case from the commencement In this case the following question was referred to a Full Bench by West, J, namely, " Whether *A*, suing as landlord or lessor to

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(1) (1893) I L R 15 All 186 (2) (1872) 9 Bom H C R 6.

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eject *B* as his tenant on the expiry of his term or for breach of his contract, is at liberty to rely as the ground of his right on a relation between him and *B* that has not arisen out of the alleged contract." In the judgment of the Court the learned Judges say :—" We are of opinion that in this case the question referred must be answered in the negative. The plaintiff has sued on a document which the Court below has believed to be a forgery. The general rule is that a party must be limited to the case which he puts forward in his plaint. He may indeed, from the commencement of the suit, put forward in his plaint an alternative case, and thus the defendant will have notice that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case he may have leave to amend his plaint, and to state his case therein correctly, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, or misconstruction of documents." That case seems to me entirely different [505] from the one before the Court. The plaintiff there relied upon a deed which proved to be a forgery, and no alternative case was put forward. Here we have clearly put forward as the foundation of the plaintiff's case an allegation of ownership of the property in dispute. We have in the defence a denial of the plaintiff's title and an allegation by the defendant that he is the owner of the property. These are matters entirely independent of any relation of lessor and lessee or of landlord and tenant. It cannot therefore be said that the defendant was taken by surprise in the case. Evidence was given on both sides upon the question of ownership, and the issue upon it was found in favour of the plaintiff. Another case upon the same question is that of *Haji Khan* v. *Baldeo Das* (1). That case is distinguishable from the present. There the plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to him, that the tenancy had commenced some eleven years before suit, but that for the last three years the defendant had ceased to pay rent and had denied the plaintiff's title. The defendant denied that the plaintiff was the owner of the house, or that he had leased it from the plaintiff. He pleaded also that he had been in adverse possession for more than twelve years. The plaintiff failed to prove the allegation of tenancy set up by him, and it was not shown that he had been in possession within a period of twelve years from the institution of the suit. This being so, it was held that on failure of the plaintiff's case as to tenancy it lay on the plaintiff to prove that he had been in possession within twelve years, and not having proved that fact, he was not entitled to a decree for possession. It was on the ground that the plaintiff had failed to prove that he had been in possession within twelve years as also the alleged tenancy that the judgment against him was based. I am unable to distinguish the case now before the Court from a case which was recently decided by a Full Bench of this Court (of which I and also Mr. Justice Knox, who was one of the Judges who decided the case reported in I. L. R. 15 All. 186, were members), namely, the case of *Abdul Ghani* v. *Musammat Babni* (2). In that case [506] the plaintiff came into Court, alleging that the defendant had about eight years previously rented a house from him at a monthly rent of one rupee, but latterly had failed to pay the rent, and that he had given the defendant notice to quit the house. He claimed possession and damages, but not

(1) Weekly Notes, 1901, p. 188. (2) Weekly Notes, 1903, p. 18.

arrears of rent The defendant denied the tenancy, and asserted that she had been in adverse possession for a period of seventeen years It was found after a remand of issues to the lower Court by the High Court, that the plaintiff was the owner of the house, that the defendant occupied the house as a friend with the plaintiff's permission, that she had never before asserted her title to it, and her possession was merely permissive It was held that the plaintiff was entitled, upon the facts established, to a decree for possession, notwithstanding that he had failed to prove that the defendant had been his tenant In the judgment of the Court in that case reference is made to the case which is now before the Court It was distinguished from the case then under consideration by the observation which appears in the judgment that the only issue in that case was the issue whether or not there was a letting of the property in dispute Now that we have before us the pleadings in this case we find that this was not the only issue which was, as a matter of fact, heard and determined by the learned Munsif Although he did not, no doubt through inadvertence frame an issue on the question of title he undoubtedly heard evidence upon it at length, and after a careful hearing determined it I am unable to distinguish the two cases I see no reason whatever for altering the view which I entertained after the arguments which we heard in the former case It appears to me that the case of *Abdul Ghani v Musammat Babni* (1) was correctly decided I am unable to distinguish the present case from it, and I therefore think that the decision of the lower appellate Court is erroneous As the issue as to title has not been decided by the lower appellate Court, I would refer that issue to that Court, and upon the return of the finding on it decide this appeal

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BANERJI, J —I think the question raised in this appeal is practically concluded by the ruling in *Abdul Ghani v* [507] *Musammat Babni* (1), decided by a Full Bench of three Judges, with which I agree That ruling fully supports the view adopted in this case by my brother Aikman As observed by Mr Justice Chamier in *Haji Khan v Baldeo Das* (2), *if a Court sees that the plaintiff is entitled* to the relief which he than those put forward in his claim, if the defendants were not thereby . case in which the defendant was, or could be, taken by surprise if the question of the title set up by the plaintiff in his plaint was determined The claim for the ejectment of the defendant from the cattle shed in question was based upon two grounds—(1) that the plaintiff was the owner of it, that the defendant had no title to it, and that he had wrongly withheld possession from the plaintiff and (2) that the defendant had been the plaintiff's tenant and the tenancy had been determined by notice If the plaintiff could succeed in proving either of the two grounds set up by him he would be entitled to a decree for ejectment, but his failure to prove the second ground would not preclude him from asking the Court to try the other ground put forward in the plaint That distinguishes this case from the ruling of the Bombay High Court in *Ramchandra v Vasudev* (3) upon which the learned advocate for the respondent has relied As in this case the plaintiff alleged that he was the owner of the

(1) Weekly Notes 1903 p 18

(2) Weekly Notes 1901, p 188

(3) (1886) I L R. 10 Bom 451

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23 A. W. N.
104.

An English or Irish barrister who by virtue of his call to the Bar is enrolled as an advocate in the High Court of Judicature for the North Western Provinces, and thereby is authorized to practise as an advocate in the said High Court and in the Courts subordinate thereto, is, in respect of fees paid to him by a client for professional services, in exactly the same position as if he were practising in England or Ireland, that is to say, the fees received by him for professional services are mere honoraria, and he can neither sue for the recovery of, nor be sued for the return of such fees, *Kennedy* v *Brown* (1), ...), *Smith* v ... (5), *Refer-* ... *Doutre* (8) ...

A client who had paid a fee to a barrister for professional services, which ...

... the exercise of its revisional jurisdiction *Amir Hassan Khan* v *Sheo* ... *bundhu Pattuck* v *Jadu Ghose Alkushi* ... (12) and *Chenbasapa* v *Lakshman* ... y, C J

Held by Banerji, J, that the application for revision preferred by the defen- ... roce- ... *Lal* ... (16), ... erred to.

[Ref. 31 Cal 385, 2 L B R 333, 3 N L B 47, 11 C L J 426, 15 I C 35, Diss 4 L B R 55, Ref. 49 P R 1906=106 P. L R 1906, 33 P L R 1907 =45 P W R 1907=61 P R, 1907]

THIS was an application to the High Court under section 622 of the Code of Civil Procedure. The plaintiff in the suit out of [510] which the application arose, had retained the defendant, who was an English barrister enrolled in the High Court as an advocate, to appear and assist the Government Pleader in a dacoity case before the Sessions Judge of Aligarh, in the prosecution of which case the plaintiff was interested The case was expected to last several days, and the plaintiff deposited one day's fee in advance, instructing his counsel to hold himself in readiness to proceed to Aligarh when called upon to do so The counsel, for reasons which need not be detailed here, did not proceed to Aligarh to assist the Government Pleader. Nearly three years after the payment of this fee, the client brought a suit for its recovery in the Court of a Munsif. The Munsif dismissed the suit, holding that no such suit would lie. The plaintiff appealed. The lower appellate Court (District Judge of Aligarh) held that the suit would lie, apparently on the ground that, in his opinion, a fee paid to counsel for professional services to be rendered in the future is not a fee for professional services, but a mere deposit reclaimable at the will of the depositor, only becom-

(1) (1862) 32 L J C. P 137
(2) 14 Cox C C 469
(3) (1869) 4 Mad H C Rep 241
(4) (1871) N W P H. C. Rep 1871, p 83
(5) (1881) I L R 3 Mad 138
(6) (1885) I L R 9 Mad 140
(7) (1893) I L R 16 All 132
(8) (1884) 9 A C 715
(9) L R 1896, 2 Ch. 487
(10) (1884) I L R 11 Cal 6
(11) (1887) I L R 15 Cal 47
(12) (1887) I L R 11 Mad 220
(13) (1893) I L R 18 Bom 369
(14) (1885) I L R 7 All 336
(15) (1886) I L R 8 All 111
(16) (1899) 3 C W N 591
(17) (1894) I L R 17 All 499.
(18) (1897) I L R 20 All 78

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ing a "fee" when professional services of some kind are actually rendered. The District Judge, however, did not, after coming to this conclusion, remand the case to the Munsif's Court for decision of the remaining issues which arose in it, but tried it himself upon such evidence as was on the record, and in the end passed a decree in favour of the plaintiff. This decree being unappealable, the defendant preferred an application in revision to the High Court.

Mr. *Ross Alston* appeared in person in support of his application. After briefly recapitulating the facts of the case, he stated that although the case had not been properly dealt with by the Court below, by reason of which the full facts of the case were not upon the record, he did not ask the High Court to deviate from their usual practice and enter upon any consideration of matters of fact. He would, for the purposes of argument, accept the finding of the lower appellate Court that it was his fault, and not the plaintiff's, that he did not go to Aligarh on the occasion in question, but he submitted that even so, such a suit as that brought by the plaintiff could not possibly be entertained by any Court.

[511] Munshi *Gobind Prasad* (who appeared with Mr. *M. L. Agarwala* for the plaintiff) at this point raised a preliminary objection to the effect that no application in revision would lie to the High Court in this case. He referred to sections 11 and 53 of the Code of Civil Procedure and to the Civil Courts Act, 1887, and contended that the suit being on the face of it within the jurisdiction pecuniary and territorial of the Munsif, the Munsif, and thereafter the District Judge, had jurisdiction to determine whether or not the suit would lie. Having such jurisdiction, even if the Court below had arrived at an absolutely erroneous dicision on the point, such a decision could not, having regard to the ruling in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), be remedied in revision. The learned vakil referred also in support of his contention that the application did not lie to *Badami Kuar* v. *Dinu Rai* (2), *Sundar Singh* v. *Doru Shankar* (3) and *Muhammad Yusuf Khan* v. *Abdul Rahman Khan* (4).

Mr. *Ross Alston*, in reply on the preliminary objection, submitted that the ruling in *Amir Hassan Khan's* case was distinguishable. There was a difference between the terms "wrongly" and "illegally." It might be that a merely wrong decision could not be open to revision, but here the decision was something more, it was illegal inasmuch as the Court could not lawfully entertain the suit at all. If the decision of the Privy Council, which was relied upon by the other side, could mean what they would interpret it as meaning, its effect would be to do away with the important words of section 622 of the Code of Civil Procedure "or acted in the exercise of its jurisdiction illegally or with meterial irregularity."

[The Chief Justice here intimated that the Court would consider the preliminary objection, but would meanwhile proceed with the hearing of the application.]

Mr. *Ross Alston*, resuming his argument, said that he relied principally on the case of *Kennedy* v. *Brown* (5) which was the leading English case on the subject, and in which, after a review of practically all the previous authorities, it had been decided [512] that no suit would lie by

(1) (1884) I L. R. 11 Cal. 6.
(2) (1886) I. L. R 8 All. 111.
(3) (1897) I. L. R. 20 All. 78.
(4) (1889) I. L. R. 16 Cal. 749.
(5) (1862) 32 L. J. C. P. 137.

or against a barrister where the work done was litigation The case of *Turner* v *Phillips* (1) was also referred to There had been several cases in India in which the doctrine of *Kennedy* v *Brown* had been followed, of which might be mentioned *Kristna Row* v *H F Muttukistna* (2), *Achamparambath Cheria Kunhammu* v *Gantz* (3), *Smith* v *Guneshee Lal* (4), *Reference under Stamp Act, section* 46 (5) and *Stamp Reference* (6) In all these cases it had been decided expressly or by necessary implication that a barrister s fees were mere honoraria and therefore no such suit as the present would lie Reference was also made to the case of *Grey* v *Lachman Das* (7)

Mr *M L Agarwala* on behalf of the plaintiff cited the case of *Queen* v *Doutre* (8) in which case he said the Privy Council had discussed the ruling in *Kennedy* v *Brown* and doubted its applicability to a country where barristers were in the habit of performing not only the functions of their own side of the profession but those of solicitors as well With respect to the position of a barrister practising as an advocate enrolled in one of the Indian High Courts, and more particularly in the High Court for the North Western Provinces, the learned counsel argued that, whatever the position of English barristers in India might at one time have been, their position had now changed greatly for the worse At the present day the degree of barrister at law was merely a qualification by virtue of which a barrister was entitled to ask to be enrolled as an advocate, it did not confer any special status as in England Counsel drew attention to sections 7 and 8 of the Letters Patent of the High Courts, as compared with the charter granted in 1823 to the Bombay High Court (this being similar to the charters of the other Presidency High Courts) He referred also to the rules made by the High Court, to those published in 1882 and to the rules of 1889 and 1898, which prescribed what persons might be admitted as advocates, and pointed out that whereas in 1823 or thereabouts, barristers (and only barristers) were entitled to [513] practise the profession of advocacy before the High Courts, Members of the Faculty of Advocates of Scotland, Vakils of 10 years standing, and LL Ds of the University of Allahabad had been successively declared qualified for enrolment in the High Court as advocates, and further, a barrister, though eligible, was not *entitled* to be enrolled in the High Court as an advocate, as was the case at an earlier date

In other respects the rules of the High Court had cut away the special privileges of barristers They had, for instance, deprived barristers, by rule 184 of the present rules of Court, of the right of pre audience formerly existing, while by rule 201, which indicates that barristers may have a lien on moneys deposited in Court on behalf of clients (and if barristers have a lien at all it can only be on account of fees due) a right of demanding fees from clients is impliedly recognised Another privilege which exists in England, namely, that a barrister is, in respect of professional misconduct, amenable only to the jurisdiction of the Inns of Court, and, where there is an appeal from the decision of the Benchers, it lies to the Judges, not as Judges, but as visitors of the

(1) (1792) Peake s N P Cases 166
(2) (1869) 4 Mad H C Rep 241
(3) (1881) I L R 3 Mad 138
(4) (1871) N W P H C Rep 1871, p. 83
(5) (1885) I L R 9 Mad 110
(6) (1893) I L R 16 All 132
(7) (1895) Panjab Record, 1895, p 213
(8) (1884) 9 A C 745

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Inns of Court, has been taken away from barristers practising in India. The privilege now claimed, if indeed it at present exists at all, is perhaps the only distinctive mark of a barrister now left.

The learned counsel referred to the various rulings which had been cited by the applicant in revision, and suggested that, as to the earlier Madras cases, they amounted to no more than laying down that the doctrine of *Kennedy* v. *Brown* (1) might apply in India; they did not decide definitely that it did; while the stamp references in Madras and this High Court merely followed the earlier Madras cases, and, moreover, the Full Bench of this Court was *ex parte* and ought not to be held binding on an equal Bench. As to the Panjab case, he would adopt the reasoning of the minority of the Bench. On his attention being drawn by the Chief Justice to the Allahabad case of 1871, Mr. *Agarwala* endeavoured to distinguish that case on the ground that it was decided before the time when barristers had lost their status as such in India.

[514] Here the Chief Justice drew counsel's attention to several cases bearing on the question whether an application in revision would lie, to which no reference had been made at the previous hearing of the case. These were *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (2), *Chenbasapa* v. *Lakshman Ramchandra* (3), *Manisha Eradi* v. *Siyali Koya* (4), and *Rama* v. *Kunji* (5); and a further argument on the applicability of section 622 of the Code of Civil Procedure took place, chiefly with reference to the meaning of the words of the section—"acted in the exercise of his jurisdiction illegally or with material irregularity." Mr. *Agarwala* again referred to the Full Bench case of *Badami Kuar* v. *Dinu Rai* (6). Mr. Justice Banerji drew counsel's attention to *Muhammad Suleman Khan* v. *Fatima* (7), where the former Full Bench case had been explained.

Mr. *Ross Alston*, in reply, dealt first with the preliminary point. It was, he said, absurd to suppose that the Privy Council in their ruling in *Amir Hassan Khan's* case intended to ignore entirely the latter part of section 622. It would be difficult to say what an "illegality" would be, if what happened in this case (supposing the contention that no such suit could possibly lie to be correct) was not an illegality. Mr. *Alston* cited the case of *Shields* v. *Wilkinson* (8) as supporting his view of the revision section of the Code, and submitted that since the ruling in *Amir Hassan's* case all the four chartered High Courts had construed the section in a manner favourable to his contention.

As to the rest of the arguments of the learned counsel for the appellants, Mr. *Alston* contented himself with observing that the plaintiff had in his plaint expressly described the defendant as a "barrister-at-law," and so far from there being any decision extant showing that a barrister could sue for or be sued for the return of a fee, all the decisions here and elsewhere were the other way.

STANLEY, C. J.—The suit out of which this application has arisen was brought against the applicant to recover a fee [515] paid to him as an advocate to assist the Government Pleader in the prosecution of a dacoity case pending before the Sessions Judge of

(1) (1862) 32 L. J. C. P. 137.
(2) (1887) I. L. R. 15 Cal. 47.
(3) (1893) I. L. R. 18 Bom. 369.
(4) (1887) I. L. R. 11 Mad. 220.
(5) (1886) I. L. R. 9 Mad. 375.
(6) (1886) I. L. R. 8 All. 111.
(7) (1886) I. L. R. 9 All. 104.
(8) (1887) I. L. R. 9 All. 398.

Aligarh The applicant is an English barrister at-law who, by virtue of his call to the English Bar, has been enrolled as an advocate of the High Court of the North Western Provinces The fee paid to him by the plaintiff represented the fee for the first day only of the hearing of the case in question The defendant failed to put in an appearance at the trial In his written statement he assigns as the reason for his absence that, at the time he was retained, the plaintiff agreed to inform him one week before the trial whether or not it would be brought up on the day fixed for the hearing, and also to state whether his presence was required on that day, and that the plaintiff failed to do so He suggests that the plaintiff did not desire his attendance, and did not summon him so as to avoid the payment of fees on the succeeding days of the trial which extended over five days With the merits, however, of the case we have no concern In his written statement the applicant avers that no suit against a barrister at law for a return of professional fees is maintainable, and upon this he takes his stand The learned Munsif before whom the suit came, upon a preliminary objection that the suit was not maintainable, held that this objection was well founded, and dismissed the suit without recording any finding on the other issues in the case In his judgment he carefully discusses the rule which, it is contended, prevails in this country, whereby an English or Irish barrister at law is precluded from entering into any contract in regard to his professional services On appeal the District Judge reversed the decision of the lower Court on the question of law, and without remanding the case for trial of the issues raised in the suit himself determined them and passed a decree in favour of the plaintiff In the course of his judgment he observes :—" It seems to me that the ruling to which I have referred (W N, 1894, p 12,) on the basis of which the lower Court dismissed the plaintiff's claim, applies to services actually rendered In the present instance *the gratuity or honorarium was duly accepted*, but no services of any kind were rendered Later on he says :— [516] " Until some services were rendered in return for the amount so prepaid, I cannot see how that sum could possibly be looked upon in any other light than that of a deposit In these circumstances the claim for refund is, in my opinion, maintainable The mere fact that the respondent is a barrister at-law does not seem to me sufficient to justify his retaining the money paid to him by Pitamber Das " It will be observed that the learned District Judge treats the fee which was paid to the appellant as a gratuity or honorarium, but seems to consider that a fee so paid is only to be considered as a gratuity or honorarium when the services in respect of which it is paid have been actually rendered. I am unable to understand how that which has been given and received as a gratuity or honorarium can be looked upon as a deposit

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The question then for our determination is whether or not in these Provinces a suit is maintainable against an English or Irish barrister who has been enrolled as an advocate of this High Court for the recovery of a fee which has been paid to him in his capacity of advocate A preliminary objection was raised to the hearing of the application on the ground that the Court has no power to entertain it under section 622 of the Code of Civil Procedure We have held over the determination of that objection, inasmuch as the answer to it appears to us to depend largely, if not entirely, on the answer to the main question whether or not such a suit as the present one is maintainable

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In England the decision in the case of *Kennedy* v. *Brown* (1) has established the unqualified doctrine that "the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation." The request and promises of the client, even if there be express promises, and the services of the counsel ".create neither an obligation nor an inception of obligation, nor any inchoate right whatever, capable of being completed and made into a contract by any subsequent promise." In Ireland the same rule was emphatically laid down in the case of *Robertson* v. *McDonough* (2) in which an eminent [517] barrister and Queen's Counsel practising at the Irish Bar was sued for breach of contract under the following circumstances. The plaintiff was retained for trial at Green Street in Dublin on a criminal charge. A special contract was entered into by the defendant with him to attend as counsel for him throughout the trial on receiving a special fee on his brief of 50 gs., refreshers of 25 gs. and consultation fees of 5 gs. The defendant refused to attend on the second and subsequent day of the trial. The plaintiff was found guilty of the charge laid against him, and subsequently brought an action against the counsel for breach of contract. On a demurrer to the statement of claim claiming £10,000 as damages, it was held that the claim was bad as no valid contract can be entered into between counsel and client. In delivering the judgment of the Court, May, C. J., observed :—"We conceive that the true principle governing cases of this nature is laid down in that case (*Kennedy* v. *Brown*), (1) namely, that an advocate and his client are legally mutually incapable of entering into contracts of hiring with respect to advocacy in litigation, and that this incapacity is reciprocal; no legal contract existing between the parties, neither can sue the other for breach of its supposed terms. Whether the advocate sues the client as in *Kennedy* v. *Brown* (1) for non-payment of the promised fee, or the client sues the advocate for a non-performance of the promised advocacy, the same principle applies and neither can succeed."

Does this rule apply to an English or Irish barrister practising as an advocate in these Provinces? The qualification for the admission of the applicant as an advocate of this High Court was the fact that he had been called to the Bar in England and was an English barrister. As an English barrister he is a member of one of the Inns of Court, according to the rules of which he is incapacitated from entering into any contract of hiring for professional services. As a member of that Inn he would be bound to adhere to its traditional usages if he practised in England, and his services in that country would be of a purely honorary character. Inability to contract in respect of fees attached to his status by the immemorial usage of his Bar. Now it is by virtue of his status as an English [518] barrister that the appellant has been enrolled as an advocate in this High Court. Did he throw off that status when he was enrolled as an advocate in this country, and become capable of contracting in respect of professional services? The question is not one which comes before the Court for the first time. It has been considered in this and also in the Madras High Court.

The contention of the respondent's learned counsel is that when, under the rules of 1882, Members of the Faculty of Advocates in Scotland became eligible for admission as advocates, and when, under

(1) (1863) 32 L. J. C. P. 137. (2) 14 Cox. C. C. 469.

the later rules of 1889 power was given to the High Court to admit any attorney or vakil to be an advocate, inasmuch as incapacity to contract in respect of their fees did not apply to the Members of the Faculty of Advocates in Scotland or to attorneys and vakils, the status of an English or Irish barrister previously existing became altered, and the rules in regard to fees to which I have referred no longer attached to their status in these Provinces that in other words an English or Irish barrister immediately on his enrolment as an advocate in India loses the status which he had in England or Ireland The case of *Kristna Row* v *H F Muttukistna* (1), to which we have been referred, has no direct application to the question before the Court The defendant in that suit, a barrister, who had accepted a fee for the defence of the plaintiff upon a charge pending against him in the Sessions Court, had failed to appear on the day to which the trial was adjourned, and the plaintiff sued him to recover the amount of the fee The suit was held to be maintainable, inasmuch as the defendant was not an advocate of the Court, and was not specially authorized to plead in the Sessions Court at the time that he had accepted the vakalatnama or at the time of the trial, and therefore the relation of advocate and client to which incapacity is attached by the rule laid down in *Kennedy* v *Broun* (2) never existed The Court for the purposes of the judgment in that case assumed that the rule of English law was binding in this country The question, however is the subject of an express decision of this High Court in the case of *Smith* v *Guneshee* [519] *Lal* (3) There it was held, on a reference to the High Court, by Spankie, J, and Turnbull, Officiating J, that a barrister enrolled as an advocate is incapacitated from making a contract of hiring as an advocate, and cannot maintain a suit for the recovery of his fees After careful consideration of the question they held that "the rule of English law is applicable to a barrister who may be enrolled as an advocate of this Court, and that the relationship between him as an advocate and his client in litigation creates the incapacity to contract for hiring, and therefore Mr Smith (the plaintiff) had no right of action and his claim must be dismissed This is the converse case of that before us But it is a clear and express ruling which necessarily applies to the question before the Court

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In the Full Bench case of *Achamparambath Cheria Kunhammu* v. *William Sydenham Gantz* (4), in which a barrister who was engaged to conduct a suit for the defendant sued the defendant for recovery of a sum which the defendant had promised to pay him as a present in addition to the fee allowed by Regulation XIV of 1816, the Court held that if the plaintiff was to be regarded as a barrister he was under a disability to contract with the defendant as to his fees, and that if he was to be regarded as a pleader he was prohibited by a Circular Order of the Sudder Adalut from enforcing his contract in this country In the judgment the following passage occurs "The fees of a barrister are not *merces* but *honoraria* It is the opinion of some of us that the decision of the Common Pleas in *Kennedy* v *Broun* (2) rules all agreement made by members of the English Bar in that character, and "it follows that if Mr Gantz, who has been called to the bar, exercises the profession and claims the privileges of a barrister, he is in respect of any professional

(1) (1869) 4 Mad H C Rep 214 p 83
(2) (1862) 32 L J C P 137
(3) (1871) N W P H C Rep 1871
(4) (1881) I L R 3 Mad 135

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assistance rendered by him in that 'capacity subject to the disabilities of of a barrister."

In a case which came before the Madras High Court, reported in the Indian Law Reports, 9 Mad., p. 140, on a reference under the Stamp Act, section 46, it was held by a Full Bench of that Court that a receipt given by a barrister in respect of a fee for a sum above Rs. 20 paid to him for professional services [520] was exempted from stamp duty. Hutchins, J., who delivered the judgment of the Court, observed that "a barrister's fee for services in litigation is a gratuity or honorarium. The relation of counsel and client in litigation creates an incapacity to contract for such services. Such services are not capable of forming such a valuable consideration as will support an action on the client's promise to pay, and conversely, if the client does pay, the payment must be held to be one without consideration." The same question came before a Full Bench of this High Court in a stamp reference from the Board of Revenue (1). In their judgment the Court, consisting of Tyrrell, Blair and Banerji, JJ., followed the decision in the Madras case to which I have just referred, observing :—" In our opinion that is a sound interpretation of the law of the Indian Stamp Act on this point, and the decision receives the highest confirmation from the ruling of Knight Bruce and Turner, L. J. J. in *In re Beavan* (2)".

It will thus be seen that the authorities in this country altogether support the view presented by the appellant.

The case of the *Queen* v. *Doutre* (3) has been strongly relied upon by the learned counsel for the respondent. But, so far from the decision in that case being in his favour, it seems to me to be against him. There a member of the Bar of Lower Canada (Quebec) who had been retained by the Government as one of their counsel before the Fisheries Commission in Nova Scotia, claimed by petition of right to recover money for his professional service in connection with the Fisheries Commission; and the main point of law involved in the appeal was whether a member of the Quebec Bar, and one of Her late Majesty's counsel could by petition of right recover upon a *quantum meruit* payment for services rendered as counsel. It appears to me clear from the report of the case that the suppliant was not a member of either the English or Irish Bar; he was a member of the Quebec Bar, and according to the law of Quebec, was entitled to contract for any rate of remuneration which was not *contra bonos mores* or in violation of the rules of that Bar. Neither by the law of Ontario, nor of Nova Scotia can a counsel maintain [521] an action for his fees or for remuneration for his services. It was contended that inasmuch as the services of the counsel were to be performed at Halifax, in the province of Nova Scotia, the case must be determined by the law of Ontario or of Nova Scotia and not of Quebec. It was held by their Lordships of the Privy Council that in the absence of a stipulation to the contrary, express or implied, the suppliant must be deemed to have been employed *upon the usual terms, according to which such services are rendered, and that his status in respect both of right and remedy was not affected either by the lex loci contractus or the lex loci solutionis.* According to the decision of the Privy Council the capacity or incapacity to contract depends not on counsel's nationality, or the place where the contract was entered into, or the place where his

(1) (1893) I. L. R. 16 All. 132.
(2) (1854) 23 L. J. Eq., 536.
(3) (1884) 9 A. C. 745.

services were to be rendered, but upon the law of his Bar Lord Watson, in delivering the judgment of the Court, says —" The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was to be performed When an advocate or other skilled practitioner is by law *and the custom of his profession* entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipula

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ed, be held to have employed him ich such services are rendered contract of employment which is ... a condition *dependent upon the professional status and rights of the person employed, and not upon the law of the place where his services are to be given so long as he is employed in his professional capacity* A member of the Bar of England, in accordance with the law of that country and the rules of the profession to which he belongs, renders and professes to render services of a purely honorary character If in his professional capacity as an English barrister he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country by whose law counsel practising in its regular Courts were permitted to have suit for their fees, that would not give him a right of action for [522] his honoraria His client would have a conclusive defence to such an action on the ground that he was employed as a member of the English Bar, and by necessary implication upon the same terms as to remuneration upon which members of that Bar are understood to practise '

This ruling clearly supports the appellant s contention It appears to me that the authorities in this country abundantly support the proposition that an English or Irish barrister practising as an advocate in this country cannot be sued for the recovery of fees paid to him in respect of professional services It would, I think be an unfortunate thing if a barrister were permitted to sue for recovery of fees, or a client permitted to sue him in respect of any alleged neglect or default on his part in the rendering of professional services

In the case of *In re LeBrasseur and Oakley* (1), Lopez, L J, observes in regard to counsel s fees —" I entirely agree that the Court cannot and ought not to assist a barrister in recovering his fees Their payment is only a matter of honour It is open to counsel if he thinks fit not to accept a brief unless the fee is prepaid, and it would be contrary to all the decisions, and I think against good policy, to hold that counsel's fees are recoverable The decision of the Court of Common Pleas in *Kennedy* v *Brown* has always been acted upon, and it establishes the unqualified doctrine that the relation of counsel and solicitor renders the parties mutually incapable of making any legal contract of hiring and service in regard to litigation That rule has existed for a long time, and speaking for myself I should be very sorry to see it in any way impugned " In this opinion Rigby, L J, concurred

It appears to me that it is a matter of paramount importance that the status of barristers practising in our Courts should be upheld, and that the traditions and usages which have gained for the bar in England and in Ireland the confidence of the public should be fully maintained

(1) L R 1896, 2 Ch D 487

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It may, I think, safely be left to the honour of the profession to protect the public from any abuse of the privileges which barristers enjoy.

[523] The learned District Judge should have paid some heed to the rulings of this High Court and, as the learned Munsif did, have rejected the plaintiff's appeal. In disregarding thus the rulings of this Court, and holding, contrary to the authorities which were quoted to him, that a suit lay against the appellant for the recovery of the fee paid to him by the respondent, the learned District Judge acted, in my opinion, contrary to law. There was no cause of action against the appellant, as the learned Munsif held, and the appeal from the decision of the Munsif ought not to have been entertained.

It remains then to consider the preliminary objection which has been raised to the hearing of this application. It is said that this Court has no power under the provisions of section 622 of the Code of Civil Procedure to interfere with the decree of the District Judge. The decision of their Lordships of the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), has been strongly relied upon by the respondent's counsel as a conclusive authority in favour of this contention. In that case the suit was instituted to obtain possession of certain property upon redemption of a mortgage. The question among others was raised as to whether the suit was not barred under sections 13 and 43 of Act No. X of 1877. The District Judge of Sitapur having maintained a decree made by the Extra Assistant Commissioner in favour of the plaintiff, a petition was presented by the defendant to the Judicial Commissioner praying him to call for the record of the suit, and to exercise his powers under section 622 of the Code of Civil Procedure. The Judicial Commissioner did so, and reversed the decisions of the Courts below. Upon appeal to the Privy Council it was contended on behalf of the appellant that the words "acted illegally or with material irregularity" in the section to which I have referred did not comprehend cases of erroneous decision. Their Lordships decided that a Court which has decided a suit over which it had jurisdiction, cannot only on the ground that it has arrived at a wrong decision be said to have exercised its jurisdiction illegally or with material irregularity within the meaning of the section referred to. Sir B. Peacock, delivering [524] the judgment of their Lordships, says:—"The question then is —Did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity." What was held in that case as I understand it was that the District Judge had jurisdiction to decide the question before him, and if he made a mistake in deciding it, that was not a matter which could be rectified by an application under section 622. A good cause of action was in that case stated in the plaint. This is unlike the present case, in which as the learned Munsif held, and I think rightly, there was no cause of action against the appellant, but in which the learned District Judge, in despite of the authorities, held that there was a cause of action, and reversed the decision of the Court of first instance. It appears to me that the District Judge acted in the exercise of his jurisdiction illegally within the mean-

1. (1884) I. L. R. 11 Cal. 6.

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to my understanding, any such inference could fairly be drawn In the 23 A W N
case of *Amir Hassan Khan* v *Sheo Baksh Singh* (1) there was, as I have 104.
said, a cause of action , in the present case there was no cause of action, no suit was competently brought before the Court, and this was apparent on the face of the plaint The case of *Jugobundhu Pattuck* v *Jadu Ghose Alkushi* (2), bears closely upon this question There a District Judge in deciding a rent suit held that section 188 of the Bengal Tenancy Act prohibited the Court from entertaining a suit in the form in which it had been framed, and therefore dismissed it and it was held on an [525] application under section 622 to have the judgment of the District Judge set aside, that he had acted in the exercise of his jurisdiction illegally, inasmuch as section 188 had no application to the case I may also refer to the Full Bench case in the Madras High Court of *Manisha Eradi* v *Siyali Koya* (3) and to the case of *Chenbasapa* v *Lakshman Ramchandra* (4), which appear to me to have a close bearing upon the question before the Court and to support the appellant s contention

I think for these reasons that in this instance the preliminary objection ought not to prevail I would therefore allow the application under section 622, and dismiss the plaintiff s suit with costs in all Courts

BLAIR, J —I entirely concur in the conclusions arrived at by the learned Chief Justice upon the question of the contractual capacity of barrister and client in relation to the services performed or to be performed by the one and the fees paid or to be paid by the other Upon the preliminary point I am inclined to think that the Courts below acted in excess of their jurisdiction in entertaining the suit at all Suits of a civil nature, and those only, fall within their jurisdiction Can a suit be said to be one of a civil nature which is based wholly upon an alleged contract which by law cannot possibly subsist between the parties? I think it is no more within the jurisdiction of the Civil Court than a landholder s suit for rent It seems to me to make no difference that in the one case another tribunal is provided while in the other the law provides no alternative remedy for what it holds to be no wrong I agree with the Chief Justice as to the order he proposes

BANERJI, J —The preliminary objection raised on behalf of the respondent that this application for revision cannot be maintained under section 622 of the Code of Civil Procedure must, in my judgment, prevail I am unable to distinguish this case in principle from the ruling of the Privy Council in *Amir Hassan Khan* v *Sheo Baksh Singh* (1), which was affirmed by their Lordships in *Muhammad Yusuf Khan* v *Abdul Rahman Khan* (5), and which was followed by a Full Bench of this [526] Court in *Magni Ram* v *Jiwa Lal* (6), and by another Full Bench in *Badami Kuar* v *Dina Rai* (7) In the case last mentioned a Full Bench of five Judges held that the meaning of the decision of the Privy Council in

(1) (1884) I L R 11 Cal 6
(2) (1887) I L R 15 Cal 47
(3) (1887) I L R 11 Mad 220
(4) (1893) I L R 18 Bom 369
(5) (1889) I L R 16 Cal 749
(6) (1885) I L R 7 All 336
(7) (1886) I L R 8 All 111

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Amir Hassan Khan v. *Sheo Baksh Singh* is that "if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under section 622 to inquire into the correctness of its view of the law or the soundness of its findings as to facts." I feel myself bound by these rulings, and I deem it unnecessary to speculate what the intention of the Legislature was in enacting section 622, and whether that intention will be frustrated by putting on the section the interpretation which has been placed on it. There cannot be any doubt that the Court below had jurisdiction to hear the suit, that is to say, that the Court of the Munsif was the proper Court in which the suit could be brought, and that the Court of the District Judge was the Court to which an appeal from the Munsif's decree dismissing the suit properly lay. According to the view of their Lordships of the Privy Council the word "jurisdiction" in the section refers, it seems to me, to the forum for the institution of a suit. The District Judge was thus competent to hear and determine all questions which arose in the suit. If the applicant's contention is correct, the District Judge committed an error of law in holding that the amount claimed by the plaintiff was held in deposit for him by the defendant, and that the plaintiff was entitled to recover it from the defendant. It may also be that the plaintiff has no cause of action, and that the Court below has erred in law in holding the contrary. The interpretation, however, which has been placed on section 622 in the rulings mentioned above precludes this Court from inquiring into the correctness or otherwise of the view of the law taken by the Court below and setting it right if erroneous. On this point I may refer also to the remarks of Maclean, C. J., in *Enat Mondul* v. *Baloram Dey* (1) and to the rulings of this Court in *Sarman Lal* v. *Khuban* (2) and *Sundar Singh* v. *Doru* [527] *Shankar* (3). Upon the authorities, by which I feel myself bound, I must hold that this application is not maintainable, and I would dismiss it on that ground.

In this view it is not necessary for me to decide the other question raised, but if I had to express an opinion upon that question, I should have no hesitation in concurring with the learned Chief Justice, to whose exhaustive judgment on the point I have nothing to add.

BY THE COURT.—The order of the Court is that the decree of the lower appellate Court be set aside, and the decree of the Court of first instance restored, and that the respondent do pay the costs of the appellant in all Courts.

Application allowed.

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(1) (1899) 3 C. W. N. 581.
(2) (1894) I. L. R. 17 All. 422.
(3) (1897) I. L. R. 20 All. 78.

25 A. 527 (=8 C W N 121=30 I A 172)

PRIVY COUNCIL

1903 JULY 7

PRIVY COUNCIL.

25 A. 527=8 C W N 121=30 I A. 172.

PRESENT

Lord Davey, Sir Andrew Scoble and Sir Arthur Wilson

BALWANT SINGH (*Plaintiff*) v SECRETARY OF STATE FOR INDIA (*Defendant*) [7th July, 1903]

[On appeal from the High Court of Judicature at Allahabad]

W P Land Revenue Act) section 241, clause ern India Canal and Drainage Act) section 45— paid by mistake—Claim arising out of collection of revenue or for sum realizable as revenue

A suit to recover canal dues alleged to have been paid by mistake is a claim arising under section 241, clause (i) of the North Western Provinces Land Revenue Act of 1873, and under that provision, read with section 45 of the Northern India Canal and Drainage Act 1873, a Civil Court has no jurisdiction to entertain it

[Ref 50 I C 332]

APPEAL from a decree (11th December 1899) of the High Court at Allahabad, which affirmed a decree (21st December 1896) of the District Judge of Agra, by which latter decree a decree (6th August 1896) dismissing the suit of the appellant with costs was affirmed

The suit was brought on the 11th of May 1894 against the Collector of Agra as representing the respondent to recover Rs 4 543 with costs and interest as an alleged excess of irrigation rate paid by the plaintiff by mistake in respect of two [528] villages—Gangui and Kaitha—of which he was zamindar during the years 1292F (1885) to 1296F (1889), which sums the Collector, on application, had refused to refund

The plaintiff was a landed proprietor whose estate was managed by agents as managers In May 1891 the managers for the time being came to know that certain canal dues (known also as owner's rate) in excess of what was properly payable by the proprietor at the time to Government had been paid in respect of the two villages abovementioned On the 14th of May 1891 petitions were presented for refund to the Collector of Agra, but they were rejected by the Assistant Collector on the 1st of August 1891

The facts are sufficiently stated in the report of the case in the High Court (I L R 22 All 139) and in their Lordships' judgment

In the Court of the Subordinate Judge and District Judge respectively the only question decided was that of limitation Both Courts held that article 14 of schedule II of Act No XV of 1877, governed the case, and that under that article the suit was barred The Subordinate Judge, however, also held on the evidence that the mistake which resulted in the excess payments being made had been discovered more than three years before the institution of the suit, which was therefore also barred with reference to the provisions of article 96 of schedule II of Act No XV of 1877 From this view the District Judge dissented on the appeal, and gave his opinion as follows —

"I think it may fairly be held that the mistake in question was only definitely discovered (i e., made certain of) on the day before the application was presented to the Collector On this finding of fact if article 96 applies to the case, the suit was within time and the appeal should be allowed But, as stated above, I am of opinion that article 14 should be applied.

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On appeal by the plaintiff to the High Court a Division Bench of that Court (BLAIR and BURKITT, JJ.) held, on a point not previously raised in the case, that the suit was not maintainable by reason of section 241, clause (*i*) of the North-Western Provinces Land Revenue Act, 1873, read with section 45 of Act No. VIII of 1873 (The Northern India Canal and Drainage Act), the Civil Court having, under those provisions of the Legislature, no jurisdiction to entertain it.

[529] The judgment of the High Court is reported in I. L. R. 22 All. 141.

Act No. XIX of 1873, so far as is material for the case, is as follows:—

"Section 241. No Civil Court shall exercise jurisdiction over any of the following matters:—

Clause (*i*). Claims connected with or arising out of the collection of revenue (other than claims under section 189) or any process enforced on account of an arrear of revenue, or on account of any sum which is by this or any other Act realizable as revenue."

Section 189 relates to the payment under protest of an arrear of revenue and to suits for its recovery, which are authorized in cases in which payment is made under protest.

Act No. VIII of 1873, section 45, which comes into Part V "of Water Rates" provides as follows:—

"Section 45. Any sum lawfully due under this Part and certified by the Divisional Canal Officer to be so due, which remains unpaid after the day on which it becomes due, shall be recoverable by the Collector from the person liable for the same as if it were an arrear of land revenue."

The plaintiff applied to the High Court for leave to appeal to His Majesty in Council, and the application was heard before STRACHEY, C. J., and BANERJI, J., who refused it in the following terms:—

"We think that the leave to appeal to His Majesty in Council from the decree passed by this Court in second appeal ought to be refused. In the first place it has not, in our opinion, been shown that the amount at stake in such appeal would exceed the amount claimed in the suit, which is about Rs. 4,500 only. In the second place it appears to us that the learned Judges placed a proper construction upon the provisions of section 241, clause (*i*) of the North-Western Provinces Land Revenue Act (XIX of 1873), read with section 45 of Act No. VIII of 1873. Having regard to section 45 we think that the owner's rate in question in the suit was, within the meaning of the latter Act, a sum which was realizable as revenue. We do not think that there is a sufficient doubt in the matter to make the question involved a substantial question of law. The application must be dismissed with costs."

On this appeal, Mr. *H. Cowell*, for the appellant, contended that the High Court was wrong in holding that the Civil Court had no jurisdiction to entertain the suit as being barred by section 241, clause (*i*), of Act No. XIX of 1873, and section 45 of Act No. VIII of 1873. On the construction of those provisions it was submitted that the claim was not one arising out of the collection of revenue, and therefore the provisions of those [530] Acts were not applicable to it. As regards limitation it was contended that the suit was governed, not by article 14 of schedule II of the Limitation Act, but by article 96, and in that case, on the facts found by the District Judge, it was not barred by lapse of time.

Mr. *A. Phillips*, for the respondent, was not heard.

1903—*July 7th.*—The judgment of their Lordships was delivered by LORD DAVEY:—

The history of this case has been rather a curious one. As originally framed the plaint asked for the recovery from the Secretary of State of a sum of money which the plaintiff alleged to have been wrongly taken

from him under the head of canal dues, such canal dues not being, in fact, payable by him or his ancestors, who were the proprietors of the lands in respect of which the dues were claimed, but by the occupiers of the lands He accordingly brought the action out of which this appeal arises to recover the money as having been paid under a mistake of fact

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PRIVY COUNCIL.

25 A 527=8 C W N 121= 30 I A 172

The only plea which need be noticed is the plea of limitation, and the facts with reference to that plea as found by the District Judge are these —The payment was only effectually discovered by the appellant's *karinda* on the 12th May 1891 His suspicions were no doubt aroused earlier, but he only verified the fact of payment by an examination of documents which may have taken him some time and he had only completed that examination and comparison of documents on the 12th May 1891 He then immediately went to Agra and presented a petition in the name of the Raja to the Court asking for a return of the money There were two petitions in fact, but only one need be mentioned Those petitions were considered, and on the 1st August 1891 an order was made rejecting them The question therefore arose From what date did the limitation run? If it was a case under article 96 of schedule II to the Indian Limitation Act, 1877, then the limitation was three years, and the suit having been instituted on the 11th May 1894, and the fact only discovered on the 12th May 1891, the three years had not expired when the suit was instituted, and limitation would not be a defence If, on [531] the other hand, it came within article 14 of the schedule, which relates to suits to set aside any act or order of an officer of the Government in his official capacity, the period of limitation is one year only, and in that case the cause of action having arisen on the 2nd August 1891 the suit would be out of time and would be properly dismissed

The Subordinate Judge of Agra dealt with the case from both points of view He held that, if the cause of action arose on the 1st August 1891, the suit was time barred , but, on the other hand, he held, on the evidence, that the *karinda* discovered the mistake more than three years before the institution of the suit, so that, even if the case fell within article 96, the suit was still time barred, and that it was not necessary for him to say under which article he thought the case came

The District Judge, on appeal, dissented from the judgment of the Court of the Subordinate Judge as to the question of fact, and held that the *karinda* had full knowledge only on the 12th May 1891, after a comparison of the canal *jamabandis* with the *patwari* papers , and that, therefore, if the case came under article 96 of the schedule, the suit would not be time barred He came, however, after full consideration and after some apparent hesitation to the conclusion that the case fell within article 14, because, though the suit was not so described in the plaint, and there was no prayer in the plaint to set aside the order of the Collector's officer of the 1st August 1891, it was, in effect, one to set aside the Collector's order The suit having been brought more than one year after the cause of action arose, it was accordingly time barred, the result being that he affirmed the decree of the Subordinate Judge

The plaintiff appealed to the High Court, and in the High Court—whether by the plaintiff or by the Court itself does not appear—an entirely new point was started not dealing with the Limitation Act at all, but arising out of another set of sections of another set of Acts Whether the point was pleaded or not, the Court no doubt could take cognizance of it The point is this Section 211 of the North W

1903 JULY 7. — PRIVY COUNCIL. — 25 A. 527=8 C.W.N. 121=30 I. A. 172.

Provinces Land Revenue Act (XIX of 1873) enacts that :—"No Civil Court shall exercise jurisdiction over any of the following [532] matters." Then a number of matters are specified, and sub-section (*i*) is in these terms :—"Claims connected with or arising out of the collection of revenue (other than claims under section 189) or any process enforced on account of an arrear of revenue, or on account of any sum which is by this or any other Act realizable as revenue." There is no doubt that the canal dues are realizable as revenue under section 45 of the Northern India Canal and Drainage Act (Act VIII of 1873), and therefore the only question is whether this claim made by the plaintiff was a claim "connected with or arising out of the collection of revenue, or on account of any sum * * * realizable as revenue." The exception "other than claims under section 189" appears to their Lordships to throw some light upon the meaning of the section, because section 189 enables a party from whom revenue is demanded to pay under protest, and upon such payment being made, then, "subject to the pecuniary limitations prescribed by law, the person against whom such proceedings were taken may sue the Government for the amount so paid in any Civil Court situate in the district where such proceedings were taken, and in such suit the plaintiff may, notwithstanding section 149, give evidence of the amount which he alleges to be due from him." That is an exception from what the Act describes as "claims connected with or arising out of the collection of revenue." It will be observed that it is a claim of exactly the same description as the present one. It is the claim of a person who says that revenue has been wrongly demanded from him which he was not under any liability to pay, and the only difference is that, if he pays it, when it is demanded from him, under protest, then he has a right, subject to the pecuniary limitations prescribed by the law, to sue the Government to recover it as money paid by him under a mistake. The exception does not apply to this case, because at the time when the money was paid there was no protest, and it was paid by the officer of the Raja under a common mistake as money that was due from him. But though that section does not apply, it illustrates what is intended to be included in claims "connected with or arising out of the collection of revenue or on account of any sum realizable as [533] revenue." The effect of the latter words in the section is to make the earlier part applicable not only to revenue properly so called, but also to sums realizable as revenue.

The judgment of the High Court, which is none the less excellent because it is short, is as follows : "In our opinion the suit does not lie by dint of section 241, second paragraph of clause (*i*) of the Land Revenue Act, No. XIX of 1873, and section 45 of Act No. VIII of 1873. This question was not raised in the appeal or indeed elsewhere at all. The Court below dismissed the suit by applying article 14 of Schedule 2 of the Limitation Act. The appeal is therefore dismissed, but, under the circumstances, without costs." Another Bench of the High Court, consisting of Sir Arthur Strachey, C. J., and Banerji, J., expressed an opinion to the same effect on an application for leave to appeal to His Majesty in Council, the application being refused on the ground that no substantial question of law was involved.

Their Lordships agree with the High Court. The subject of the action is either a claim connected with or arising out of the collection of revenue, or else it is a claim for a sum which is realizable as revenue

Mr. *Cowell*, on behalf of the appellant, brought every point which could be properly raised to the attention of their Lordships, but the utmost he could say was that, although it was in a sense a claim connected with or arising out of the collection of revenue, or a sum realizable as revenue, it was only remotely, and not directly, arising out of the collection of revenue. Their Lordships fully appreciate Mr. *Cowell's* point, but it does not seem to them a good one, and they cannot do otherwise than agree with the High Court that this claim is one arising under section 241, sub section (i) of Act XIX of 1873, over which therefore no Civil Court can exercise jurisdiction. They will therefore humbly advise His Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal

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25 A. 527=8 C W N 141=30 I. A. 172.

Appeal dismissed.

Solicitors for the Appellant—Messrs *Pyke and Parrott.*

Solicitors for the Respondent—*The Solicitor, India Office*

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25 A 534 (=23 A. W. N. 100.)

[534] REVISIONAL CRIMINAL

Before Mr. Justice Blair.

EMPEROR *v* GUR NARAIN PRASAD *

[2nd April, 1903]

. 423—*Powers of appellate Court— ... sed is prejudiced by alteration—Act*

Held th. ... Code of ... sentence, ... precedent, ... would be binding on a Court of first instance

Hence when in appeal from a conviction under section 162 the appellate Court altered the conviction to one under section 500 of the Indian Penal Code, it was *held* that this was within the competence of the appellate Court, notwithstanding that there was in existence no complaint by the person aggrieved.

... so mate- ... ame facts, ... been pro- ...

[Ref. 3 L B R 232]

IN this case the applicant, who had in a petition presented by him cast certain reflections upon the conduct and judicial integrity of a Tahsildar Magistrate, was prosecuted under section 182 of the Indian Penal Code on a complaint made by the Tahsildar with the sanction of the Local Government. The Magistrate before whom this complaint came found the charge proved, and accordingly convicted and sentenced Gur Narain Prasad under section 182. Gur Narain Prasad appealed against his conviction and sentence to the Sessions Judge. On this appeal the Sessions Judge came to the conclusion that the facts found did not warrant a conviction under section 182, but that they did disclose the commission by the appellant of the offence, namely, defamation, defined in section 499 of the Indian Penal Code, and altered the conviction to

* Criminal Revision No. 40 of 1903

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one under section 500 of the Code. Against this order Gur Narain Prasad applied in revision to the High Court, where it was urged, first, that inasmuch as by reason of section 198 of the Code of Criminal Procedure a prosecution for defamation could not be initiated except upon complaint by the person aggrieved, therefore the [535] appellate Court had no power, in the absence of such a complaint, to alter the conviction into one under section 500; and, secondly, that even if the appellate Court had such power, there was a substantial difference in the defences which were open to the accused in respect of the two sections, and the accused had been seriously prejudiced in his defence.

Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—In this application for revision a point has been raised which I have not heard raised before in this Court. The applicant was put upon his trial for an offence under section 182 of the Penal Code. For the institution of such a charge before the Court of first instance, it is essential that the case, to be made cognizable at all, must be preceded by a complaint or sanction by the public servant concerned, or by some public servant to whom he is subordinate. In this case the charge under section 182 was held by a Magistrate proved, but upon appeal the Sessions Judge did not consider that the conviction under section 182 was justified by the evidence, and he thereupon altered the finding to one under section 500 of the Indian Penal Code. Now for a prosecution in a Court of original jurisdiction under section 500, it is necessary that a complaint should have been made by a person injured. The able argument addressed to me was to the effect that though the initial charge had been made by the complainant, or with the sanction of the public servant interested, there had been no complaint by the person injured by the defamatory statement upon which the Judge in appeal based his conviction under section 500. There is no doubt of the difference between the condition precedent to a prosecution in the one case and in the other. Beyond all doubt the Court of first instance would have been acting outside its jurisdiction if it had entertained the prosecution for defamation without any complaint being made by the injured person.

It is under section 423 of the Code of Criminal Procedure that an appellate Court has power to alter the finding, and there are no words limiting its right to such an alteration or [536] prescribing any preliminaries to its taking cognizance of an offence other than that for which the Court of original jurisdiction had convicted. Having regard to the general powers of the Court of appeal, which enable the Court in its discretion either to reverse the finding or sentence, to order a prisoner to be re-tried by a competent Court, or to make such alterations in the finding as to it seems proper, and are subject only to the limitation that no sentence should be enhanced without the person convicted having an opportunity of showing cause, I do not think the Legislature contemplated the imposition upon the appellate Court of the restrictions imposed by it upon the Court of original jurisdiction.

I have also been invited to consider whether the person convicted may not have suffered substantial injury and difficulty in defending

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himself from the variation in the prosecution of the section under which he was originally convicted and the section under which the appellate Court found him guilty It was argued that whereas in a trial for an offence under section 182 it was necessary to prove that the statements made were false, and must have been known to be false by the person making them, and that the *onus* in that case lay upon the prosecution, yet in a prosecution under section 500, though the words might be *prima facie* defamatory, a conviction could not take place if the accused was able to show that in that specific case the words were not intended to be used in their ordinary sense

I have bestowed much consideration upon the facts of this case, and I must confess it seems to me there is no substantial difference in respect to the *onus* of proof In each case the prosecution has to establish its case, and in the case of defamation their case was clearly to establish that words likely to injure the character of the person aggrieved were spoken, and it would be open to the accused to show circumstances under which the words might fairly be interpreted in a different sense In a prosecution under section 182 the facts to be proved by the prosecution are a guilty knowledge or belief on the part of the accused, and it would be open to him to show that the fact from which the inference was drawn was mistaken or [537] erroneous Had I been able to see that the accused had suffered any injury, or had been put face to face with any difficulty in defending himself, I would have sent the case down for re trial Failing, however, to perceive any such dis advantage or difficulty, I find the conviction was a conviction had accord ing to law and ought not to be disturbed

Let the papers be returned

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25 A 537 (=23 A W N 102)

REVISIONAL CRIMINAL

Before Mr Justice Banerji

MAHADEO KUNWAR AND OTHERS v BISU

[3rd April, 1903]

Criminal Procedure Code, sections 145 (5) and 435 (3)—Order of Magistrate on dispute as to possession of immoveable property—Revision—Jurisdiction of High Court

The order to which finality is given under sections 145 (5) and 435 (3) of . only purports to . been passed with on in making the se of its revisional powers is competent to interfere with it *Hurbullubh Narain Singh* v *Luchmeswar Prosad Singh* (1), *In re Pandurang Govind* (2) and *Agra Bank* v *Leishman* (3) referred to

Where a Magistrate under circumstances which would apparently have justified his taking action under section 145 of the Code of Criminal Procedure took action in fact under section 107, and having passed an order seemingly under section 118, added as it were, as an appendix to this order —' Lisu Ahir put in possession under section 145, Code of Criminal Procedure —It was *held* that this order, passed without any of the procedure prescribed by section 145 being adopted, was more than an irregularity, and

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* Criminal Reference No 53 of 1903

(1) (1898) I L R 26 Cal 188

(2) (1900) I L R 24 Bom 527

(3) (1894) I L R 18 Mad 41

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was an order passed without jurisdiction and liable to revision by the High Court. *Mohesh Sowar* v. *Narain Bag* (1) and *Sakor Dusadh* v. *Ram Pargash Singh* (2) referred to.

[Ref. 26 All. 144; 36 Mad. 275=13 Cr. L. J. 573=17 Ind. Cas. 65=23 M. L. J. 499=12 M. L. T. 439=1912 M. W. N. 1154; 8 Cr. L. J. 170=1 S. L. R. 50; Fol. 15 Cr. L. J. 424=24 Ind. Cas. 160; Dist. 4 A. L. J. 91=1907 A. W. N. 50=5 Cr. L. J. 117; Ref. 34 All. 449=9 A. L. J. 582=13 Cr. L. J. 526=15 Ind. Cas. 798; 33 Cal. 68; Not foll. 10 Cr. L. J. 221=3 Ind. Cas. 64=5 N. L. R. 94; Ref. 3 Pat. L. J. 213; 59 I C. 401=18 A. L. J. 1140=22 Cr. L. J. 97.]

THE facts of this case were as follows:—

The parties to the present proceeding, Mahadeo Kunwar and others, and Bisu Ahir had a dispute about the possession of a certain quantity of land. The existence of this dispute, and the likelihood of its leading to a breach of the peace were brought to the notice of the Joint Magistrate of Ballia. The Magistrate, instead of proceeding under section 145 of the Code of Criminal Procedure, took action under section 107 of [538] the Code, and made an order calling upon the parties to show cause why they should not be ordered to furnish security to keep the peace. On the day fixed the parties appeared, filed statements in answer to the notice issued to them and adduced evidence. Upon the evidence the Joint Magistrate came to the conclusion that Bisu Ahir was in possession of the land, and thereupon made an order, described by him as an order under section 107, but which must have been passed under section 118, directing Mahadeo Kunwar and others to furnish security to keep the peace. After the Joint Magistrate had signed this order and dated it, he added these words:—"Bisu Ahir put in possession under section 145 of the Code of Criminal Procedure." Against these orders Mahadeo Kunwar and others applied in revision to the Sessions Judge, who reported the case for the orders of the High Court under section 438 of the Code of Criminal Procedure recommending that the orders passed by the Joint Magistrate should be set aside.

Babu *Sital Prasad Ghosh*, for the applicants.

Mr. *C. Dillon* and Maulvi *Muhammad Ishaq*, for the opposite party.

BANERJI, J.—This case has been reported under section 438 of the Code of Criminal Procedure with the recommendation that two orders passed on the 25th of November, 1900, by the Joint Magistrate of Ballia, purporting to be orders under sections 118 and 145 respectively of the Code of Criminal Procedure, be set aside. As for the latter order, Mr. *Dillon* contends that, having regard to sub-section (5) of section 145, and sub section (3) of section 435, the order is not open to revision. In my judgment the order to which finality is given under those sections must be an order which not only purports to be, but is in reality, an order under section 145, and has been passed with jurisdiction. Where the Court has exceeded its jurisdiction in making the order it is null and void, and this Court in the exercise of its revisional powers is competent to interfere with it. This has been held by the Calcutta High Court in several cases, of which I may mention the cases of *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (3) [539] The same view was held by the Bombay High Court in *In re Pandurang Govind* (4), and the Madras High Court in *Agra Bank* v.

(1) (1900) I. L. R. 27 Cal. 981.
(2) (1902) 7 C. W. N. 174.
(3) (1898) I. L. R. 26 Cal. 188.
(4) (1900) I. L. R. 24 Bom. 527.

Leishman (1) exercised its revisional powers in such a case We have therefore to see whether the order which the Joint Magistrate purported to make under section 145 is in fact and substance an order under that section and was passed with jurisdiction The facts are these — 1903 APRIL 3 — REVISIONAL CRIMINAL — 25 A. 537= 23 A W N 102

In October last the Joint Magistrate was informed by the police that a dispute existed between the parties to these proceedings about the possession of a certain quantity of land, which was likely to lead to a breach of the peace The Magistrate, instead of proceeding under section 145, which, under the circumstances was the appropriate section applicable, chose to proceed under section 107, and made an order calling upon the parties to show cause why they should not be ordered to furnish security to keep the peace On the day fixed the parties appeared, filed statements in answer to the notice issued to them, and adduced evidence In the view which the Magistrate took of that evidence he came to the conclusion that Bisu *Ahir* was in possession of the land, and he made an order, which he calls an order under section 107 but which must have been passed under section 118, directing Mahadeo Kunwar and others, the first party, to furnish security to keep the peace After he had signed this order and dated it, he noted the following order at the foot of the order —" Bisu *Ahir* put in possession under section 145 of the Code of Criminal Procedure It is thus clear that no proceedings under section 145 were initiated by the recording of an order under sub section (1) of that section, no notice was issued, no written statements were called for, and no inquiry was held under the section It is manifest that for the making of an order under sub section (6) of section 145, it is essential that the provisions of the section should be complied with Where a Magistrate has failed to do so, his omission is something more than an irregularity, and his order must be deemed to be an order made without jurisdiction The Calcutta High Court has held this view in a series of decisions of which I may refer to *Mohesh Sowar* v [540] *Narain Bag* (2), and *Sakor Dusadh* v *Ram Pargash Singh* (3) The Bombay High Court also in *In re Pandurang Govind* (4) was of the same opinion The Joint Magistrate states in the explanation which he submitted to the Sessions Judge that the parties were not prejudiced, as they filed their written statements and adduced evidence As I have already said, the omission to take proceedings under sub section (1) of section 145 was more than an irregularity Further, it was distinctly pleaded by Bisu *Ahir* in answer to the notice issued to him that this being a case in which there was a question of disputed possession, proceedings should be initiated under section 145 It is thus clear that the parties did not understand that the Magistrate intended to hold proceedings under that section, and that they did not adduce such evidence as they would have adduced in a matter of which cognizance could be taken under that section The parties were therefore prejudiced by the proceedings of the Magistrate, and his order directing Bisu *Ahir* to be put in possession under section 145 was passed without jurisdiction, and must be set aside

As regards the other order which was passed in the proceedings taken under section 107, I think having regard to the provisions of section 145, that the Court should have proceeded under that section, and not under section 107 Chapter XII of the Code of Criminal Procedure lays down the procedure in regard to disputes relating to immove-

(1) (1894) I L. R 18 Mad 41
(2) (1900) I L. R 27 Cal 981
(3) (1901) 7 C W N 174
(4) (1900) I L. R 24 Bom 527

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Court in the case of *Jogul Kishore* v. *Cheda Lal* (1). That case apparently was a case on all fours with the case before us. In it the learned Judges are reported to have said as follows :—"It is true that it is not strictly a decree prepared under section 88 of the Transfer of Property Act; it is a combination of the decree proper under section 88 and of the supplementary decree which might be given after the exhaustion of the decree under section 88, under the provisions of section 90; but we think it is unquestionably a decree other than the decree referred to in section 230, and therefore not liable to the disabilities attached by that section to a decree for money more than twelve years old." We see no reason why we should dissent from the opinion therein expressed, and in our opinion that case governs the appeal now before us. We therefore dismiss the appeal with costs.

[544] AIKMAN, J.—I am of the same opinion. It is certainly an extraordinary thing that an application for the realization of money decreed to the respondent, or rather to his predecessor in title, so long ago as the 20th of December, 1884, should now be made, and that that application should be for the sale of articles of moveable property set forth in the decree-holder's application. But the amount found due to the decree-holder has not been fully paid, and it is for the judgment-debtor who objects to the application to show that it is too late for the decree-holder to get his money. In support of his objection the judgment-debtor relies on the provisions of section 230 of the Code of Civil Procedure, which allow a period of twelve years, counting from the date of final decree, within which an application may be made to execute a decree for the payment of money. It was held by this Court in *Ram Charan Bhagat* v. *Sheobarat Rai* (2) that a decree directing the sale of hypothecated property is not a decree for the payment of money to which the limitation provided by section 230 applies, and that case has been followed by the Calcutta High Court in *Kartick Nath Pandey* v. *Juggernath Ram Marwari* (3). It is true that this decree is not purely a decree directing the sale of hypothecated property for the realization of money found due. It is of a composite nature, partaking both of the nature of the decree referred to in section 88 and of that referred to in section 90 of the Transfer of Property Act. But, as has been shown by my learned colleague, it has been held by this Court in the case cited by him that a composite decree of this nature is not a decree for the payment of money within the meaning of section 230, and the learned Judges who decided the case in the Calcutta High Court which has just been referred to take the same view. This being so, it seems clear that the judgment-debtor's objection fails and was properly repelled by the Court below.

Appeal dismissed.

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(1) Weekly Notes, 1893, p. 184.
(2) (1894) I. L. R. 16 All. 418.
(3) (1899) I. L. R. 27 Cal. 285.

25 A 545 (=23 A W N 103)

[545] REVISIONAL CRIMINAL

Before Mr Justice Banerji

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REVISIONAL CRIMINAL.

25 A 545= 23 A W. N. 103.

BHAGWANIA v SHEO CHARAN LAL * [18th April, 1903]

Criminal Procedure Code, section 488—Maintenance—Application for cancelment of order for maintenance

Where it is sought, under section 488, sub-sections 4 and 5, of the Code of
sub-section (1) of section
the Magistrate who passed
, and who only, has juris

THIS was a reference submitted under section 438 of the Code of Criminal Procedure by the Sessions Judge of Cawnpore It appears that on the 23rd of April 1895 an order was made by the Joint Magistrate of Cawnpore under section 488 of the Code of Criminal Procedure directing one Sheo Charan Lal to make a monthly allowance of five rupees for the maintenance of his wife Musammat Bhagwania On the 6th of October 1902 Sheo Charan Lal applied to the Cantonment Magistrate of Cawnpore, under sub sections (4) and (5) of section 488 of the Code, for the cancelment of the order of maintenance, upon the ground that Musammat Bhagwania was living in adultery The Cantonment Magistrate made an order granting the application and setting aside the order for maintenance On an application by Musammat Bhagwania for revision of this order the Sessions Judge was of opinion that the Cantonment Magistrate had no jurisdiction to pass the order which he had made cancelling the previous order of the Joint Magistrate, and accordingly referred the case to the High Court

Babu *Satya Chandra Mukerji*, for the applicant

BANERJI, J —On the 23rd of April 1895, an order was made by the Joint Magistrate of Cawnpore, under section 488 of the Code of Criminal Procedure, directing one Sheo Charan Lal to make a monthly allowance of Rs 5 for the maintenance of his wife, Musammat Bhagwania On the 6th of October, 1902, Sheo Charan Lal applied to the Cantonment Magistrate of Cawnpore, under sub sections (4) and (5) of section 488, for the [546] cancelment of the order of maintenance, upon the ground that Musammat Bhagwania was living in adultery The Cantonment Magistrate has made an order granting the application and setting aside the order of maintenance

I agree with the learned Sessions Judge, who has reported this case under section 438 of the Code of Criminal Procedure, that the Cantonment Magistrate had no jurisdiction to entertain the application and to make an order cancelling the order of maintenance It is manifest from the provisions of section 488 that the application should have been made to the Magistrate who made the original order, or to his successor in office If it had been the intention of the Legislature that an application like the one in question could be made to any Magistrate, we should have expected to find in the Code a provision similar to that contained in the latter portion of section 490, by which any Magistrate in any place where the person against whom the order is made resides, is authorized to enforce the order of maintenance In the absence of such a

* Criminal Reference No 142 of 1903

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provision, and having regard to the whole context of section 488, I am of opinion that an application like the one made by Sheo Charan Lal could not be made to a Magistrate other than the presiding officer of the Court which made the order of maintenance. I accordingly set aside the order of the Cantonment Magistrate, dated the 22nd of October, 1902, as passed without jurisdiction.

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25 A. 546 (=23 A. W. N. 137.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

GOBIND KRISHNA NARAIN AND ANOTHER (*Plaintiffs*) *v.* ABDUL QAYYUM AND OTHERS (*Defendants*).* [29th April, 1903.]

Hindu law—Joint Hindu family—Effect of conversion of member of joint Hindu family to Muhammadanism—Regulation No. VII of 1832, *section* 9—*Compromise—Title taken under compromise between persons having mutually exclusive claims.*

In the year 1845 one Ratan Singh, who at that time formed with his son Daulat Singh, a joint Hindu family, possessed as such of considerable [547] property, both moveable and immoveable, became converted to Muhammadanism. In 1851 Ratan Singh died, his son Daulat Singh having pre-deceased him, and such portion of the property as was situate in British India was taken over by the Court of Wards, and held by them apparently on behalf of Raj Kunwar the widow of Ratan Singh, and Sen Kunwar the widow of Daulat Singh (these two ladies being at that time detained in Lucknow under the supervision of the officials of the King of Oudh), without any recognition of either widow having a title superior to that of the other. In 1857 Sen Kunwar executed a bond for a considerable sum of money in favour of Jai Chand, the father-in-law of her daughter, Mewa Kunwar. Sen Kunwar died in 1857 and Raj Kunwar in 1858. After the death of these ladies three claimants to the property appeared, namely, Chatar Kunwar and Mewa Kunwar the daughters of Daulat Singh, and Khairati Lal the son of a daughter of Ratan Singh who had pre-deceased her father. The matters in dispute between these claimants were settled by means of a compromise, in virtue of which 8½ annas of the property were assigned to the daughters of Daulat Singh and 7½ annas to Khairati Lal, and in 1861 the partition of the property in accordance with the terms of the compromise was completed. In 1866 Chatar Kunwar died, and upon her death Mewa Kunwar successfully asserted her right by survivorship to the 4¼ annas which had been the share of her sister, and thus became possessed of the whole 8½ annas assigned by the compromise mentioned above to the daughters of Daulat Singh. Meanwhile, however, Jai Chand had brought a suit upon the bond given to him in 1857, by Sen Kunwar. Why this bond was originally executed did not appear, nor that there was evidence of any such legal necessity pressing upon Sen Kunwar as would have supported an incumbrance of more than her own life interest in the property. The final decree in this suit was obtained by Jai Chand in 1868, that is to say, after the surviving defendant, Mewa Kunwar, had been declared entitled to the entire 8½ anna share, and it was a decree based upon a confession of judgment by Mewa Kunwar. In satisfaction of this decree certain villages, part of the said 8½ anna share, were made over to the decree-holder, some of which, in turn, were sold by him to various vendees. On suit by the sons of Mewa Kunwar to recover some of these villages on the ground that their mother had in them no more than a Hindu daughter's life estate, which had come to an end on her death in 1899, it was *held* that Ratan Singh by his conversion to Muhammadanism became, according to Hindu law, civilly dead, and the whole of the property of the former joint Hindu family became vested in Daulat Singh in 1845, the provisions of section 9 of Regulation No. VII of 1832 embodying merely a rule of procedure and not a rule of substantive law,

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* First Appeal No. 86 of 1900, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 30th of March, 1900.

and no suit claiming the family property having been brought by Daulat Singh to which the rule of procedure therein laid down could be applied that in any case the conversion of Ratan Singh worked a separation of the joint Hindu family and one half of the property became vested in Daulat Singh, though it might not have been actually partitioned that the property so becoming vested in Daulat Singh would be held by him as a separated Hindu that the property was held by the Court of Wards [548] during the lives of Raj Kunwar and Sen Kunwar not specifically for either of them but for the benefit of the rightful owner both ladies being incapable of managing their affairs that after the compromise arrived at between Chatar Kunwar and Mewa Kunwar on the one side and Khairati Lal on the other the estate which Chatar Kunwar and Mewa Kunwar took was a Hindu daughter s estate

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be more than that possessed by Mewa Kunwar and on her death her sons were entitled to recover possession *Abraham* v *Abraham* (1) referred to

Held also that although the findings in the case between Mewa Kunwar and her brother-in law (N W P H C Rep 1868 p 82) could not be held to be *res judicata* in the present appeal, the judgment in that case could be used as evidence to the extent pointed out in the cases of *Ram Ranjan Chukerbutty* v *Ram Narain Singh* (2) *Bitto Kunwar* v *Kesho Pershad* (3) *The Collector of Gorakhpur* v *Palakdhari Singh* (4) and *Dharmidhar* v *Dhundiraj* (5)

[Reversed 31 All 497 13 C W N 1117 Ref 4 A L J 365 1907 A W N 115 =29 All 451 30 All 406=5 A L J 425=1908 A W N 165 Fol 29 All 985 (Widow—alienation—Legal necessity) Ref 57 P R 1916]

THE plaintiffs in this case claimed as reversioners to a Hindu widow after the death of the widow certain immoveable property which had come into the hands of the defendant by sale from one Khairati Lal, to whom it had been transferred by the widow in satisfaction of a decree held by Khairati Lal against her

The following is the devolution of the title claimed by the plaintiffs The property in suit originally belonged to a joint Hindu family consisting of a father and one son In 1845 the father Ratan Singh became a convert to Muhammadanism He died on the 14th of September 1851, surviving by some months his son Daulat Singh, who died in January of the same year Ratan Singh left a widow, Raj Kunwar, and Daulat Singh left a widow, Sen Kunwar On the death of Ratan Singh disputes arose between the two widows as to the estate left by Ratan Singh in Rohilkhand, of which the property in suit formed a part, and partly for this reason and partly because the widows were detained in Lucknow under the supervision of the officers of the King of Oudh, the Court of Wards assumed superintendence over the Rohilkhand estate, without however determining [549] on behalf of which of the widows they held it Both the widows remained in Lucknow, where Sen Kunwar died in 1857 and Raj Kunwar in 1858 After the death of the two widows three claimants to the estate arose, namely Chatar Kunwar and Mewa Kunwar the daughters of Sen Kunwar and Khairati Lal the son of a daughter of Ratan Singh (Jiwan Kunwar) who had predeceased her father The conflicting claims of these parties were settled by a compromise dated the 21st of June 1860, in virtue of which Khairati Lal obtained 7½ annas and Chatar Kunwar and her sister Mewa Kunwar 4¼ annas each out of the property of Ratan Singh In 1866 Chatar Kunwar died, and her husband Awadh Behari Lal took possession of her

(1) (1863) 9 Moo I A 199 at p 237
(2) (1894) L R 22 I A 60
(3) (1897) L R 24 I A 10
(4) (1889) I L R 12 All 1
(5) (1903) 5 Bom L R 230

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$4\frac{1}{4}$ annas share, claiming it as his late wife's *stridhan*. This led to a suit by Mewa Kunwar, who claimed title by survivorship, and succeeded in obtaining possession under a decree of the High Court in her favour, dated the 10th of February 1868.

In 1857 it appears that Sen Kunwar had executed a bond for a large amount in favour of one Rai Jai Chand the father-in-law of Mewa Kunwar. In 1865 Rai Jai Chand instituted a suit against Chatar Kunwar and Mewa Kunwar, as being in possession of the estate of Sen Kunwar, on the basis of this bond. After protracted proceedings, during the course of which Chatar Kunwar died and Mewa Kunwar got possession of her share in the estate, Jai Chand obtained against Mewa Kunwar a consent decree for 96,000 and odd rupees. It was in satisfaction of this decree that Mewa Kunwar handed over to her father-in-law several villages belonging to the estate which had come to her from Ratan Singh. Of these villages one, named Sunaia, in the district of Bareilly, was sold by Jai Chand to the predecessors of the defendants.

Mewa Kunwar died in March 1899, and in September 1899 the plaintiffs filed the present suit to recover possession of Sunaia. The plaintiffs were the two sons of Mewa Kunwar, and their position, put shortly, was that under the compromise with Khairati Lal the estate which their mother and aunt had taken was only a Hindu daughter's estate, and as the transfer to Jai Chand was not supported by any "legal necessity" sufficient [660] to warrant the passing of a larger estate, the estate which Jai Chand and the transferees from him had acquired was only an estate for the life of Mewa Kunwar, and that had determined on her death in March 1899.

The Court of first instance (Subordinate Judge of Bareilly) found that Chatar Kunwar and Mewa Kunwar had acquired an absolute estate in the property, and that *on the death of the former the latter became* absolute owner of the whole, and accordingly dismissed the plaintiffs' suit. From this decree the plaintiffs appealed to the High Court.

The Hon'ble Mr. *Conlan*, Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellants.

Pandit *Moti Lal Nehru*, Maulvi *Ghulam Mujtaba*, and the Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

JUDGMENT.—This is an appeal from a decree of the Subordinate Judge of Bareilly dismissing the plaintiffs' claim in a suit in which the appellants were the plaintiffs, the respondents being the defendants. There are also several connected appeals in which the same questions are raised as in this appeal. This suit was brought to recover possession on title of mauza Sunaia, which had been transferred by sale to the predecessors in title of the respondents by one Jai Chand Rai in October, 1880. For the purpose of this appeal, it will be necessary to enter in some detail into the history of the family to which the appellants belong, and of the litigation between the members of that family. In order to render this history intelligible we append a pedigree of the family. The plaintiffs, it will be seen, are the sons of Rani Mewa Kunwar. Their title they allege accrued on her death in March, 1899. The Subordinate Judge held that the plaintiffs' mother, Rani Mewa Kunwar, was the full owner of the property in suit and was competent to transfer the whole estate, or any portion of it, to Jai Chand Rai, under whom the defendants claim title. The appellant's case is that she had no power of transfer.

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[551] BHAGWAN DAS
- Balak Ram (ob 1843)
  - Ratan Singh = Raj Kunwar (ob November, 1858) (Ratan Singh became a Muhammadan in 1845, ob 14th September, 1851)
    - Daulat Singh (ob January 8th, 1851) = Rani Sen Kunwar (ob November 9th, 1857)
      - Chatar Kunwar (d s p April 13th, 1866) = Awadh Behari Lal
      - Mewa Kunwar (ob 25th March, 1899) = Aftab Rai, son of Rai Jai Chand
        - Gobind Krishna (plaintiff, appellant)
        - Kashi Krishna (plaintiff, appellant)
    - A daughter (d. s p) = Rajjan Lal
    - Jiwan Kunwar (died before 1851 pre deceased her father) = Ram Prasad
      - Khairati Lal = Hulas Kunwar

From the above table it will be seen that Jai Chand Rai, the respondent vendor, was father in law of the appellants' mother, his son, Raja Aftab Rai, having married Rani Mewa Kunwar, whose sons the appellants are The family are by caste Kayasths, descended from one Raja Bhagwan Das There is but little evidence respecting him He appears to have been well to do, and possessed of property in Rohilkhand and in Oudh He is described in the judgment of Mr Justice Pearson, to which we shall presently refer, as being "the founder of the fortunes" of the family to which the plaintiffs belong, and was styled subahdar of the Province of Rohilkhand His son, Balak Ram, died in 1843 at Lucknow It is said for the respondents that he was converted before his death and died a Musalman The only evidence of this is that on Balak's death some one told the King of Oudh that he had died a Muhammadan, and thereupon the King ordered his body to be buried and not cremated This was accordingly done His body was buried at Lucknow The only other evidence we have respecting Balak is that for the last few years of his life he lived in seclusion He is said to have held high office at Lucknow under the Nawab Asaf ud daula There is no evidence whatever to show that during his life he was an avowed Musalman His [552] change of faith (if it took place at all) most probably occurred not long before his death The King clearly knew nothing of it till after his death Whether Rai Balak Ram did so recant or not is quite immaterial for the purpose of this case His change of faith on his death bed (if it really occurred) can have had no effect further than to accelerate by a short time the devolution by survivorship of his interests in the family property on the surviving members of the family, who then were his son, Ratan Singh and his grandson, Daulat Singh

His son, Raja Ratan Singh, was in his day a distinguished man He is described in a letter, dated August 13th, 1833, from the Secretary to the Governor General of India to the Commissioner of Bareilly, as being "a person well known for his erudition and scientific pursuits, and whose character has stood very high, he was also in independent

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circumstances, and some years ago was summoned to hold a high situation under the Lucknow Government." The Commissioner was authorized to offer him the place of Principal Sadr Amin at Gorakhpur. We are informed that he did not avail himself of that proposal. The case for the appellants plaintiffs is that Ratan Singh became a Muhammadan in 1845, and took the name of Jafir Husain. The Subordinate Judge finds that such was the case. We entirely agree with him on this issue. The evidence appears to us to be overwhelming. The evidence of the two witnesses Nawasi Lal (record No. 59 in appeal No. 87) and Ram Dayal (record No. 60 in appeal No. 87), both of them by caste Kayasths, connections of the family, who lived at Lucknow, and were acquainted with Raja Ratan Singh is, if credible, conclusive on this question. No reason has been shown to us for disbelieving it. It is to the effect that Ratan Singh was converted to the Muhammadan faith by Saiyyid Dildar Husain, who was the *mujtahid* or chief priest of the Shiahs at the Lucknow Court in 1845, during the latter part of the reign of Amjad Ali Shah, and took the name of Jafir Husain. No doubt the reason why such an important ecclesiastical official as the high priest, Dildar Husain, was employed in the conversion of Raja Ratan Singh was because the latter was a distinguished and well-known personage in Lucknow, having held (though [553] while still a Hindu) the high office of Diwan, with a high sounding title, under the King Muhammad Ali Shah. He was dismissed from that office by the succeeding King Amjad Ali Shah, in whose reign his conversion is said to have taken place. These witnesses further depose that after his conversion Raja Ratan Singh, or rather Jafir Husain Khan, ceased to live with his family. Indeed if he had become a Muhammadan it was out of the question that his Hindu relations could live in commensality with him. Accordingly, the witnesses say, he left the part of the house in which he had usually resided and took up his quarters in another and outer part of the buildings. The evidence of these witnesses leaves no doubt on our minds that in 1845 Raja Ratan Singh abandoned Hinduism ; that he became a convert to the Muhammadan faith ; that up to his death in 1851 he remained a Muhammadan, and that he died and was buried as a Muhammadan. His grave is still pointed out in Lucknow.

The evidence of these witnesses is much strengthened by certain recitals contained in a *rubkari* or Court proceeding of the Court of the British Resident at Lucknow, dated October 27th, 1851, a few weeks after the death of Raja Ratan Singh. In that *rubkari* the Resident (Colonel Sleeman) set forth that the interest on Rs. 30,000 in Government paper is payable at the Lucknow Treasury, that the notes stood in the name of Raja Ratan Singh, "who bore the name of Jafir Husain after his conversion to Muhammadanism." The *rubkari* then goes on to state that the notes were claimed by "one Tulshi Ram *alias* Fida Ali, son of Balak Ram, father of Ratan Singh, who claimed according to the Muhammadan religion," and after naming the Hindu heirs, *viz.* his widow, his son's widow and daughters and his daughter's sons, all then residing at Lucknow, decides that as Raja Ratan Singh was "by origin" *dar asl bud* (the translation in the paper-book is inaccurate) a Hindu, the right to the notes should be adjudicated according to the Hindu Shastras. Coloner Sleeman accordingly had a case drawn up for the opinion of the Pandits in the shape of an interrogatory. That interrogatory was submitted through the Judge of Agra for the opinion of the Pandit of the Sadr

Court at Agra, who replied [554] under date of November 25th, 1851 In the "interrogatory" the Resident's Court set out the claim made by Fida Husain and his relinquishment of it in consideration of Rs 10,000, and after mentioning the Hindu heirs (as in the *rubkari*) asked the Pandits to give a *fatwa* as to "which of these persons can succeed under the Hindu law, and if it is to be partitioned, how is the partition to be carried out?" We shall advert to the Pandit's reply later on Thus we have within a few weeks after Ratan Singh's death a distinguished British officer, who had to decide as to the disposal of that portion of Ratan Singh's estate which was under his control, and who by reason of his official position at Lucknow must have known all about Ratan Singh's family and position, judicially asserting that Ratan Singh had been converted to Muhammadanism, and on that fact asking the Pandit for a *fatwa* as to the persons entitled to the succession according to the Hindu Shastras The fact of the conversion is recited both in the *rubkari* and in the interrogatory As to the Government paper which formed the subject of the reference to the Pandit, we find from a passage in the judgment (record No 18 in appeal No 87) of Mr Justice Pearson, in the case of *Lalla Oudh Beharee Lal* v *Ranee Mewa Koonwer*, (1) to which we shall have to refer presently, that two of the claimants, namely, Rani Raj Kunwar, widow of Raja Ratan Singh, and her daughter in law, Rani Sen Kunwar, widow of Daulat Singh, subsequently, after the Pandit's *fatwa* had been received, agreed to a compromise, by which they divided the Government paper equally among themselves

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The next piece of the evidence bearing on the conversion of Raja Ratan Singh is No 27 of the record (in appeal No 87) This is a judgment of Saiyyid Dildar Husain, the *mujtahid ul asr*, the chief high priest at Lucknow, who occupied the highest ecclesiastical and judicial position at the Lucknow Court, as is almost invariably the case where the Muhammadan law prevails The suit in which the judgment was given was that in which Fida Ali *alias* Tulshi Ram, as a convert to Muhammadanism, claimed against Ratan Singh to succeed to the property left by Balak Ram, father of Ratan Singh The judgment [555] described the defendant as "Jafir Husain Khan *alias* Raja Ratan Singh," who "admitted to have embraced and followed Islam Indeed as to this last matter the author of the judgment could have had no doubt, for it was he who in his spiritual capacity had two or three years previously (the judgment bears a Muhammadan date, corresponding to the 26th October, 1845) converted Raja Ratan Singh to Islam The judgment then recites the compromise by which, for a consideration, the plaintiff withdrew his claim, and finally directs the plaintiff "to have no dispute with the defendant as regards the estates and properties left by the said deceased (Balak Ram) on any ground"

The evidence produced by the defendants to show that Ratan Singh did not become a Muhammadan consists of copies for four sale deeds and one mortgage executed after 1845, in which the vendee and mortgagee, Raja Ratan Singh, is described by that name and not by his Muhammadan name It is contended that this fact shows that Ratan Singh did not become a Muhammadan We cannot attach any great weight to this evidence, unsupported as it is by any other evidence, it is not sufficient to destory the effect of the mass of evidence to the contrary

(1) (1863) N W P H C Rep 1863 p 82

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which we have detailed above. Further, it should not be forgotten that the sale and mortgage transaction took place in Bareilly in Rohilkhand, while the conversion occurred at Lucknow in Oudh, where Ratan Singh had almost always resided, and where he continued to reside till his death. News of the conversion may not have reached Rohilkhand. All the transactions were negotiated through Ratan Singh's Karinda, one Durga Prasad, and quite possibly the conveyances, the value of none of which exceeded Rs. 1,000, were never seen by the Raja. Of the five documents, three were executed in 1846, within a year after the conversion : the fourth bears a date in 1847 and the fifth in 1849. They are quite insufficient to discredit the evidence on the other side. We have no hesitation in finding that Raja Ratan Singh was converted to Muhammadanism in 1845, and adhered to that faith till his death in 1851.

Next it is contended for the defendants-respondents that Ratan Singh, notwithstanding his open profession of the [556] Muhammadan faith, did not really abjure Hinduism, and that he pretended to be converted simply to please the King (Amjad Ali Shah). This argument we do not quite understand. We cannot say what were the motives which prompted his adoption of the Muhammadan faith. Whether he abjured Hinduism to please the King, or whether his reason was to obtain by that act a better position before a Muhammadan tribunal in Fida Ali's suit, the fact remains that he was publicly received into Islam by the Shiah high priest at Lucknow, and that he lived as a Muhammadan and was buried as such. We cannot enquire into nor have we any evidence as to what was his state of mind in 1845, or as to whether he sincerely embraced Muhammadanism from a belief in the tenets of that faith, or only pretended to be converted in order to gain wordly advantages. We have no doubt that he openly avowed the Muhammadan faith for several years. That is sufficient for us. This question as to the conversion of Raja Ratan Singh is the pivot on which this case turns, and that is the reason why we have discussed it at such length. At a later period of this judgment we intend to consider what was the legal effect of the Raja's conversion as regards his title to and the devolution of his property.

Raja Ratan Singh *alias* Jafir Husain died at Lucknow on September 14th, 1851, his son Daulat Singh (who remained a Hindu up to his death) having predeceased him on the 8th January of the same year. Soon after the death of Raja Ratan Singh, dissensions likely to cause a breach of the peace arose between his widow and his son's widow as to the Rohilkhand estate. Both the ladies were said to have been of somewhat unsound mind, and incapable of managing their affairs, and were reported to be held under restraint by the Lucknow officials with a view to extort some of Ratan Singh's property from them. Rani Raj Kunwar claimed under Hindu law as the widow of Raja Ratan Singh, while Rani Sen Kunwar claimed as widow of Daulat Singh, son of Raja Ratan Singh. Apparently, in consequence of the dispute as to the succession, it was considered advisable to put the estate in Rohilkhand under the management of the Court of Wards. This was done by [557] the Collector of Bareilly under instructions from the Commissioner of Rohilkhand, issued on the 20th November, 1852 (*vide* record No. 17 in appeal No. 87). It is contended for the respondents that possession of the estate was assumed by the Court of Wards on behalf of

Rani Raj Kunwar, widow of Raja Ratan Singh, and that the possession by the Court of Wards during her life time must be taken to be her possession This view no doubt was advocated by the Commissioner of Rohilkhand in his letter No 373 of August 26th, 1853, to the Board of Revenue (No 67 of the record in appeal No 86) He expresses a strong opinion that Raja Ratan Singh s widow was the party entitled to succeed He adverts to Rani Sen Kunwar s contention that the property had passed by law to Daulat Singh on Ratan Singh s conversion, and that she as Daulat s widow was entitled to succeed Rani Sen Kunwar s agent evidently had lost no time in putting forward her claim to the succession through her deceased husband Both the ladies had, it appears, obtained rather conflicting certificates under Act No XX of 1841, from the District Judge of Bareilly The Board of Revenue, who were the Court of Wards, however, declined to decide the question of succession, but holding that both the ladies were incompetent to manage their affairs it decided to retain the estate of Raja Ratan Singh under the Court of Wards, [*vide* the Board s Secretary s No 342 to the Commissioner of Rohilkhand (No 20 of the record in appeal No 87) dated September 8th, 1854, and an order by the Board of Revenue on an application made by Rani Sen Kunwar, dated August 28th, 1854 (record No 19 in appeal No 87] From the above it is clear that the Board directed the estate of Raja Ratan Singh to be placed and retained under the superintendence of the Court of Wards, *not on behalf of any one of* the ladies but on behalf of the true owner The Court of Wards then remained in charge of the estate of Raja Ratan Singh the two ladies continuing to reside in Lucknow, where Rani Raj Kunwar *died in* November, 1858, Rani Sen Kunwar having predeceased her on November 9th, 1857

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Now on the death of these ladies there remained only three possible claimants to the estate under the Hindu law, putting [558] aside Tulshi Ram *alias* Fida Husain mentioned above The latter did make an attempt to recover the estate, but was defeated on the ground that he was illegitimate The three claimants were (1) Raja Khairati Lal, grandson of Raja Ratan Singh and of Rani Raj Kunwar, by their daughter, Jiwan Kunwar, and (2) Rani Chatar Kunwar and (3) Rani Mewa Kunwar, daughters of Daulat Singh, who was son of Raja Ratan Singh and of Rani Raj Kunwar, but who had predeceased his father He died, as already mentioned, on January 8th, 1851 Now the titles set up by the son of Jiwan Kunwar and by the daughters of Daulat Singh were absolutely incompatible one with the other One party or the other was under Hindu law entitled to the whole estate or to nothing As Daulat Singh predeceased his father, his daughters had no title unless they could show that their father had succeeded to the estate during Raja Ratan Singh's life time, and so had transmitted it to his widow, Rani Sen Kunwar and his daughters on their mother s death If in a suit between them and Khairati Lal they established that fact, they must have succeeded, and they would have excluded Khairati Lal from any share in the inheritance The parties thus had before them the prospect of a long and expensive litigation in which the chances of success were not unevenly balanced Under these circumstances they adopted the wisest course possible To use the language of this Court on appeal from the decree of Mr Justice Pearson mentioned above, they agreed to refer their disputes to arbitration under the provisions of section 3_6 of the

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Code of Civil Procedure. Soon afterwards, on the 21st July, they, without the intervention of arbitrators signed an agreement for the division of the disputed property in the following shares : $7\frac{1}{2}$ annas to Raja Khairati Lal, $4\frac{1}{4}$ annas to Rani Chatar Kunwar and $4\frac{1}{4}$ annas to Rani Mewa Kunwar, and having thus settled their several shares they provided for the actual division of the estates accordingly (*Lalla Oudh Beharee Lal* v. *Ranee Mewa Koonwer*) (1). The agreement of July 21st, 1860, is record No. 44 in appeal No. 86. The executants are Rai Khairati Lal, grandson of Raja Ratan Singh, on the one side, and the [559] general attorneys of Ranis Chatar Kunwar and Mewa Kunwar on the other. It recites the existence of disputes between the parties "as regards all the properties, moveable, immoveable, ancestral, and self-acquired, owned, possessed, and left by Raja Ratan Singh, deceased, in the districts of Bans Bareilly, Pilibhit, Shahjahanpur, Budaun, &c., and in the Province of Oudh," and declares that the parties having come to "amicable terms in the presence of Mr. John Inglis, Collector of Bareilly" (a gentleman who was afterwards successively a member of the Board of Revenue, N.-W. P., and Chief Commissioner of Oudh), and no doubt through his advice and mediation, they entered into the agreement to divide the estate mentioned in the judgment of this Court cited above. In accordance with this agreement the estate was released from the custody of the Court of Wards and made over to the parties, who thereupon appointed Mr. Inglis as their arbitrator to partition it among them (*vide* record No. 66 in appeal No. 86). Mr. Inglis had partition made by his Deputy Collector, Munshi Khair-ud-din Ahmad. We have on the record (in record No. 66 in appeal No. 36) complete details of this partition, which included not only the immoveable property, but also the cash and securities which had accumulated to the credit of the estate while it was under the superintendence of the Court of Wards. Final orders on the partition were passed by Mr. Inglis on March 4th, 1861.

The next important event is the death on April 13th, 1866, of Rani Chatar Kunwar, one of the executants of the agreement mentioned above, who had been put into possession of $4\frac{1}{4}$ annas of the estate in dispute. On her death her husband Awadh Behari Lal took possession of his wife's $4\frac{1}{4}$ annas, claiming it as her *stridhan*. His title was disputed by his sister-in-law, Rani Mewa Kunwar, the owner of other $4\frac{1}{4}$ annas. She as daughter of Daulat Singh claimed to take *by survivorship* the estate left by her sister, and instituted a suit to recover it. That suit was removed for trial to this Court in its extraordinary original civil jurisdiction. It was heard by Mr. Justice Pearson, who, on July 18th, 1867, passed a decree in favour of the plaintiff, Rani Mewa Kunwar (record No. 14 in appeal No. 87). That decree was affirmed on appeal by the Chief [560] Justice and Mr. Justice Ross on February 10th, 1868 (*Lalla Oudh Beharee Lal* v. *Ranee Mewa Koonwer* (1). Under this decree Rani Mewa Kunwar got possession of her sister's $4\frac{1}{4}$ annas.

But meanwhile litigation was in progress in Oudh, which has an important bearing on this appeal. Rani Sen Kunwar (the widow of Daulat Singh) is said to have executed a bond for the sum of Rs. 51,359-0-3 in favour of Rai Jai Chand, father-in-law of her daughter, Rani Mewa Kunwar. It is said to have been executed at Lucknow on October 4th, 1857, when the Mutiny was at its height there. This document has

(1) (1868) N.-W. P. H. C. Rep., 1868, p. 82.

not been produced in this case, nor has its non production been explained, consequently we know nothing about it We cannot say what was the consideration given for it, nor whether the money it purported to secure was borrowed for purposes which under the Hindu law would authorize a widow to lay a burden on her husband s estate All we know is that the bond was executed during the Mutiny, at a time when the estate of Raja Ratan Singh in Rohilkhand had been for more than five years under the superintendence of the Court of Wards of the N W P In the year 1865 (the exact date is not known) Rai Jai Chand instituted a suit on this bond in the Court of the Civil Judge at Lucknow He impleaded as defendants Rani Mewa Kunwar and Rani Chatar Kunwar They were sued as being in possession of Rani Sen Kunwar's estate On July 2nd, 1865, the Court at Lucknow dismissed the suit as against Rani Chatar Kunwar, who had resisted the claim, but gave a decree against Rani Mewa Kunwar who had confessed judgment The reason why Rani Mewa Kunwar confessed judgment is no doubt to be found in the fact that the plaintiff was her father-in law On appeal to the *Court of the Judicial Commissioner* the case was remanded for re trial to the lower Court, where, in consequence of the death of Rani Chatar Kunwar in April, 1866, further proceedings were suspended pending the result of the suit brought by Mewa Kunwar against her sister's husband to which we have already referred On the termination of that suit proceedings were resumed in the Civil Court at Lucknow Rani Mewa Kunwar (now the sole defendant) [561] again confessed judgment, and a money decree was accordingly given against her on her confession for Rs 96,367 7 0 on June 9th, 1868 Execution of this decree was transferred to the Court at Bareilly On an application made in that Court for execution of the decree, now amounting to Rs 1,06,832, the judgment debtor, Rani Mewa Kunwar, put in a petition to the effect that in accordance with a settlement and com promise made between her and the execution creditor (her father in law) it had been agreed that in satisfaction of the decree several revenue pay ing and perpetual muafi villages (a list of which is appended to the petition) possessed by the petitioner, together with one year's mesne profits, should be taken over by the decree holder '*as a proprietor like the petitioner*' So whatever title Rani Mewa Kunwar possessed in those villages, that title passed to her father in law, the execution creditor Among the villages transferred in this way to Jai Chand Rai is the village in dispute in this appeal

The case made by the plaintiffs appellants is that on the conversion of Raja Ratan Singh to Muhammadanism "all his rights in the properties, ancestral and jointly acquired, which he collectively possessed and managed for the family, became absolutely extinct under Hindu law, and according to that law, *he being taken to be dead from that time his rights* devolved on his only son, Kunwar Daulat Singh, the plaintiff s maternal grandfather, who became the sole permanent owner of all the properties The plaintiffs then recite the proceedings in the Lucknow Court on Jai Chand Rai's suit, and attribute their mother s admission of the claim made by Jai Chand to the "influence exercised by her relation" Jai Chand Rai, as already mentioned, was her father in law And finally in the 10th paragraph of the plaint the plaintiffs contend that "under the compromise made in execution of Jai Chand s decree only the life interest of their mother was transferred to Jai Chand "The said Rani," they

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say, "had no right to transfer more than that, nor was anything more transferred," and as she died on March 25th, 1899 (paragraph 11) "from that time her life interest was extinguished and all the transfers made by her in her life-time became null and void."

[562] In reply the defendants respondents deny that the village in suit was ever owned and possessed by Daulat Singh, and alleged it was self-acquired by Raja Ratan Singh. They deny that Raja Ratan Singh ever became a Muhammadan in reality, and say that "if he had indirectly declared himself to be a Muhammadan to gain some object, that affair was not based on good faith, nor can such person be deemed a Musalman in law." They further plead that "under Hindu law no Hindu loses his self-acquired property by the change of religion;" that section 9 of Regulation No. VII of 1832 saved Ratan Singh from disabilities and the forfeiture which may have been recognised by Hindu law on change of religion; they point out that even if Daulat Singh had had a right "to take by force the ancestral and self-acquired property in Ratan Singh's possession under Hindu law," he did not avail himself of that power, and could not have made use of it after the passing of Act No. XXI of 1850, which was in force before his death; and they further allege that if Ratan Singh had been deprived of his property on his conversion, the effect of Act No. XXI of 1850 was that on Daulat Singh's death his father, Ratan Singh, "would have been and was the sole owner of the property by right of survivorship." The defendants-respondents then assert that Rani Raj Kunwar got possession of the estate as the widow of Raja Ratan Singh, defeating the attempts made by her daughter-in-law, Rani Sen Kunwar, and had her name recorded in the village papers in succession to her husband, and it remained so recorded up to 1860. (NOTE.—Raj Kunwar died in November, 1858). Then they plead (paragraphs 10 and 11) that "the person in whose favour the mutation of names was effected in place of Rani Raj Kunwar in 1860 came in *adverse* possession, and the answering defendants are from the date of the sale in proprietary and adverse possession as representatives of the person who is in possession as a usurper." (NOTE.—The person who came into possession of the village in suit in 1860 was Rani Chatar Kunwar.) The defendants explain their position by contending (in the 13th paragraph of the written statement) that "the property which came into the possession of Mewa Kunwar should be deemed as her self-acquired property, to transfer which Mewa Kunwar had an [563] absolute power on account of the adverse possession." The last paragraph of the written statement to which we need allude is the 11th in which the respondents, putting forward a subsidiary line of defence, plead that the transfer of the village in suit was made "under such circumstances and for such purposes as under the Hindu law can be validly made by the wife and daughters, even if there are heirs, and the plaintiffs are bound by them even as reversioners."

On these pleadings the main position taken up by the respective parties is clear and precise. The appellants claim as reversioners (daughter's sons) to their grand-father, Daulat Singh, alleging that the succession opened to them on the death of their mother, Rani Mewa Kunwar, who, they say, took (with her sister Rani Chatar Kunwar), a daughter's life estate in the property of her father Daulat Singh, and that such being her interest in the property, she had no power to transfer more than her life estate in this village (with others) to Jai Chand,

and that no legal necessity justified an absolute transfer The case of the respondents is that the village in suit came into Rani Mewa Kunwar's possession as her *self acquired* property, that she was in respect of it "a usurper," by which presumably they mean a person who got possession without title, excluding the true owner, and that by *adverse* possession they have acquired a prescriptive title The most important question to be decided in this appeal is, what was the nature of the estate which Rani Mewa Kunwar took in the property of which she was put into possession by the partition made in pursuance of the agreement of July 21st, 1860?

As to this question the decision of the Subordinate Judge is in the following terms —"Till Raj Kunwar s death Ratan Singh's estate was under the control of the Court of Wards It may therefore be presumed that Raj Kunwar died possessed of the estate in 1858 Raja Khairati Lal, daughter s son of Ratan Singh, was entitled under the Hindu law to succeed to his maternal grandfather's estate An agreement was made by Khairati Lal with Rani Mewa Kunwar and Chatar Kunwar, whereby he kept with him 7½ annas in Ratan Singh's estate and gave to each of the two ladies 4¼ annas share As Khairati [564] Lal was the legal heir of Ratan Singh after his widow's death, he in fact was owner of the estate Rani Mewa Kunwar and Chatar Kunwar had no right to inherit it or (sic) any portion under the Hindu law They must be supposed to have acquired the 8½ annas in the estate through a grant from the rightful owner, Khairati Lal The shares of 8½ annas should be treated as self acquisition of the two ladies Mewa Kunwar also became legal owner of Chatar Kunwar's share, when she got its possession she was competent to deal with the whole 8½ annas in the estate as she liked As it did not belong to the plaintiff s maternal grandfather, they have no right to question the validity of the transfer made by their mother"

And again in his decision on the 7th issue the learned Subordinate Judge makes the following remarks —"Supposing that Ratan Singh did forfeit his right in his self acquired property at the date of his conversion, his possession on such date became adverse to Daulat Singh and his heirs He continued in possession of the estate till his death, and his son, Daulat, pre deceased him After Ratan Singh's death his widow, Raj Kunwar s name was recorded for his estate in the revenue papers, and the Court of Wards held it as Raj Kunwar's property till 1850 Raj Kunwar died in 1858 Her possession was adverse to Daulat Singh's heirs Rani Sen Kunwar never got possession of Ratan Singh's estate Adverse possession of Ratan Singh and of his widow which exceeded 12 years conferred a right of absolute ownership on Raj Kunwar at the time of his (her?) death Khairati Lal was the legal successor to Ratan Singh's estate through his mother, Raj Kunwar (NOTE — This is a mistake The learned Subordinate Judge evidently meant 'through his mother, *Jiwan Kunwar*, daughter of Ratan Singh) Rani Mewa Kunwar and Chatar Kunwar's right to it, if they had any, was barred by limitation before they entered into possession of the 8½ annas share by virtue of the agreement they made with Khairati in 1860"

On the above findings the Judge held that Rani Mewa Kunwar and Chatar Kunwar held the property as their own acquisition as absolute owners, and that Rani Mewa Kunwar was the *full owner* of the whole 8½ annas after Rani Chatar [565] Kunwar's death, and was competent

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to transfer the whole or any portion of that estate. He therefore dismissed the suit.

Now with the reference to the views of the learned Subordinate Judge expressed in the above extracts from his judgment, we think it right before going any further to express our dissent from his opinion that Rani Raj Kunwar got possession of Raja Ratan Singh's estate after his death, or that she remained in possession up to her death, and that the Court of Wards held possession on *her* behalf. On the question of the Rani's possession, we concur in the opinion expressed by Mr. Justice Pearson in the suit already mentioned, that neither of the two ladies, Rani Raj Kunwar and Rani Sen Kunwar, ever got any actual possession over the estate before it was taken over by the Court of Wards, though Rani Raj Kunwar's name may have been entered in the revenue papers, and though both tried to obtain certificates from the Judge of Bareilly under Act No. XX of 1841. Both ladies were at the time at Lucknow, held under restraint by the King's officials. In an earlier portion of this judgment we have shown that the Court of Wards did not hold possession of the estate solely on behalf of Rani Raj Kunwar, but on behalf of Rani Sen Kunwar also. The Court of Wards in fact held for the true owner (*in usum jus habentis*).

It was most strenuously contended before us by the learned advocate for the respondents that the villages in dispute in this and in the connected appeals were the "self-acquired" property of Raja Ratan Singh, and were not the property of a Hindu joint family. The Subordinate Judge was of opinion that those villages formed the separate and self-acquired estate of Raja Ratan Singh. He says he is "inclined to believe" that Balak Ram, father of Ratan Singh, became a Muhammadan before his death, and that therefore Ratan Singh, who was a Hindu at the time of his father's death, cannot be supposed to have formed in his Muhammadan father a joint Hindu family. Unquestionably a Muhammadan and a Hindu cannot form a joint Hindu family. But we disagree with the opinion of the Subordinate Judge that Balak Ram had become a Muhammadan. As we have already pointed out, there is no evidence to support this contention beyond some gossip which reached the [566] ears of the King of Oudh after Balak Ram's death. If he did become a Muhammadan, his conversion must have taken place very shortly before his death. As to the villages in suit in this and in the connected appeals, there can be no doubt that they were all purchased in the name of Raja Ratan Singh. They were all so purchased before the year 1835, when Balak Ram and Ratan Singh and Daulat Singh were alive. According to Hindu law there is a strong presumption that such a family, consisting of a father, son, and grandson, constitutes a joint Hindu family, and that any property it possesses belongs jointly to the members of the family. That presumption is rebuttable by evidence to the contrary. Here we look in vain for any evidence of any separation between any of the members. There is not the slightest evidence of any separation or of severalty of interest among the three men. But it is contended that as all the properties in dispute in this and in the connected appeals were purchased in the name of Raja Ratan Singh during his father's lifetime, that fact indicates a separation of interest between him and his father and his son, and is evidence that these properties were his self-acquisition purchased with his own funds. We are unable to accede to this conten-

tion In the case of *Gajendar Singh* v *Sardar Singh* (1) it was held by Chief Justice Sir John Edge and one of us that the fact that purchases of immovable property have been made from time to time in the names of individual members of a joint family is not, standing by itself, sufficient evidence that a separation has taken place At page 179 of the report it is said to be "well established law in these Provinces that a Hindu and the sons born to him (sons will, under the same law, include grandsons) constitute, until separated, a joint Hindu family, and all property acquired, of which the ancestral *property is the source, constitutes joint* family property of such family It is also well understood in these Provinces that, given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint' And again, at page 182 —"In a joint Hindu family it not uncommonly happens in these Provinces that when property is acquired from the resources of a joint Hindu family the purchase is made in the [567] name of one member of the family, not as his exclusive property, but really on behalf of the family of which he is a member, and that entries in revenue and village papers, consequent on such assignment of interest as a rule are made in the name of the nominal assignee' So here we have property purchased in the name of Raja Ratan Singh in his father's lifetime, and while he was still a member of a joint family, and similarly during the same period other properties were purchased in the name of Daulat Singh Of these latter properties possession was taken on behalf of Rani Sen Kunwar in the dispute which occurred after the successive deaths of Daulat Singh and of Ratan Singh in 1851 That there was a "nucleus of family property' there can be no doubt Balak Ram was unquestionably a well to do man, as also his father Raja Bhag wan Das. Ratan Singh considered his fathers, interest in the family property so valuable that he thought it worth his while to buy off Fida Ali's claim for Rs 5,000 in cash, and a house in Lucknow Balak Ram *had migrated* to Oudh and settled in Lucknow There can be no doubt that the family possessed considerable means Thus there is not the slightest evidence of any separation in the family, and there is evidence that the family did possess considerable resources We are of opinion that Raja Ratan Singh was a member of a Hindu joint family up to his conversion in 1845, and that the villages purchased in his name before his conversion were not his separate self acquired property, but formed a part, as did also the villages purchased by Daulat Singh, of the joint property of the joint family

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We have discussed this question at *some length because it was very* ably argued before us, but in the view we are inclined to take on another issue in this appeal we do not consider the matter is *one of much* im portance

The next question we have to consider is what was the effect of Ratan Singh's conversion This question also was argued at great length at the hearing of this appeal

For the appellants it is contended that under the Hindu law Ratan Singh immediately on his conversion became divested *of* all the *property* he then possessed, and that that property passed to the next Hindu heir The respondents deny that the [568] effect of conversion is as stated by the appellants, and plead that even if such were its effect section 9 of Regulation VII of 1832 prevented its application The Pandit of the Agra

(1) (1896) I L R 18 All. 176.

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Sadar Court to whom Colonel Sleeman's *interrogatories* of the 25th October, 1851 (No. 28 of the record in appeal No. 87), were addressed, replied on 25th of November of the same year (No. 11 of the record in appeal No. 87) in the following terms:—"The disputed property having devolved on Daulat Singh constitutes his estate, as ever since his grandfather Balak Ram and his father Ratan Singh became Musalmans they lost their ownership in that property, as is shown by the words of Bir Mitrodai and Manu." After citing some authorities, to which we shall presently refer, the learned Pandit says, "according to the authority of Yajnavalk in the Mitakshara the widow of Daulat Singh is entitled to that property." And again, after stating that in their mother's lifetime the two daughters of Daulat Singh had no right, he adds:—"Khairati Lal has also no right, for he is son of the daughter of Ratan Singh, and the property is not the estate of Ratan Singh." In support of the proposition of law laid down by the learned Pandit, we were referred to several leading authorities on the Hindu law. It is not technically correct to say that the rule of law they lay down is that a person in the position of Ratan Singh *forfeits* his property by reason of his conversion. The rule laid down by those authorities is, that such a person is treated as one who is "civilly dead," his wife is treated as a widow, his property devolves on the next Hindu heir maimed funeral rites are performed for him, a libation of water being offered on an inauspicious day outside the village, a pot of water being kicked over by a female slave in the presence of some sapindas and Brahmans, while the ceremonial impurity consequent on the death of a near relation is observed for one day and one night only. This is the rule laid down by Manu, who directs that the contemptuous libation is to be offered in the manner described above to the outcast *as if he were dead*, and that he is not to be given his share of the inheritance (family property). In the Viramitrodaya, at page 37 of the chapter on partition, it is laid down that the extinction of the father's right might arise, not merely from natural **[569]** death, but also from degradation (*i.e.*, becoming an outcast) and retirement, whereupon the sons would have a right to partition, if no expiation had been performed. The learned writer's contention was that the son had no right to a partition during his father's lifetime.

The same rule is to be found in the Dayabhaga (*vide* Stoke's Hindu Law Books, page 191, paragraph 31), in which, treating of the right to partition on the father's death, it is observed that "mere demise is not exclusively meant, for that intends also the status of a person degraded as occasioning an extinction of property." We find the same rule in the Vyavastha Chandrika (Shama Charan Sirkar, Vol. 1, page 20), where it is laid down in section 19 (referring to previous sections) that "by the term death physical death alone is not meant; it alludes also to a person's excommunication or degradation for sin, etc.," and in the annotation, citing from Sir Thomas Strange's Hindu Law, from page 184 of the first volume, it is observed:—"There are two occasions upon either of which wherever the Hindu law prevails dominion may be transferred from the father in his lifetime without his consent, *whether* the property claimed by the sons to be divided be ancestral or acquired. These are voluntary devotion * * * and degradation from caste, by which it is forfeited." At page 160 of the 1st volume of his work on Hindu law, Sir Thomas Strange, after detailing the disabilities inflicted on an outcast, continues:—"So that a man under these

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circumstances might as well be dead, which indeed the Hindu law considers him to be, directing libations to be offered to his *manes* as though he were naturally so' The last authority we need refer to is Macnaghten's Principles and Precedents of Hindu Law, in which, at page 131, in reply to a question as to the person on whom ancestral and self acquired property belonging to a Hindu who had become a Muhammadan would devolve, it was answered, citing authorities, that "what ever property he previously to his conversion was possessed and seised of, will devolve on his nearest of kin who professed the Hindu religion, and whatever he acquired subsequently to his conversion will go to the person who, according to the Muhammadan law, became the legal heir Such was also the opinion of [570] Mr Justice Pearson in Mewa Kunwar's suit in 1867, an opinion which was not contested in the subsequent appeal On the above authorities we cannot come to any other opinion than that Raja Ratan Singh must be considered, at least as far as the villages in Rohilkhand, where the Hindu law prevailed, are concerned, to have become "civilly dead' on his conversion to Muhammadanism, and that all his property, whether joint, ancestral or self acquired (if any) devolved on his son Daulat Singh We also are of opinion that there is no foundation for the distinction which the learned advocate for the respondents would have us draw between joint ancestral and self acquired property The authorities we have cited make no such distinction The rule they lay down is that a person in Raja Ratan Singh's position, an outcast by reason of his adoption of the Muhammadan faith, became civilly dead, and being dead all his property passed to the next Hindu heir As to this matter also we disagree with the conclusions of the Subordinate Judge, as we moreover disagree with him in his finding that the villages in dispute here and in the connected appeals were the self acquired and separate property of Ratan Singh

Then it is contended for the respondents' that the 9th section of Regulation No VII of 1832 had the effect of preventing the forfeiture (if we may use a word which is technically incorrect) from taking place Now that Regulation does not purport to enact or to modify any substantive law It is an enactment which treats of procedure only "It repeals so much of Regulation No VIII of 1795 as provided that "in causes in which the plaintiff shall be of a different religious persuasion from the defendant the decision is to be regulated by the law of the religion of the latter,' and substituted (in the province of Rohilkhand) the rules contained in the first clause of section 16 of Regulation No III of 1803 The substituted enactment is to the effect that "in suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, the Muhammadan law with regard to Muhammadans, and the Hindu law with regard to Hindus, shall be considered to be the general rules by which the Judges are to form their decisions' By section 9 of Regulation No VII of 1832 it was [571] declared that the above rules (*i e*, the rules contained in Regulation No III of 1803) "are intended and shall be held to apply to such persons only as shall be *bona fide* professors of those religions at the time of the application of the law to the case, and were designed for the protection of the rights of such persons, not for the deprivation of the rights of others' The section then further provided that when in any civil suit the parties were one of the Hindu and the other of the Muhammadan persuasion "the laws of those religions shall not be permitted to

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operate to deprive such party or parties of any property to which but for the operation of such laws they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity and good conscience."

It is contended for the respondents that the words we have just quoted have the effect of abrogating the rule of Hindu law, which regards an apostate Hindu as being dead in the eyes of the law. We do not think those words have that meaning. The Regulation, as we have already remarked, is purely one which prescribes procedure without making any change in the substantive law. It directs the Court *on hearing a suit* respecting inheritance, succession, marriage, etc., in which one party is a Muhammadan and the other a Hindu, *when giving its decision* (which we think is the meaning of the words "*at the time of the application of the law to the case*") to be governed by the principles of justice, equity and good conscience, in such a manner as not to permit the law of one religion to deprive a party of any property to which, but for the operation of such law, he would have been entitled. That, we think, is the meaning of this section of the Regulation. It did not abrogate the Hindu law as to the consequences of apostacy, but laid down for the guidance of the Judge a rule under which he might refuse to enforce those consequences. But it does not purport to affect the substantive law. The Hindu law remained unaltered in this respect, and we hold that under it Daulat Singh became on his father's conversion sole owner of the property which up to that time had belonged jointly to him and to his father. It may be that, had Daulat Singh instituted a suit for possession of that property against his father, alleging the "civil death" of the latter as [572] affording him a cause of action, the Court acting on section 9 of the Regulation might have dismissed his suit. But the Court would have dismissed it, *not* because the Hindu law was abrogated, *but* because the Court had considered itself to be directed by the Regulation not to enforce that law. In the opinion we have expressed on this matter we have the support of the judgment of this Court in the case of *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer*, in which, at page 85 of the report (1), the learned Judges held as follows :—"The Regulation provides *a rule of decision for suits* in which the parties are of different persuasions, one being a Hindu and the other a Muhammadan. In such *suits* the laws of those religions are not permitted to operate to deprive *any party to the suit* of property to which he would otherwise be entitled. Thus in a suit by Raja Daulat Singh against his father after the conversion for recovery of the Rohilkhand property on forfeiture, the Court on being satisfied that the latter was a *bona fide* professor of the Muhammadan religion at the time of the application of the law to the case would not have adjudged his property to be forfeited by reason of his Lucknow conversion, but would have governed its decisions by the principles of justice, equity and good conscience. The Regulation also appears to us to have no application to such a suit as the present." From the above it is clear that the learned Judges held that the intention of section 9 of the Regulation was *to give a direction to the Judge* hearing such a suit as to how he should proceed under certain circumstances, and that the "time of the application of the law to the case" is the time when in such a suit the Judge had to decide whether he would enforce the

(1) (1868) N. W. P. H. C. Rep., 1868, 82 ; at p. 85.

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Hindu law by which an apostate from Hinduism is regarded as "civilly dead"

The learned advocate for the appellants, however, contends that in such a suit Daulat Singh must have been successful His argument is that the intention of section 9 of Regulation No VII of 1832 was to preserve rights already vested in the respective litigants, and that the section was not intended to be used for the purpose of depriving a person of his vested rights, e g, in this case of that which the Hindu law had given to [573] Daulat on his father's conversion *Ex hypothesi*, according to the learned advocate, the property at the date of the suit would by Hindu law have vested in Daulat Singh, and he contends that the object of the Regulation was to protect him in the enjoyment of that property, and not be used as a tool to deprive him of it Raja Ratan Singh, he contends, would not have been allowed by the Court to set up the Muhammadan law (which naturally does not inflict any penalty on a convert to Islam) so as to deprive Daulat of that which the Hindu law had already given him The argument is no doubt ingenious, but it is not one to which we think we can safely accede And anyhow, whatever may be the value of the learned advocate's arguments, the fact remains that no such suit was instituted by Daulat Singh against his father, and consequently the "time" never arrived at which the law could be applied "to the case" No outward change in the possession of the property took place between the father and the son, and they died within a few months one of the other

One very important change in their legal relationships did, however, take place immediately on Ratan Singh's conversion It is unquestionably impossible that a Hindu and a Muhammadan could be members of a joint Hindu family As soon as Raja Ratan Singh became a Muhammadan he ceased to belong to the joint family of which up to that time he had been a member The result of his conversion was to work a complete separation (though without actual partition) between him and his son Consequently, even if section 9 of the Regulation No VII of 1832 had the effect for which the learned advocate for the respondents contends, it follows that on his father's conversion, and on the separation resulting therefrom, the joint family being dissolved, Daulat Singh became the sole and absolute owner of at least one-half of the joint family property in which his interest while still joint had been one half Even if it be conceded that the Regulation abrogated the Hindu law as to the consequences of apostacy, it certainly did not touch the rules affecting the constitution and the incidents of a joint Hindu family We therefore hold that on his father's conversion Daulat Singh became sole and absolute owner—at the least—of an [574] undivided moiety of that which had been joint family property In arriving at this opinion we have the support of their Lordships of the Privy Council in the case of *Abraham* v *Abraham* (1) Discussing the parallel case of a Hindu convert to Christianity their Lordships consider "what is the position of a member of a Hindu family who has become a convert to Christianity," and hold that "he becomes at once severed from the family, and regarded by them as an outcast The tie which bound the family together is so far as he is concerned not only loosened but dissolved The obligations consequent on and connected with the tie must, it seems to their Lordships, be dissolved with it Partnerships may be put an

(1) (1863) 9 Moo. I. A. 199.

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end to by severance effected by partition; it must also, their Lordships think, equally be put an end to by severance which the Hindu law recognises and creates." On this part of the case the learned advocate for the respondents laid great stress on the fact that after Raja Ratan Singh's conversion no outward change was made in the management and apparent possession of the property before the deaths of the father and son, which took place within a few months of each other in 1851—the son dying first. Stress was also laid on the fact that Daulat instituted no suit against his father for recovery of the property. We did not attach much importance to this matter. Considering the near relationship the son could hardly have cared to institute such a suit against his father. We are of opinion that this omission by Daulat to enforce against his father his rights to the family property which he had acquired by his father's conversion, assuming that Daulat was acquainted with the Hindu law as to that matter, had not, in our opinion, any effect whatever on the devolution of the property. As to this question we fully concur in the opinion of the learned Judges of this Court in *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer*, (1) at p. 84 of the report, where they are reported to have held as follows :—" In fact no advantage was ever taken by Raja Daulat Singh of this forfeiture, and the possession of the father appears to have continued until his death in 1851 . . . . We were not shown any authority to the effect that the mere omission by Daulat to enter upon the property vested in him by the [575] forfeiture or otherwise to assert his right to it would revest it in Raja Ratan Singh and make it descendible to his heirs." And again :—" Both father and son were at the time, and always afterwards continued to be, fixed residents in the King of Oudh's dominions. That the conversion in Lucknow of the former to Muhammadanism would be attended by the forfeiture to his son of his property in Rohilkhand, was a consequence probably not foreseen by either. If foreseen, it is certain that the son took no advantage of the forfeiture." If under such circumstances adverse possession in Raja Ratan Singh could be presumed, we need only point out that he died in 1851, some six years after his conversion. It was further contended for the respondents that on Daulat Singh's death in January, 1851, his father took the property as his son's heir—Act XXI of 1850 having come into force before Daulat's decease. The answer to this contention is that Raja Ratan Singh was not his son's heir. The true heir was Daulat's widow, and on her decease her daughters Ranis Chatar Kunwar and Mewa Kunwar, through one of whom the respondents here claim title. From the time of the conversion Daulat held as a separated Hindu a status which remained unaffected either by the Regulation of 1832 or by the Act of 1850.

The next and most important question we have to decide is, what was the status of the two sisters under the agreement of the 21st July, 1860 (record No. 44 in appeal No. 86). Were they absolute owners possessing, *inter alia*, the power of alienation, or were they only limited owners as daughters of Daulat Singh, holding only the limited estate of a daughter in ancestral property inherited from a father? On this question it was contended for the appellants that we were bound by and should regard as *res judicata* the findings of this Court in the case of *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer* (1) mentioned above.

(1) (1868) N. W. P. H. C. Rep. 1868, 82.

In our opinion the findings in that case cannot, under section 13 of the Code of Civil Procedure, be held to be *res judicata* in the present appeal It is impossible to say that the parties to this appeal are "litigating under the same title" The plaintiffs appellants claim title as reversioners to Daulat Singh only They made no claim through Rani Mewa Kunwar The defendants respondents, on the other hand, claim through Mewa [576] Kunwar, who, they contend, acquired a title not in any way derived from her father Daulat, but by a grant from Raja Khairati Lal But though we cannot regard the findings in that case as being *res judicata*, we can use the judgment as evidence to the extent pointed out by their Lordships of the Privy Council in the case of *Ram Ranjan Chuckerbutty* v *Ram Narain Singh* (1) and *Bitto Kunuar* v *Kesho Pershad* (2), by this Court in *The Collector of Gorakhpur* v *Palakdhari Singh* (3), and by the Bombay High Court in *Dharnidhar* v *Dhundiraj* (4) Now as to the agreement of July, 1860, the respondents, case is that Raja Khairati Lal had a complete title to the whole property then in dispute, he being son of Ratan Singh's daughter, and that actuated by kind feelings towards his cousins, the two Ranis, he made a grant to them of more than a moiety of the disputed estate We can find no foundation whatever for this contention The wording of the agreement gives no support to it. There is no suggestion that Raja Khairati Lal, and he alone, had a legal title to the whole property, and that his cousins accepted more than half the estate as bounty granted by him to which they had no legal right Indeed we think it might just as forcibly be contended that the two sisters made a grant of the $7\frac{1}{2}$ annas to their cousin the Raja The parties we think came together as persons at arms' length from each other, each side claiming the whole estate through different lines of descent, each side having a good fighting title, who to avoid litigation consented to an amicable division of the disputed estate The fact that Khairati Lal allowed his cousins to take more than half indicates, we think, an apprehension on his part that theirs was the better case, and moreover he and his advisers must by that time have known that, as we have already pointed out, his cousins' father Daulat had, on the con- [illegible] ist one half [illegible] provisions [illegible] nsideration [illegible] ellate judg [illegible] the report, which are to the following effect —"The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each relinquishing all claims in respect of all property in dispute other than that falling to his share, and recognising the rights of the others, as they had previously asserted it, to the position allotted to them respectively It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Court to uphold, and give full effect to such an arrangement" In coming to this conclusion we are further supported by the opinion of their Lordships of the Privy Council in the case of *Rani Mewa Kunwar* v *Rani Hulas Kunwar* (No 45 of the record in appeal No 86), also reported in L R 1 I A 157, and 13, B L R 312 This was

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(1) (1894) L. R 22 I A 60
(2) (1897) L. R 24 I A 10.
(3) (1889) I. L. R 12 All 1
(4) (1903) 5 Bom. L. R. 230.

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for improvements we leave for determination in execution. It is admitted for the respondents that these are the only questions which now require to be determined.

Appeal decreed.

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25 A. 580 (=23 A. W. N. 122.)

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji, and Mr. Justice Aikman.

MANGAL SEN (*Defendant*) *v.* SHANKAR SAHAI (*Plaintiff*) AND TAJAMMUL HUSAIN KHAN (*Defendant*)* [1st May, 1903].

Mortgage—Suit for sale after redemption of a prior mortgage—Bond held by prior mortgagee found to have been altered in a material particular—Effect of such alteration.

A puisne mortgagee brought a suit for sale against his mortgagors on two mortgages, and impleaded therein as defendants the heirs of a prior mortgagee. [581] As to this prior mortgage the plaintiff stated in his plaint:—"The plaintiff has now learnt that the defendant No. 1, Tajammul Husain Khan, had made a prior mortgage of a four biswa share in mauza Saiyid Nagar *alias* Nayagaon, pargana Bilari, to Bhagwan Das, under a registered bond, dated the 7th August, 1886, for Rs. 1,000. Bhagwan Das is dead. The defendants Nos. 3 to 6 are his heirs. As the plaintiff has a right to redeem on payment of Rs. 1,000 the prior debt, or of the amount which may be found due to the defendants Nos. 3 to 6, he is entitled to get the entire property sold by auction and to recover the whole amount." And the plaintiff prayed "that in case of default in payment (by the mortgagors) of Rs. 1,000, or whatever may be found due to the defendants Nos. 3 to 6, the plaintiff may be asked to pay that sum; and the entire hypothecated property may be sold by auction, and the whole amount of the prior incumbrance which the plaintiff might have to pay, and also the entire amount claimed and costs and interests up to date of payment may be satisfied out of the sale proceeds." The prior mortgagees brought the mortgage deed of the 7th of August, 1886, into Court and claimed that Rs. 6,764 principal and interest were payable thereunder. The bond, when produced, was found to have been tampered with, and altered in a material particular, the extent of the share mortgaged having been increased.

Held by Stanley, C. J., and Banerji, J. (*dissentiente* Aikman, J.) that such alteration did not render the instrument void *in toto* so as to justify a Court in ignoring its existence and passing a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it, or any part of that amount. An interest in immoveable property having become vested by the operation of the mortgage bond, that instrument was admissible in evidence on behalf of the mortgagee to show the estate which passed under it.

Davidson v. *Cooper* (1), *Pigot's case* (2) *Master* v. *Miller* (3), *Ganga Ram* v. *Chandan Singh* (4), *Gogun Chunder Ghose* v. *Dhuronidhur Mundul* (5), *Sitaram Krishna* v. *Daji Devaji* (6), *Christacharlu* v. *Karibasayya* (7), *Ramasamy Kon* v. *Bhavani Ayyar* (8), *Suffell* v. *Bank of England* (9), *Subrahmania Ayyan* v. *Krishna Ayyan* (10), *Beanland* v. *Hirst* (11), *Hucthins* v. *Scott* (12) *Stewart*

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* First Appeal No. 105 of 1900, from a decree of Babu Achal Behari, Additonal Subordinate Judge of Moradabad, dated the 10th of April 1900.

(1) (1844) 13 M. and W.343.
(2) (1615) 11 Co. 26 *b*.
(3) (1793) 1 Smith L. C. 10th ed 747.
(4) (1881) I. L. R. 4 All. 62.
(5) (1881) I. L. R. 7 Cal. 616.
(6) (1883) I. L. R. 7 Bom. 418.
(7) (1885) I. L. R. 9 Mad. 399.
(8) (1866) 3 Mad. H. C. Rep. 247.
(9) (1882) 9 Q. B. D. 555.
(10) (1899) I. L. R. 23 Mad. 137.
(11) (1821) 23 R. R. 756.
(12) (1837) 46 R. R. 770.

v *Aston* (1), *Browne* v *Lockhart* (2), *Chichester* v *Marquis of Donegall* (3) and *Kennedy* v *Green* (4) referred to

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West v *Steward* (5) and *Agricultural Cattle Insurance Company* v *Fitzgerald* (6) also referred to by Banerji, J

of the 7th of August, 1886, hts of the prior mortgagee in ug a material and unexplained neither sue upon it nor use it as a defence to the action brought by the puisne mortgagee.

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Croockewit v *Fletcher* (7), *Bolton* v *The Bishop of Carlisle* (8), *Caldwell* v *Parker* (9) and *Mussamut Khoob Conwur* v *Baboo Moodnarain Singh* (10) referred to in addition to most of the cases mentioned above

[Fol 6 N L R 1 Dist 33 Cal 812=3 C L J 363=10 C W N 788, Not fol 25 I C 607 Ref 13 A L J 683=29 I. C 1009]

THE facts of this case are as follows :—

On the 7th of August 1886, Tajammul Husain Khan made a mortgage of a four biswa share in mauza Saiyid Nagar *alias* Nayagaon, to one Bhagwan Das, for the sum of Rs 1,000 On the 8th of January 1894, Tajammul Husain Khan and Muhammad Husain Khan mortgaged four biswas seven and a half biswansis in two mahals in mauza Saiyid Nagar, in favour of one Sahu Shankar Sahai to secure a sum of Rs 1,600 Subsequently Tajammul Husain Khan and Muhammad Husain Khan borrowed a further sum of Rs 400 from Shankar Sahai, under a bond dated the 9th of February 1895, by which they hypothecated the same property On the 8th day of January, 1900, Shankar Sahai sued to recover the money due upon his mortgages of the 8th of January 1894, and the 9th of February 1895 As to the mortgage of the 7th of August 1886, the plaintiff said in his plaint —" The plaintiff has now learned that the defendant No 1, Tajammul Husain Khan, had made a prior mortgage of a four biswa share in mauza Saiyid Nagar, *alias* Nayagaon, pargana Bilari, to Bhagwan Das, under a registered bond, dated the 7th of August 1886, for Rs 1,000 Bhagwan Das is dead The defendants Nos 3 to 6, are his heirs As the plaintiff has a right to redeem on payment of Rs 1,000 the prior debt, or of the amount which may be found due to the defendants Nos. 3 to 6, he is entitled to get the entire property sold by auction and to recover the whole amount " In the second prayer to the plaint, the plaintiff prayed that he might be directed to pay Rs 1,000, or whatever might be found due to the defendants Nos 3 to 6, and that the entire hypothecated property might be sold to satisfy the prior incumbrance and the amount due to the plaintiff on foot of his bonds

The defendant No 3, Mangal Sen, filed a written statement in which he alleged that he was entitled to the interest of Bhagwan Das under the bond of the 7th of August 1886, under [583] a partition carried out between the members of the family of Bhagwan Das, and that he was also entitled to the moneys secured by a bond dated the 15th of December 1891, which had not been disclosed by the plaintiff in his plaint He submitted that until the principal amount and interest due on foot of those two bonds was paid, the plaintiff was

(1) (1858) 8 Ir C L R. 35
(2) (1840) 10 Sim 420
(3) (1870) L R 5 Ch A 4J7
(4) (1833) 6 Sim 6
(5) (1845) 14 M and W 47
(6) (18J1) 16 Q B. 43J
(7) (1857) 1 H and N 8J3.
(8) (17J3) 2 H Bl 25J
(9) Ir Rep. 3 Eq J19
(10) (1861) 9 Moo I A 1

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not entitled to enforce the sale of the mortgaged property. Tajammul Husain Khan also filed a written statement, in which he alleged that a number of payments had been made from time to time to Bhagwan Das in respect of his two mortgage bonds.

The Court of first instance (Additional Subordinate Judge of Moradabad) found that the whole amount claimed on foot of the bond of the 15th of December 1891 was due to Mangal Sen, and passed a decree in favour of the plaintiff in the terms of his plaint, subject to redemption of this bond. With regard to the bond of the 7th of August 1886, he found on production of it by Mangal Sen that a material alteration had been made in it whilst it was in the custody of the mortgagees, and he held that in consequence of this alteration the bond was not admissible in evidence, and that the claim of Mangal Sen in respect of it must fail *in toto*.

Against this decree Mangal Sen appealed to the High Court urging in the first place, that it was not proved that the bond, of 1886 had as a matter of fact been fraudulently tampered with, and in the second place that, even if it had been, the appellant was not by reason of such alteration disentitled from recovering under it.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

Mr. *A. E. Ryves*, for Tajammul Husain Khan.

Messrs. *W. K. Porter* and *Muhammad Raoof*, and *Govind Prasad*, for Shankar Sahai.

STANLEY, C. J.—In this appeal an interesting question, upon which there appears to be no direct authority, as to the effect produced upon the rights of a mortgagee by a material alteration in his security bond, is raised. The plaintiff Sahu Shankar Sahai brought a suit to enforce payment of a mortgage executed in his favour by the defendants Tajammul Husain [584] Khan and Muhammad Husain Khan, and for redemption of a prior mortgage which had been executed in favour of the appellant Mangal Sen. The facts are shortly as follows:—The defendants Tajammul Husain Khan and Muhammad Husain Khan borrowed a sum of Rs. 1,600 from the plaintiff, and as security hypothecated 4 biswas 7½ biswansis in two mahals in mauza Saiyid Nagar by a bond of the 8th of January, 1894. They subsequently borrowed a further sum of Rs. 400 from the plaintiff under a bond dated the 9th of February, 1895, by which they hypothecated the same property. Before the date of either of these bonds namely, on the 7th of August, 1886, the defendant Tajammul Husain Khan had executed a mortgage of a share in mauza Saiyid Nagar in favour of one Bhagwan Das to secure a sum of Rs. 1,000, which was duly registered. Bhagwan Das being dead the plaintiff in his suit impleaded the defendants Nos. 3—6 as his heirs. The third paragraph of the plaint runs as follows:—"That the plaintiff has now learnt that the defendant No. 1, Tajammul Husain Khan, had made a prior mortgage of a 4 biswa share in mauza Saiyid Nagar *alias* Nayagaon, pargana Bilari, to Bhagwan Das under a registered bond, dated the 7th of August, 1886, for Rs. 1,000. Bhagwan Das is dead. The defendants Nos. 3—6 are his heirs. As the plaintiff has a right to redeem on payment of Rs. 1,000, the prior debt, or of the amount which may be found due to the defendants Nos. 3—6, he is entitled to get the entire property sold by auction and to recover the whole amount." In the second prayer to the plaint the plaintiff prays that "he may be directed to pay" Rs. 1,000, or whatever may be found due to the defendants

Nos 3—6, and that the entire hypothecated property may be sold to satisfy the prior incumbrance and the amount due to the plaintiff on foot of his bonds

Mangal Sen filed a written statement, in which he alleged that he was entitled to the interest of Bhagwan Das under the bond of the 7th of August, 1886 under a partition carried out between the members of the family of Bhagwan Das, and that he was also entitled to the moneys secured by a bond dated the 15th of December, 1891, which had not been disclosed by the plaintiff in his plaint He submitted that until the principal amount [585] and interest due on foot of these two bonds was paid the plaintiff was not entitled to enforce the sale of the mortgaged property Tajammul Husain Khan also filed a written statement, in which he alleged that a number of payments had been made from time to time to Bhagwan Das in respect of his two mortgage bonds The Subordinate Judge found that the whole amount claimed on foot of the bond of the 15th of December, 1891, was due to Mangal Sen, and passed a decree in favour of the plaintiff in the terms of his plaint subject to redemption of this bond With regard to the bond of the 7th of August, 1886, he found on production of it by Mangal Sen that a material alteration had been made in it whilst it was in the custody of the mortgagees, and he held that in consequence of this alteration the bond was not admissible in evidence, and that the claim of Mangal Sen in respect of it must fail *in toto* The title of Mangal Sen to this bond is not in controversy, but I may at once say that it appears to me beyond any doubt that the bond was altered in a material particular The area which was hypothecated was 4 biswas only of mauza Saiyid Nagar, but the bond, when produced, disclosed the addition of 7½ biswansis to the area actually mortgaged It is only necessary to look cursorily at the document to discover that the additions were introduced after the execution of the bond That this was so is placed beyond any doubt by the copy of the document which was produced by the plaintiff from the Registrar s office It shows that 4 biswas *only were mortgaged* It does not appear when or by whom the alteration was made, but that the document was tampered with is clear beyond any doubt

The question then for our determination is whether, in a suit brought by a puisne mortgagee for the redemption of a prior mortgage and the sale of the hypothecated property, the fact that the prior mortgage when tendered in evidence by the prior mortgagee is found to have been tampered with and a material alteration made in it, renders the instrument void *in toto*, so as to justify the Court in ignoring its existence and passing a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it or any part of that amount

[586] It is to be observed that the fact that the bond was executed was not, and could not be denied The plaintiff admitted it in his plaint, and expressed his willingness to pay whatever sum should be found to be due on foot of it There was no question as to the principal amount secured by it, or as to the rate of interest chargeable But from the mere fact that there was a material alteration in the original document the bond has been rejected as evidence, and in fact treated as absolutely void, the secondary evidence afforded by the production of a copy from the Registry Office being put aside as incapable of supporting any claim under the bond This decision is said to have as its basis the principle

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that where a man has either been base enough fraudulently to alter a document in his favour or having the custody of an instrument made for his benefit has failed to preserve it in its original state, it is not consistent with equity and good conscience that he should be entitled to recover upon it. It is said to be supported by the ruling laid down in *Davidson* v. *Cooper* (1), which is thus stated by Mr. Justice Byles in his book on Bills, 15th edn., at p. 333 :—" By a recent solemn decision, a deed, bill of exchange, promissory note, guarantee, or any other executory written contract, is avoided by an alteration in a material part, made while it is in the custody of the plaintiff although that alteration be made by a stranger. For a person who has the custody of an instrument is bound to preserve it in its integrity, and as it would be avoided by his fraud in altering it himself, so it shall be avoided by his laches in suffering another to alter it." As Lord Denman said in delivering the judgment in *Davidson* v. *Cooper* (1) :—"It is highly important for preserving the purity of legal instruments that this principle should be borne in mind and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

Mr. *Porter*, in his able argument, contended that it was immaterial whether the party producing the altered instrument is a plaintiff seeking the assistance of the Court in the enforcement of a claim under it, or a defendant who relies upon the altered instrument in defence of his rights. I shall [587] refer to this later on. It would serve no useful purpose and I do not propose to attempt to review the authorities in England beginning with *Pigot's Case* (2) which bear upon this question. They are referred to in the leading case of *Master* v. *Miller* (3). None of them goes the length of deciding that in a redemption suit where a plaintiff in his plaint admits and seeks to redeem a prior mortgage, an alteration discovered in the deed upon production of it by the prior mortgagee, avoids the deed for all purposes and disentitles the defendant mortgagee to recover the amount due under it; that the Court in fact in such an event will take upon itself to discharge the mortgaged property from a subsisting mortgage, regardless of the fact that the mortgage debt had not been satisfied. None of the decisions, as I have said, goes so far as this. In the case of *Ganga Ram* v. *Chandan Singh* (4), which has been much relied upon by the respondents, the obligee of the bond was the plaintiff seeking to enforce a claim upon it. It was not the case of a puisne incumbrancer seeking to redeem a prior mortgage; at the same time it resembles very closely in its facts the case before us. In that case the plaintiff sued to recover the amount alleged to be due on a bond purporting to hypothecate a 5 biswa 8 biswansi share of a village and other property. The defendant admitted the execution of the bond and that he owed Rs. 332 and odd under it, but alleged that he had only hypothecated in the bond a 5 biswansi 8 kachwansi share of the village in question, and that the plaintiff had fraudulently altered 5 biswansis and 8 kachwansis into 5 biswas and 8 biswansis. The Court of first instance found that the bond had been so altered, either by the plaintiff himself or with his knowledge, and on that ground dismissed the suit. On appeal by the plaintiff the lower appellate Court affirmed the decision of the Court of first instance. On appeal to the High Court on the

(1) (1844) 13 M. & W. 343.
(2) (1615) 11 Co., 26*b*.
(3) (1793) 1 Smith, L. C., 10 edn., 747.
(4) (1881) I. L. R. 4 All. 62.

ground that the alteration in the bond did not justify the dismissal of the claim altogether, the Court, consisting of Straight and Duthoit, JJ, dismissed the appeal In their judgment the learned Judges says — "We certainly do not think that in the present form of his claim the plaintiff [588] appellant should be allowed to succeed His suit was instituted upon an instrument which had been intentionally altered in a most important and material particular, either by himself or with his knowledge, behind the back and the cognizance of the obligor, for his own advantage and to the detriment of the defendant respondent In other words, he sought to enforce hypothecation against 5 biswas and 8 biswansis of land when only 5 biswansis and 8 kachwansis had been pledged When the contract upon which he based his suit is found never to have been made in the shape he set it up, it does not appear to us that, having thus been detected in a forgery, he should be allowed to revert to the contract that actually was made It seems to us that on all grounds of equity and good conscience the bond now produced by the plaintiff should be discarded as evidence of the hypothecation of land, and this being so, the claim of the plaintiff appellant falls to the ground" Later on they observe —"How far and to what extent the plaintiff appellant may be able to recover the money debt due from the defendant respondent is not a matter with which we are now called upon to deal It is sufficient to say that the suit, being brought upon a bond which has been rejected as evidence of the hypothecation of land, in that shape fails and this appeal must therefore be dismissed with costs'

The only distinction between this case and the case before us is that there the person who set up the altered document was the obligee of the bond who sought to enforce payment of the amount due under it, whilst in the case before us the bond was set up in the plaint by the plaintiff who was a stranger to it, and not by the mortgagee himself The mortgagee himself did not set the law in motion, but simply came into Court at the instance of the plaintiff to protect his interests It remains to be seen whether this differentiates the two cases It seems to me that there is a difference in the two cases It is one thing for the Court to refuse its aid to a fraudulent plaintiff, and another thing to direct the sale of property in which a defendant has an interest without compensating him for such interest, because on production of his title deed it is found to have been tampered with The Judges who heard the appeal in the case of *Ganga* [589] *Ram* v *Chandan Singh*, (1) referred to above, did not decide that the plaintiff appellant in that case could not recover the debt due to him, but merely that his suit upon an altered bond in its altered form which had been rejected as evidence of the hypothecation of land *in that shape* failed A similar case is that of *Gogun Chunder Ghose* v *Dhuronidhur Mundul* (2) In that case a party who had a bond executed in his favour by one of three brothers, forged the signatures of the other two brothers to the bond, and brought a suit upon it in its altered form against the three brothers The forgery having been established, the Court of first instance dismissed the suit as against all the three defendants, and this decision was affirmed on appeal and also on second appeal to the High Court The Chief Justice Sir Richard Garth, delivering the judgment of the High Court, referred to the case of *Davidson* v *Cooper*, (3) and observes —"The law of England so far as it is consistent with the principles of equity and good conscience, has

(1) (1831) I L R 1 All 02 (2) (1881) I L R 7 Cal 616

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generally prevailed in this country, unless it conflicts with the Hindu or Muhammadan law. The learned pleader who appears for the defendant thinks that in equity and good conscience, the plaintiff in this case ought to succeed against one of the defendants. But we are clearly of a different opinion. Where a man has been wicked enough to alter a document fraudulently in this way, we do not think it consistent with equity and good conscience, or with sound policy (especially in a country like this where forgery and fraud are so lamentably common), that he should be entitled to recover upon it." In the case of *Sitaram Krishna* v. *Daji Devaji* (1), the suit was brought on an attested instrument, which was not requird by law to be attested, and in the course of the evidence it appeared that while the instrument was in the possession and custody of the obligee, he got another attesting signature added to it by a man who had not in fact witnessed the execution of it by the obligor. It was held that, although the alteration did not vary the contract, it was material in the sense of stating a falsehood, either expressly or by implication, by way of increasing the apparent evidence of its genuineness, and that the [590] obligee could not sue upon it. To the same effect is the decision in the Full Bench case of *Christacharlu* v. *Karibasayya* (2), in which, in a suit brought to recover the amount due upon a registered mortgage bond, it was found that the plaintiff had fraudulently altered the terms of the bond prior to registration by inserting a condition making the whole sum payable upon default of payment of any instalment and by doubling the rate of interest. It was held after a review of the authorities that the suit must be dismissed. An earlier case in the same High Court, *Ramasamy Kon* v. *Bhavani Ayyar*, (3) to which I shall presently refer, was not followed in this last case. Counsel on behalf of the respondents strongly relied upon the decision of the Court of appeal in the case of *Suffell* v. *The Bank of England* (3), and the rule therein laid down by Jessel, M. R., and Brett, L. J. In that case an action was brought against the Bank of England by the plaintiff for the non-payment of notes payable to bearer, which had been regularly issued by the bank and which had been *bona fide* purchased by the plaintiff for value, but it appearing that before the plaintiff's purchase the notes had been altered by erasing the numbers upon them and substituting others, with the object of preventing the notes from being traced, as payment had been stopped, and a notice issued specifying their numbers, the Court held, reversing the decision of Lord Coleridge, C. J., that although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part, and that therefore the notes were vitiated, so that the plaintiff could not recover on them against the Bank. In this as in the other cases to which I have referred, the party seeking to enforce a contract produced and relied upon an altered contract. This is not, as I have pointed out, the case here, for the appellant did not come into Court to enforce his mortgage, but was impleaded in a suit for redemption of that mortgage. He did not invoke the assistance of the Court to recover his debt, but at the instance of the plaintiff appeared in Court to defend his right. According, however, to the view expressed by Brett, L. J., in the case of *Suffell* v. *The Bank of England* (4), it would seem to be immaterial whether the party who relies [591] upon an altered instrument is plaintiff or defendant.

(1) (1883) I. L. R. 7 Bom. 418.
(2) (1885) I. L. R. 9 Mad. 399.
(3) (1866) 3 Mad. H. C. Rep. 247.
(4) (1882) L. R. 9 Q. B. D. 555.

He says at page 569 of the report —" I am inclined to think with regard to instruments which either contain the contract and something more, or which do not contain the contract at all, that the rule may be thus stated Whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it, *or to defend himself by using it as a direct defence depending on its obligatory force as an instrument* I put in those cautionary words myself because I am not sure that, although an instrument may be avoided for the purposes which I have mentioned, nevertheless it may be used for other and collateral purposes, as for instance, by way of proving or enforcing an admission, where the instrument itself is not used either for the purpose of its being sued upon or for the purpose of its being used as a direct defence in the terms which I have stated But whenever it is within the terms which I have stated, then, it seems to me, any material alteration in it avoids it for those purposes, although that alteration does not alter any contract in it If the learned Lord Justice intended to lay down a rule of general application, and such as would apply to a suit brought for redemption of a mortgage such as the present, it may be doubted whether he has not stated the rule too widely There is nothing in the judgment from which it can be gathered that the learned judge had in view a class of cases wide enough to include the present case In any case his statement of the law is merely *obiter*, and he expresses his views with some doubt

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Let us see what the position of the plaintiff is He is admittedly the owner of a bond by which certain property was hypothecated to secure a debt, and as mortgagee he had an interest in the specific immoveable property comprised in the bond " A mortgage in this country is " the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability (Section 58 of the Transfer of Property Act) Upon the execution [592] of the bond an interest in the land comprised in it became vested in Bhagwan Das, the predecessor in title of the appellant The alteration of the bond by whomsoever it was effected could not and did not divest the estate or interest so created In *Davidson* v *Cooper*, (1) which has been so much relied upon by counsel for the respondents, Lord Abinger refers to the transfer of an interest in land as an exception to the rule laid down in that case in regard to the alteration of instruments, and pointed out that when property, or some interest in property, has been actually transferred, the right to possession of such property, or to the recovery of such interest, is an incident attached to the vested estate or interest, and the subsequent alteration cannot operate to divest it There are, I may here observe, cases to be found in the books in which an alteration has not been treated as so vitiating a deed as to render it void for all purposes In the case of *Ramasamy Kon* v *Bhavani Ayyar* (2), to which I have alluded, a mortgagee was allowed to give in evidence an altered bond in proof of the debt, and also of the creation of a charge upon the mortgaged property In that case the plaintiffs instituted two suits upon two hypothecation bonds executed by different defendants, suing in the first suit for recovery from the defendants personally, and in the second suit for recovery from the defendants, and also from the hypothecated

(1) (1844) 13 M. and W. 313 (2) (1866) 3 Mad. H C Rep 217

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property, and in each case obtained a decree. On appeal the lower appellate Court reversed both the decrees on the ground that the bonds were vitiated by a fraudulent alteration of them in a material part, namely, the date fixed for payment. On special appeal the decree of the lower appellate Court was reversed, the Court being of opinion that the rule of English law does not go beyond this, that the alteration of the instrument renders it invalid as a foundation of a suit by the party who has altered it, or in whose custody it was when altered. It does not render it void for all purposes, and the altered document may be used as proof of some right or title created by or resulting from its having been executed. In this case, say the learned Judges:—"We think that the documents may be used as evidence of the debt between the parties, and also of the creation of a charge [593] upon the property hypothecated. This decision was disapproved of, as I have already said, in *Christacharlu* v. *Karibasayya* (1). In the more recent case in the same High Court of *Subrahmania Ayyan* v. *Krishna Ayyan* (2), where a mortgage bond had been altered after its execution in a material part, and it was contended that the alteration vitiated the document, and that the suit being based on the altered document, must fail, it was held, on second appeal, by Subrahmania Ayyar, O. C. J., and Moore, J. (O'Farrell, J., dissenting), that on the execution of the mortgage instrument an interest in the property comprised therein at once became vested in the plaintiff; that such interest was not and could not have been divested from him by the subsequent alteration of the document, and that in asking for the sale of the land, the plaintiff was seeking to enforce, not a right resting on the contract or covenant, but one arising by the operation of law with reference to the vested interest created by the instrument having been executed. That an alteration of a deed does not vitiate the deed for all purposes, was also decided in two early English cases. In the case of *Doe dem Beanland* v. *Hirst* (3), which was an ejectment suit to recover certain beds of coal, the lessors of the plaintiff produced a deed purporting to convey the estate from the then owner to two of the lessors of the plaintiff. This deed was proved to have been altered in a material part after its execution. Bayley, J., held, that, although the deed was void, the estate which had originally passed by it remained still vested, and he admitted the deed in evidence to prove the contents of it. In another case *Hutchins* v. *Scott*, (4), which was a suit for damages for illegal distress for rent, the plaintiff to prove the amount of rent due put in an agreement for a lease whereby the defendant agreed to let and the plaintiff agreed to take for seven years a house which in the agreement was stated to be No. 35, Broad Street, at a rent of £ 42 per annum, payable quarterly. The distress was made for two quarters' rent. It appeared that after the execution of the agreement and its delivery to the plaintiff, the number of the house had been altered from 38 to 35, No. 35 [594] being the house actually occupied by the plaintiff under the agreement. It was contended on behalf of the defendant that the agreement was avoided by reason of the alteration in it, that it was a document essential to the proof of the plaintiff's case, since without it he could not prove the real amount of rent due. The deed was admitted in evidence to prove the terms of the holding. These cases show that it has not invariably been

(1) (1885) I. L. R. 9 Mad. 399.
(2) (1899) I. L. R. 23 Mad. 137.
(3) (1821) 23 R. R. 756.
(4) (1837) 46 R. R. 770.

held that the alteration of a document so vitiates it as to preclude a plaintiff from adducing it in evidence, and relying upon it under any circumstances In their work on the interpretation of deeds Messrs Elphinstone, Norton and Clark in an explanatory observation upon the rule that "if a material alteration be made in a deed by or with the consent of any party to it, after execution by erasure, inter lineation or otherwise, he cannot afterwards as plaintiff enforce any obligation for his benefit contained in it, observe, at page 19, "There is a distinction between those deeds or clauses of a deed which have a con tinuing effect, or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execu tion, such as a conveyance of land No case can be found in which a deed or clause of the latter nature has been prevented from taking effect because the deed was altered after execution, so that an altered deed may be given in evidence to prove any effect produced by it at the instant of execution, or of any right which existed *aliunde* and of which it is evidence The case of *Stewart* v *Aston* (1) is an instructive one upon this question It was an ejectment on the title for recovery of land in the County of Antrim, and was tried on two occasions at the Assizes for the County of Antrim It ultimately came before a Bench of the Exchequer Chamber in Ireland, composed of Lefroy, C J, Monahan, C J, and four Puisne Judges including Christian, J, after wards Lord Justice Christian, who was an eminent and erudite equity lawyer This was before the fusion of law and equity which was intro duced into that country by the Irish Judicature Act The common title of both the plaintiff and the defendant was a lease for 61 years executed by the then Marquis of Donegall to James Aston, deceased, on the [595] 5th of March, 1806 The part of the lands comprised in the lease, which was the subject of the ejectment, came into the possession of the defendant under the will of James Aston The plaintiff procured an assignment of the lease from the defendant by means of false and fraudulent representations that he was the executor and devisee of one James Stewart, and in that capacity a creditor of the defendant The defendant was, in fact, indebted to James Stewart for part of the alleged consideration moneys The deed contained the following recital —"And whereas the said Samuel Aston being indebted to the said James Stewart of Reo Hill aforesaid by bonds and promissory notes to a considerable amount, and the said James Stewart having since died, the said William Stewart party hereto, his executor and devisee, agreed to accept an assignment of the said farm in discharge of the said security, which with interest and costs amounted to the sum of £ 264' The recital was altered by the defendant, the word "William' being inserted in the place of "James, and instead of the words "since died,' the words 'excepted them' being inserted The jury found that the assignment was obtained by the plaintiff from the defendant by fraud, the fraud be ing that he falsely represented himself to be the executor and devisee of the late James Stewart. They also found that the alterations in the deed were made fraudulently by the plaintiff after the execution of the deed Counsel for the defendant then called upon Ball, J, who presided at the trial, to direct a verdict for the defendant, but he refused to do so, and directed them to find for the plaintiff generally Upon exception taken to this ruling the case was argued in the Court of Exchequer, when that

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(1) (1858) 8 Ir C L R 35

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Court (Richards, B., dissenting) overruled the exceptions and gave judgment for the plaintiff. A writ of error was then brought to the Exchequer Chamber. It was contended, amongst other things, on the part of the plaintiff in error that the deed having been fraudulently altered by the plaintiff, could not be read in evidence on his behalf for any purpose whatsoever; whilst on the part of the defendant in error it was contended that the alteration in the deed did not divest the estate which passed by it, and that the deed was admissible in evidence for the purpose [596] of showing what estate passed under it; that if the defendant went into a Court of Equity to get rid of the deed on the ground of fraud, he would not get relief except on the terms of putting the plaintiff in the position in which he would have been if the deed had not been executed. The Court unanimously held that the plaintiff might maintain ejectment, the fraudulent representations not being sufficient (at law) to avoid the deed, and a Court of law being incompetent to do perfect justice between the parties; that alterations made in a deed after execution by the grantee named in it, though material, will not prevent the deed being received in evidence on his behalf to show the estate which passed by it, and which was not divested by the alterations. Lefroy, C. J., in delivering the judgment of the Court, observed :—"The defendant who received a certain consideration for the conveyance of lands for which the ejectment has been brought, insists that he shall hold both the lands and the consideration. If he is entitled in point of strict law to do so, we must allow him the benefit of the law, but if the law does not so entitle him, it will be a very happy thing to find that the principles of law coincide with the principles of common sense and justice. Does the law so entitle him? There are two questions upon this record, according to which we are to decide the law: the first is as to the effect of the alterations in this deed to destroy and defeat its original validity; and the next question is whether the deed, though it may not be destroyed by anything done to it in the way of alteration, is destroyed by some inherent defect amounting, when taken in connection with the evidence, to such a fraud as a Court of law has jurisdiction to decide it to be a nullity upon that ground." After referring to the fact that the alterations which were made did not raise any question of doubt or difficulty as to the lands, the subject-matter of the ejectment, having passed by assignment to the plaintiff, and that the deed at the time it was executed was free from any objection, there being nothing in the way of alterations to raise any ambiguity, the learned Chief Justice observes:—"Now I take it that the authorities cited put it beyond all doubt that no alterations, even if made by the party who offers the deed in evidence, can prevent its being received in evidence for the [597] purpose of ascertaining the state in which it was when it was executed, and for the purpose of showing that it was in a state and condition in which it operated to pass the estate. Alterations by the party will not prevent its being offered in evidence for the purpose I have referred to, *viz.*, of showing that it did pass an estate at the moment of its execution, and such subsequent alterations, though they will have the effect of avoiding the deed as to matter subsequent to the title given at its execution, yet will not avoid the deed as to the title given at the time of its execution, and when it was in a perfect state. As to any subsequent rights, as to anything that accrued after the alteration it is null and void from the moment it is altered; but looking back to antece-

dent time it is valid and subsisting, and admissible in evidence to show that it did pass an estate." He held that there was nothing to support the argument that the alterations divested the estate, and proceeds to say —"The next ground is that we ought to hold the deed void for an inherent defect that it is a deed impeachable for fraud, for a suggestion of falsehood and a suppression of truth, a deed in fact to be avoided in a Court of law for a misrepresentation in respect of some matters stated in it. It would be a curious thing if a Court of law were to avoid this deed, whereby the parties would be placed in an entirely different situation with respect to what was just and equitable between them, from what they would be if the deed were avoided in a Court of Equity. A Court of law would thus avoid a deed for fraud, and by avoiding it, itself commit a fraud on one of the parties, for it would leave the lands and the consideration for the lands in the hands of one of the parties. This case is directly within the principle of what is laid down by Burton, J., in *Hovenden* v. *Tilly* that the Court will not set aside a deed on the ground of fraud when it is incompetent to do justice between the parties, but will leave them to the only tribunal which can do justice between both, and will not, while professing to do justice on the ground of fraud, itself be accessory to a fraud. It is not necessary to go further into the case. One or two doubtful cases were referred to, but certainly very distinguishable from the present upon the point I have [598] referred to, *viz*., the impossibility to do justice between parties. There may be some simple cases of fraud in which the Court could do justice between both parties by avoiding the instrument altogether; it may be so. I do not think it necessary to consider these cases further, the more so because unquestionably, if they go to establish the proposition that a Court of law can set aside a deed in every case in which a Court of Equity can do so, they announce a proposition opposed to every principle down to themselves, and go far to destroy acknowledged landmarks of property." This case, decided as it was by the Exchequer Chamber, is one of weighty authority for the proposition that an alteration in a deed in a material particular does not render the deed void *in toto*, and that an altered deed whereby an interest in land had become vested is admissible in evidence on behalf of the grantee to show the estate which passed under it. We also gather from it that when the Common Law and Chancery Courts exercised distinct jurisdiction, if a party sought to set aside a deed on the ground of fraud, the proper Court in which to seek redress was a Court of Equity, inasmuch as that Court had the means of doing full justice by placing the parties in the position in which they would have been if the deed had not been executed. The Common Law Courts in Ireland at that time had not the means of doing full justice in such a case.

If then the interest in the land which was vested in the appellant upon the execution of his mortgage bond was not divested by the alterations made in the bond, the Court before it can sell property at the instance of a puisne mortgagee must get rid of that interest. How can it rightly do so? As it seems to me, only upon payment to the appellant of the sum which may be found to be actually due to him on foot of his security. The puisne mortgagee has undoubtedly a right to redeem the prior mortgage, and that is the right which he is seeking to enforce. This right is conditional on the payment of the mortgage money, and this is the right which he seeks to enforce by his suit. The Court

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which is asked to assist a party in enforcing this right is not entitled, as it seems to me, to impose a penalty upon a prior mortgagee in such a case because of the [599] fact that his security has been tampered with. Under colour of doing justice it ought not to do an injustice by forfeiting the prior mortgagee's interest in the mortgaged property for the benefit of the mortgagors and their puisne mortgagees. It is an elementary principle of equity, that he who seeks equity must do equity, and it seems to me that to allow the plaintiff in a suit for redemption to sell a prior mortgagee's interest in the mortgaged property without payment of the amount due on the mortgage, would be a grave infringement of this principle. In a case where a contract is set aside by a Court of Equity on the ground of fraud, the Court places the parties in the same position as if the contract had never been made, revesting or discharging all rights which were transferred or created by the contract. A party who has been defrauded may have a contract rescinded, but he can only obtain this relief on the terms that he himself makes restitution. He cannot at the same time hold the money or other advantage which he gained under the contract and resume the property which he parted with. Thus we find that instruments under which money has passed, if they be set aside for fraud, are either set aside on repayment of the actual consideration with interest thereon at a reasonable rate, or of the amount which upon investigation shall be ascertained to be really due. Can it be held that the same principle is not applicable when a Court of Equity passes a decree in favour of a plaintiff in a redemption suit, and the mortgagee's deed is found to have been materially altered? If the bonds which belonged to the appellant had been procured by fraud, and the suit had been to set them aside as fraudulent, even in that case, on proof of the alleged fraud, I take it that the Court would only have set aside the bonds on payment to the appellant of any money which he had advanced in respect of them. If this be so, then I ask if the appellant is to be treated by the Court as being in a worse position as defendant in a suit for redemption of a bond admittedly genuine, but which is found to have been tampered with after execution? I cannot think so. An interest in the mortgaged property was unquestionably vested in the appellant when the bond was executed, that interest a Court administering justice cannot divest without seeing that [600] the money for which it formed a security has been satisfied. The Court is now asked, although this was not sought in the plaint, to be instrumental in effecting a forfeiture of an interest in land which was purchased by the appellant's predecessor in title. This a Court of Equity cannot do. So jealously did the Courts in England protect the right of mortgagees that before the passing of the Conveyancing and Law of Property Act, 1881, a mortgagee was not bound to produce his deed of mortgage until his claim had been satisfied. It was by section 16 of that Act that the privilege was conceded to the mortgagor of inspecting and taking copies of title deeds in the possession of the mortgagee. The rule formerly was that if a mortgatgor executed a mortgage deed, and handed over the title deeds to the mortgagee, he could not after the mortgage had become absolute inspect either the mortgage deed or the other documents of title without paying the mortgagee his principal, interest and costs, and the same rule applied to persons claiming under the mortgagor—*Brown* v. *Lockhart* (1), *Chichester* v. *The Marquis of Donegall* (2). In *Browne* v. *Lockhart*, (1) Shadwell, V. C., commenting upon an application,

(1) (1840) 10 Sim. 420.
(2) (1870) L. R. 5 Ch. A. 197.

which was made by a mortgagor that the mortgagee should produce his mortgage in order that it might be laid before a conveyancer to enable him to draw an assignment of the mortgage to a third party who might be disposed to pay off the mortgage, observes —"I apprehend that an application would not be listened to at the present time it does not quite tally with our notions of the right of the mortgagee to keep his deeds to himself until the moment arrives when the mortgagor appears with the principal and interest in his hand, and then the mortgagee is not bound to part with the deeds before he has received his money, ... ot be a simultaneous transaction In *Chichester* v *The* ... " Gifford, L J says —"I take the rule of ... that if a mortgagor executes a mortgage, ... he cannot see those title deeds after and hands over the ... the mortgage has become absolute without paying the mortgagee his principal, interest and costs No doubt where fraud was charged a mortgagee could be compelled to produce [601] deeds, as in *Kennedy* v *Green* (2) The law upon the subject has now been changed by the legislation to which I have referred It has been contended on the part of the respondents that the appellant, though defendant in the suit, is really in the position of a plaintiff as regards his co defendant, the mortgagor I am unable to appreciate this argument The appel lant has been sued in his capacity of mortgagee, and that alone, at the instance of a puisne mortgagee He is in no sense a plaintiff His presence before the Court was alone necessary as mortgagee, and that for the purpose of enabling the plaintiff to obtain the relief which he sought There is nothing, in my opinion, in this contention Again, it has been contended that the appellant should in no event be allowed any sum beyond the principal amount secured by the bond in question, that the bond cannot be received in evidence to prove the amount of interest secured by it, or to prove any obligation to pay such interest I am unable to see how the right of the appellant can properly be so restricted The right conferred by the bond upon him was a right to retain the interest in the mortgaged property which was transferred by it until both principal and interest had been paid off Part of the foundation of the suit for redemption is the readiness of the plaintiff to satisfy the prior mortgagee's debt in full, and the Court can only grant the relief prayed for upon the condition that the contract shall be fully carried out by payment on redemption of interest as well as principal This is not, as I have pointed out, a case in which a mortgagee asks the assistance of the Court in the enforcement of his right, basing his claim upon an instrument which turns out to have been tampered with It is a case in which a puisne mortgagee comes into Court with an offer to redeem a prior mortgage In such a case it seems to me, if the Court has the means of determining the terms of the prior mortgage bond as it certainly has in this case, it ought to give relief on the basis of the bond as it stood at the date of execution, and would not be justified in imposing a penalty upon the prior mortgagee by reason of the fact that the bond was tampered with

[602] For these reasons I am of opinion that this appeal ought to be allowed

BANERJI, J —Two questions arise in this case first, whether a material alteration was made in the mortgage bond of the 7th of August,

(1) (1870) L. R 5 Ch A 497

(2) (1833) 6 Sim 6.

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1886, after its execution and registration, while it was in the possession of the appellant or his predecessor in title; and secondly, whether, if such an alteration has been made in it, the instrument is altogether void and is inadmissible in evidence to prove the existence of a subsisting mortgage in favour of the appellant Mangal Sen.

As to the first point I have no hesitation in concurring with the finding of the Court below. It is manifest upon an inspection of the document that the words "7 biswansis and 10 kachwansis," which are written over the line in several places, have been interpolated, and a comparison of the document with the copy obtained from the Registration office clearly shows that the alterations were made subsequently to registration while the document was in the custody of the appellant or his predecessor in title. The alteration being in respect of the property mortgaged is a material alteration, although as regards other matters the document has not been tampered with.

Upon the second question the Court below has held that the alteration vitiates the document, and that it cannot be admitted as evidence of a mortgage. In support of the view the Court has referred to the ruling of the Court in *Ganga Ram* v. *Chandan Singh* (1), in which the learned Judges held that the hypothecation bond upon which the plaintiff brought his suit and which had been altered in such a way as to make it appear that a larger share of a village than that originally hypothecated was mortgaged as collateral security "should be discarded as evidence of the hypothecation of land," and dismissed the suit. The observations of the learned Judges quoted above no doubt favour the conclusion at which the Court below has arrived; but, for reasons I shall presently state, I am, with all deference, unable to agree with those observations. The rule in England as laid down in *Pigot's case* (2) with respect to contracts under seal and extended to all other written instruments in *Master* v. **[603]** *Miller*, (3) and the numerous other cases collected in the note to that case in Smith's Leading Cases is that any material alteration in a written instrument, made after its execution and without the privity of the party to be affected by it "renders it void as an executory instrument" (Leake on Contracts, 3 edn., p. 702). This rule, which is founded mainly upon reasons of public policy, has on that ground been applied in this country in the several rulings cited to us at the hearing to which it is unnecessary to refer in detail. There are, however, exceptions to the rule, and one of these is that a material alteration "does not affect the past operation of the instrument upon any estate, right or title vested under it." (Leake on Contracts, p. 702). In *Davidson* v. *Cooper* (4), Lord Abinger, after referring to the rule mentioned above, said:—"The case is different where the deed is produced merely as proof of some right or title created by or resulting from its having been executed; as in the case of an ejectment to recover lands which have been conveyed by lease and re-lease, or now by re-lease only. There what the plaintiff is seeking to enforce is not, in strictness, a right under the lease and re-lease, but a right to the possession of the land, resulting from the fact of the lease and re-lease having been executed. * * If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds." In *West* v. *Steward* (5) it appears to have been held that the alteration

(1) (1881) I. L. R. 4 All. 63. 320.
(2) (1615) 11 Co. 26*b*.
(3) (1793) 2 H. Bl. 140 : 4 D. and E.
(4) (1843) 11 M. and W. 778; at p. 800.
(5) (1845) 14 M. and W. 47.

of a deed of conveyance did not affect the ownership of the property conveyed, Alderson, B, observing that at the time the deed was executed the property passed, and that a subsequent alteration in the deed did not revest the property In *The Agricultural Cattle Insurance Co* v *Fitzgerald* (1) the Company's deed of settlement was admitted in evidence to prove that the defendant was a share holder, although the deed had been altered since execution Lord Campbell, C J, said — "We think that the erasure does not prevent the deed from being given in evidence to prove that the defendant executed it as a share holder There is no ground for saying that if a deed be altered in a material part it is [604] rendered void from the beginning It ceases to have any new operation, * * but it may still be given in evidence to prove *a right or title created by its having been executed* Another very clear authority on the point is the case of *Steuart* v *Aston* (2), to which the learned Chief Justice has referred in detail It is needless to multiply the authorities on the point All of them establish the proposition that a material alteration in an instrument does not render it void and inadmissible for all purposes, and that it may be admitted and used 'as proof of some right or title created by, or resulting from, its having been executed And we have not been referred to any authority which holds the contrary The cases in England and India to which we have been referred by the learned counsel for the respondents are all, with the exception of *Ganga Ram* v *Chandan Singh* (3), cases in which no question of vested interest arose A mortgage being, under the Transfer of Property Act, "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money, a right or title is created in favour of the mortgagee in respect of the property mortgaged and of the mortgage money by the fact of the execution of the instrument of mortgage, and where the money secured is one hundred rupees or upwards, also by the registration of that instrument A subsequent alteration in the deed does not divest the mortgagee of, this vested right and revest the property in the mortgagor, and the mortgage deed, though altered, is admissible for the purpose of proving the creation of the right The learned Judges who decided the case of *Ganga Ram* v *Chandan Singh* (3) seem to have overlooked the authorities to which I have referred in holding that " the bond now produced by the plaintiff should be discarded as evidence of the hypothecation of the land, and I am unable to agree with their view, which is unsupported by any authority, English or Indian In *Ramasamy Kon* v *Bhavani Ayyar* (4), it was held by the Madras High Court that notwithstanding a material alteration in a hypothecation bond, *viz*, as regards the date fixed for payment, "the document might be used as evidence of the debt [605] between the parties, and also of the creation of the charge upon the property hypothecated,' and a decree was passed in the suit brought upon the basis of the altered document for the amount of the debt and for the sale of the hypothecated property The view adopted in that case was approved, as it seems to me, by Kernan, O C J, and Muttusami Ayyar and Hutchins, JJ, in the later case of *Christacharlu* v *Karibasayya* (5), and by Subrahmania Ayyar, O C J, and Moore, J, in the recent case of *Subrahmania Ayyan* v *Krishna Ayyan* (6) The suit

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(1) (1851) 16 Q B 432
(2) (1858) 8 Ir C L Rep. 35
(3) (1881) I L R 4 All 62
(4) (1866) 3 Mad. H C. Rep. 217
(5) (1883) I L R 9 Mad. 399
(6) (1899) I L R 23 Mad. 137

in *Christacharlu's* case was dismissed by the Full Bench upon the ground that there was no valid mortgage, inasmuch as, having regard to the amount of the mortgage, registration of the mortgage deed was essential for its validity, and the document which was registered was not the mortgage deed executed by the mortgagor, but the altered document. This case, therefore, does not in any way help the respondents. Nor are the rulings in *Gogun Chunder Ghose* v. *Dhuronidhur Mundul* (1) and *Sitaram Krishna* v. *Daji Devaji* (2) of any avail to them, as those were suits for bond debts brought upon the basis of altered documents.

In the case before us Bhagwan Das, the predecessor in title of Mangal Sen appellant, acquired a vested interest as mortgagee in 4 biswas out of Tajammul Husain's share upon the execution of the mortgage bond of the 7th of August, 1886. Of that interest Mangal Sen has not been divested, and the property has not re-vested in Tajammul Husain by reason of the alterations which have been subsequently made in the mortgage deed. So long, therefore, as Mangal Sen's interest as first mortgagee of the said 4 biswa share subsists, the plaintiff as second mortgagee of that share cannot, according to the rulings of this Court, maintain his suit for the sale of that share without redeeming the first mortgage. Indeed the plaintiff has made Mangal Sen a party to his suit upon the allegation that Mangal Sen is the prior mortgagee of a 4 biswa share, and the plaintiff offers to redeem him by payment of Rs. 1,000, or whatever amount may be found to be due to him. The very fact of Mangal Sen's being joined [606] as a defendant to the suit pre-supposes the existence of a mortgage in his favour, and as Tajammul Husain also in his statement of defence admitted the existence of the mortgage and only raised a plea of payment, it was not necessary for Mangal Sen to prove the mortgage. Mr. *Porter* on behalf of the plaintiff concedes that upon the plaintiff's admission he cannot repudiate the status of Mangal Sen as mortgagee, but he contends that *quoad* any sum in excess of Rs. 1,000 it is for Mangal Sen to prove that it is due, and this he cannot do by the production of the altered deed of mortgage. Mr. *Ryves*, the learned counsel for Tajammul Husain, would go further. He urges that the effect of the alteration was to re-vest the property in Tajammul Husain, and that the altered deed cannot be admitted for any purpose. This contention, as has been shown above, is untenable. In my opinion the mortgage deed can be used in evidence to prove the nature and extent of the right created in favour of the mortgagee by "the fact of its having been executed," and that it is admissible to prove the original transaction of mortgage, both as regards the property mortgaged and the amount of mortgage money. Upon this point I am in full accord with the learned Chief Justice, and hold that the Court below was in error in excluding the mortgage deed of the 7th of August, 1886, from consideration, and refusing to allow to the appellant Mangal Sen the amount due upon it.

AIKMAN, J.—This appeal arises out of a suit brought by the respondent Sahu Shankar Sahai to recover money due to him under two mortgage deeds executed in his favour by Tajammul Husain Khan and Muhammad Husain Khan, by sale of the mortgaged property. The dates of the bonds sued on are the 8th of January, 1894, and the 9th of February, 1895, respectively. Besides the mortgagors, the plaintiff impleaded four other persons, the heirs of one Bhagwan Das, deceased,

(1) (1881) I. L. R. 7 Cal. 616. (2) (1883) I. L. R. 7 Bom. 418.

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in whose favour Tajammul Husain Khan . . on the 7th of August, 1886, over property . . mortgage to secure a loan of Rs 1,000 . . for sale of the mortgaged property on payment by him of Rs 1,000, or whatever sum might be found due under the prior mortgage

[607] The suit was defended by the mortgagors, and by Mangal Sen, son of Bhagwan Das, who claimed that under a private partition the bond of the 7th of August, 1886, had fallen to his share. Mangal Sen also set up another prior mortgage over the property, dated the 15th of December, 1891 He alleged that Rs 6,764 principal and interest was due under the bond of 1886, and Rs 1,795 principal and interest under the bond of 1891 The written statement [illegible] partial payment to the plaintiff and also to [illegible] Das It was also pleaded that the whole [illegible] bond of 1891 had not been received It was further pleaded that the stipulations in the bonds in regard to the payment of compound interest were penal in their character, and should be relieved against A plea was also raised that the bonds in favour of Bhagwan Das having been executed by Tajammul Husain alone, his property only was liable under them.

The learned Additional Subordinate Judge on the issues framed by him found that the defendants mortgagors had failed to prove any payment to the plaintiff on account of his mortgage That being so, the plaintiff was entitled to recover the money he sued for by sale of the mortgaged property, subject to his liability to pay off the amounts due under the prior mortgages

As to this the learned Additional Subordinate Judge says —"The prior mortgagor will be entitled to recover from the plaintiff only as much as he (the prior mortgagee) is able to prove to be due upon the two bonds " The Court below found that the prior mortgagee had established his right to recover the amount he claimed under the mortgage of 1891 But as regards the earlier bond of 1886, it found that Mangal Sen was entitled to recover nothing, on the ground that the bond produced by Mangal Sen in support of his claim had been intentionally altered in a material part The learned Additional Subordinate Judge, following the ruling of this Court in *Ganga Ram* v *Chandan Singh* (1) and of the Bombay High Court in *Sitaram* v *Daji Devaji* (2), decided that this alteration, for which he held Mangal Sen or his predecessor in title responsible, deprived him of the right to recover anything under the bond. In the [608] result the Court below gave the plaintiff a decree for sale conditional on his redeeming only the bond of 15th December, 1891 Against this decree, the prior mortgagee Mangal Sen has appealed, contending that the plaintiff is not entitled to a decree for sale without redeeming the mortgage of 1886

One plea raised in the memorandum of appeal is that it has not been proved that the mortgage deed of 1886 has been fraudulently tampered with. This contention may be shortly disposed of

The property mortgaged in the plaintiff's deed is a 4 biswa 7½ biswansi share in mauza Saiyid Nagar. The copy of the appellant's deed of 1886 taken from the Registration office shows the property hypothecated therein as a 4 biswas share in that village The original

(1) (1881) I L. R 4 All 62 (2) (1883) I. L. R 7 Bom. 418

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This disposes of the second plea raised in the [illegible] of appeal to this Court, and brings us to the main question [illegible] ly, whether the Court below was right in holding that [illegible] alteration in the deed deprives the appellant of the rig[illegible] anything under it. This has been the subject of long and [illegible] ment at the bar.

A large number of authorities were cited in argume[illegible] considered these, and also all other authorities bearing on [illegible] which I could discover.

[609] The result is that, in my opinion, the decision of [illegible] Court on the question at issue is right and should be affirmed.

The doctrine in regard to the avoidance of a docume[illegible] material alteration therein is a very old one, and has been cont[illegible] acted on in England from the time of James I, if not earlier.

" The grounds of the doctrine," says Taylor, "are two-fold[illegible] first is that of public policy, which dictates that no man shou[illegible] permitted to take the chance of committing a fraud without any ri[illegible] losing by the event in case of detection. The other is to ensure identity of the instrument, and prevent the substitution of anot[illegible] without the privity of the party concerned." (Taylor on Eviden[illegible] 8th edn., sec. 1821).

These remarks are based on the *dicta* of many learned Judges wh[illegible] have had to consider the question. In support of the first ground I cite the observations of two of the learned Judges who decided the leading case of *Master* v. *Miller* (1). Kenyon, C. J., says :—" No man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected." Eyre, C. J., says :—"If an unsuccessful attempt to gain by an alteration only puts the party in the same situation in which he would at first have stood, attempts of this kind would be safe and frequent. It is necessary that the danger of losing the real demand upon it must be held up to deter from any attempt to add to the value of the bill."

In support of the second ground upon which the doctrine is based, reference may be made to *Henry Pigot's* case (2), where it was laid down that "when a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum*, because at the time of his plea it is not his deed."

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For the appellant it is argued that, the basis of his title being a mortgage, the rules as to the effect of material alterations will not apply, inasmuch as by the execution of the mortgage an interest in land was transferred which no subsequent alteration would divest In support of this the case of *Ramasamy Kon* v *Bhavani Ayyar* (6), was cited That was the case of a suit on two hypothecation bonds in which the date had been altered with the object of bringing the claims within limi tation The learned Judges relying on certain observations of Abinger, L J, in the case of *Davidson* v *Cooper* (7), held that the execution [611] of the instruments created a charge upon the property which the subsequent alterations did not destroy The authority of this case has not passed unchallenged, even in Madras

In a subsequent case *Christacharlu* v *Karibasayya* (3), Hutchins, J, referring to the case in 3 Mad, H C Rep, says —" It seems clear that no English Court would have passed such a decree, whilst Parker, J, says —" With all deference I cannot but think that the English Courts would have decided otherwise ' In the case of *Christacharlu* v *Kariba sayya*, (3) which was a Full Bench case, the views expressed by the other Judges support the contention of the appellant here Kernan, C J, says —" By the execution of the original bond, the hypothecation was a right and interest created by and resulting from the execution of the ori-

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(3) (1885) I. L. R. 9 Mad 399
(4) 2 H Bl 140, 4 D and E. 320
(5) (1881) I L. R. 4 All 62.
(6) (1866) 3 Mad. H C Rep. 247
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ginal instrument, and that right or interest was not destroyed or divested by the alteration of the bond." Again Muttusami Ayyar, J., at p. 415, says :—" When property or some interest in property is actually transferred, the right to the possession of such property or to the recovery of such interest is an incident attaching to the vested estate or interest which the subsequent alteration cannot operate to divest." The basis of the view here expressed is clearly to be found in what was said by Lord Abinger in *Davidson* v. *Cooper*.(1) I entirely agree with Parker, J., when he says :—" I would hesitate to lay down that the doctrine of Lord Abinger in *Davidson* v. *Cooper* (1) can be pushed so far as to allow a plaintiff to recover upon a conveyance altered by himself in a material part, declaring upon the document so altered, when the document must necessarily be proved to enable him to succeed at all. To push the doctrine so far would be practically to nullify in the most important class of cases the equitable doctrine laid down by Lord Abinger, that no man shall be permitted to take the chance of committing a fraud without running the risk of losing by the event when it is detected." It appears to me that pushed to its logical extreme the view that the rule as to material alteration has no application to the case of mortgages, would be a premium on dishonesty, and would enable a mortgagee to try the experiment of claiming a [612] fraudulently enhanced amount of mortgage money without the risk of losing when the fraud is discovered.

This I feel sure was never in Lord Abinger's contemplation. The following is the material passage in his judgment :—" There is no doubt but that, in the case of a deed, any material alteration, whether made by the party holding it or by a stranger, renders the instrument altogether void from the time when such alteration is made. This was so resolved in Pigot's case, and though it was contended in argument that the rule had been relaxed in modern times, we are not aware of any authority for such a proposition, *when the altered deed is relied on as the foundation of a right sought to be enforced.* The case is different when the deed is produced *merely* as proof of some right or title created by or resulting from its *having been executed* ; as in the case of an ejectment to recover lands which have been conveyed by lease and re-lease, or now by re-lease only. There, what the plaintiff is seeking to enforce, is not, in strictness, a right under the lease and re-lease, but a right to the possession of the land, resulting from the fact of the lease and re-lease having been executed. The moment after their execution, the deeds become valueless, so far as they relate to the passing of the estate, except as affording evidence that they were executed. If the effect of the execution was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds ; and the principle laid down in Pigot's case would not be applicable. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the re-lease, then the alteration of the deed in any material point after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover." (11 M. and W., pages 797—800).

These observations appear to me to refer to a case where an indefeasible title to land is created at the time the deed is executed. But, in my judgment, they cannot be held to apply to the case of a simple mortgage bond, which merely gives the mortgagee a right to sue to have

(1) (1844) 13 M. and W. 343.

...e mortgaged property sold in the event of his money not being paid such a case the [613] mortgage deed must be relied on "*as the* ...*undation of the right sought to be enforced,*" and a material alteration ...it, if unexplained, will prevent the mortgagee from relying on it

Eyre, C J, in the case of *Bolton* v *The Bishop of Carlisle* (1), ...aid —"I hold clearly that the cancelling of a deed will not divest pro...perty which has been once vested by transmutation of possession" If a ...man by a deed acquires an absolute right to property, any subsequent alteration of the deed will not operate so as to divest him of this right But such a case is clearly distinguishable from the case of a hypothecation bond, which merely creates a lien over property As remarked by Parker, B, in *Davidson* v *Cooper* (2) "There is a distinction between cases when the estate passes by virtue of the instrument and that of a deed whereby a lien is created by virtue of the deed The effect of all the English authorities appears to be this, that the doctrine laid down in *Henry Pigot's* case as to the effect of alterations in documents under seal and extended in the case of *Master* v *Miller* to documents not under seal, applies in all cases "*when the altered instrument is relied on as the foundation of a right sought to be enforced*" So much is this the case that Parker, B, goes on to say after the passage quoted above — "Suppose the case where the alteration is made in a covenant conveying an estate, the estate would pass, though you could not maintain an action on the covenant"

For the appellant an Irish case *Stewart* v *Aston* (3), was cited, in which an action was successfully maintained upon a deed of assignment of a lease of land, although there were material alterations in the deed By the deed one Samuel Aston assigned the remainder of his lease to the plaintiff William Stewart In the earlier part of the deed reference had been made to *James* Stewart, a deceased brother of the plaintiff, and the deed contained a passage which had originally run as follows — "And whereas the said Samuel Aston being indebted to the said *James* Stewart by bonds, &c and the said *James* Stewart having *since died*" In the deed when propounded in Court this passage ran —"And whereas the said [614] Samuel Aston being indebted to the said *William* Stewart by bonds, &c, and the said *William* Stewart having *excepted* (sic) *them*" The question before the Court was, whether the assignment being destroyed by these alterations, the estate which passed by it was destroyed also, and the Court held that it was not The following passages occur in the judgment of Lefroy, C J, who delivered the judgment of the Court —"The first question relates to the effect of the alterations in the deed I need not refer further to their nature than to say that they do not at all apply to that portion of the deed containing the parcels of the lands, in which case, as counsel suggested in argument, a question might have arisen of a different kind" Further on he says —"They are not alterations that raise the least question of doubt or difficulty as to its having passed by assignment, and purporting to have passed by assignment to the plaintiff the lands which are the subject matter of this ejectment" From these passages I infer that the *ratio decidendi* in this case was that the alterations had no bearing on the subject matter of the claim, in other words that they were not material to it, and I further infer that had the alterations been such as

(1) (1793) 2 H Bl 259

(2) (1843) 11 M and W 778, at page 794

(3) (1853) 8 Ir C L R 35

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to affect the area of the land claimed, the decision of the Court might have been very different. Apparently the Courts of law in Ireland are inclined to put a narrower interpretation on what is a material alteration than the Courts in England. See the remarks of Jessel, M. R., and of Brett and Cotton, L. JJ., in the case of *Suffell* v. *The Bank of England* (1), dissenting from what was laid down in the case of *Caldwell* v. *Parker* (2), as to the materiality of alterations. The view taken by the Irish Courts appears to be in accord with the rule in America. There the doctrine is that a party producing a writing as genuine which has been altered after execution in a part *material to the question in dispute,* must account for the alteration by showing that it was made by a stranger without his concurrence, or that it was made by the consent of the parties affected or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does, the document may be given in evidence, otherwise not. [615] (Taylor on Evidence, section 1828, note.) There is much to be said in favour of the American rule. But it would not advantage the appellant in the present case, for the object and effect of the alteration is to prevent the plaintiff bringing to sale *any* portion of the land hypothecated to him for the sale of which he sues : it is therefore an alteration material to the matter in dispute. The appellant has made no attempt whatever to account for the alteration, maintaining, even up to this Court, in the face of conclusive evidence, that the document on which he relies has not been fraudulently tampered with.

A mortgage no doubt is defined in section 58 of the Transfer of Property Act as "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced." A simple mortgage, such as that held by the appellant, is defined as one in which the mortgagor, *without delivering possession of the mortgaged property*, binds himself to pay the mortgage money, and agrees that in the event of his failing to pay according to the contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money. By the execution of such a mortgage, therefore, no present right to the property is conveyed. The only right given is a right to have the property sold on failure of the mortgage or to pay the money as agreed. In order to enforce this right, the mortgagee must have recourse to the Court, and put his bond in suit. But here comes in the principle "founded," to use the words of Grose, J., in *Master* v. *Miller*, "in great good sense," that when there is a material alteration in the bond, the party seeking to enforce it or claiming any interest under it must explain that alteration, otherwise he cannot recover. I hold that the principle applies to a claim to enforce a right under a mortgage bond as much as to a suit based on any other kind of deed. I agree entirely with the decision of this Court in *Ganga Ram* v. *Chandan Singh* (3). and I am unable to concur with such of the learned Judges of the Madras High Court as have taken an opposite view. Had the appellant been suing on the altered bond the decision in the case just cited [616] would be adverse to him, and his suit would, in my judgment, be bound to fail.

(1) (1882) L. R. 9 Q. B. D. 555.
(2) Ir. Rep. 3 Eq. 519.
(3) (1881) I. L. R. 4 All. 62.

The question now remains to be decided whether the fact that the appellant is not plaintiff but has been impleaded as defendant renders the principle inapplicable I have not been able to discover any case in which such a question directly arose In Leake on Contracts, 3 Edn, p 696, the following passage occurs —"Alteration of a contract under seal in a material part by the promisee without the consent of the promisor so far avoids the contract that the promisee is deprived of all benefit of it as ground either of action or *of defence*

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In the case of *Suffell* v *Bank of England* (1), Brett, L J, says (p 568) —"Whenever any instrument is purposely altered by a party in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it or to *defend himself* by using it as a direct defence depending on its obligatory force on an instrument'

The plaintiff in the present case is a puisne mortgagee, and as such he is entitled to bring the appellant, a prior mortgagee, into Court, and call upon him to prove how much is due upon the prior mortgage In order to prove the terms of a bond, and show how much is due there under, it is necessary for the person claiming under the bond to make protest thereof In the present case, the material alterations in the appellant s bond put it out of his power to use it for the purpose of proving what is due under it, and under section 91 of the Evidence Act no other evidence is in the case admissible The appellant was in reality as regards the respondents in the position of a plaintiff endea vouring to make out what money is due to him For this purpose the bond was an essential part of his case

In *Mussamut Khoob Conwur* v *Baboo Moodnarain Singh* (2), their Lordships of the Privy Council said (at p 17) —"It may be conceded that in an ordinary case the party who presents an instrument which is an essential part of his case in an apparently altered and suspicious state must fail from the mere infirmity or doubtful *complexion* of his *proof*, unless he can satisfactorily explain the existing state of the docu ment Here [617] the altered mortgagee deed is an essential part of the appellant s case, and he has made no attempt to explain the state in which it is I therefore hold, in accordance with what was laid down by the Privy Council, that he cannot claim any interest under it The appellant has tried the experiment of putting forward and asserting a right under a document which has been tampered with He ought not to be allowed to do this with impunity, finding himself in no worse position after the discovery of the attempted fraud than he would have been had he not tried to avail himself of it As said above, the appellant s bond has been fraudulently tampered with with the object of making his security co extensive with the plaintiff's and putting it out of plaintiff s power to sell *any part* of the land hypothecated to him without first paying off the appellant Supposing the alteration, instead of having been made in the area of the share mortgaged, had been made in the *amount* secured by the appellant s mortgage, e g, by the alteration of Rs 1,000, the amount secured to Rs 1 500, and that the appellant had put forward a claim to Rs 1,500 based on this fraudulent alteration I think any Court of Justice would hesitate on discovery of such an alteration to pass a decree awarding payment of the amount originally secured

(1) (1882) L. R. 9 Q B. D 555 (2) (1861) 3 Moo I A 1

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And if a Court would decline to pass a decree operating in the prior mortgagee's favour, where the *amount* had been tampered with, I think it should equally refuse to do so where the alteration is in the area of the share hypothecated, such an alteration having a material bearing on the matter in dispute in the case. If the appellant had been suing as plaintiff, he would, on the law as laid down by this Court, have failed.

The result of decreeing this appeal would be that the appellant would attain the same end as if he were plaintiff.

For the above reasons I would dismiss the appeal with costs.

BY THE COURT.—In accordance with the provisions of section 557 of the Code of Civil Procedure, we allow the appeal, vary the decree of the lower Court, and make a decree in the terms of the minutes which have been agreed to by the parties, and have been initialled by us this day. Having regard to the circumstances of the case we make no order as to the costs of this appeal.

Decree modified.

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25 All. 618 (=23 A. W. N. 117).

[618] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

UDIT NARAIN MISR AND OTHERS (*Defendants*) *v.* MUHAMMAD MINNAT-ULLA (*Plaintiff*).* [30th April, 1903.]*

Act No. IX of 1872 (*Indian Contract Act*), *section* 65—*Act No. XV of* 1877 (*Indian Limitation Act*), *Schedule ii, Article* 97—*Agreement to sell—Suit for specific performance—Agreement declared unenforceable—Alternative claim for refund of consideration paid thereunder—Limitation.*

The defendants against whom a decree for foreclosure was outstanding agreed to sell certain immoveable property to the plaintiff, and the plaintiff paid into Court as part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which he had paid on their behalf. The plaintiff thereupon sued the defendants, claiming in the alternative either a decree for specific performance of the agreement to sell or a refund of the money paid by him as part of the consideration for the sale agreed upon. The Court of first instance gave the plaintiff a decree for specific performance. On appeal by the defendants it was held by the High Court (1) that the terms of the agreement to sell not being satisfactorily proved no decree for specific performance could be made; (2) that the plaintiff was therefore entitled to get back the money which he had paid under the agreement; (3) that the plaintiff's alternative claim for a refund on failure of consideration was governed as to limitation by article 97 of the second schedule to the Indian Limitation Act, 1877, and was not barred by limitation, inasmuch as limitation only began to run from the date of the High Court's decree declaring the agreement to sell to be unenforceable. *Dassu Kuar* v. *Dhum Singh* (1) followed.

[Appr. 31 All. 68=9 C. L. J. 512=11 Bom. L. R. 525: Ref. 43 Mad. 185=38 M. L. J. 1=26 M. L. T. 459=54 I. C. 66; 59 I. C. 98.]

THE suit out of which this appeal arose was one for specific performance of a contract alleged to have been entered into on the 15th of September 1896, with an alternative claim that if for any reason the Court should decline to pass a decree for specific performance the con-

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* First Appeal No. 27 of 1901, from a decree of Maulvi Syed Abbas Ali, Subordinate Judge of Gorakhpur, dated the 27th of September 1900.

(1) (1888) I. L. R. 11 All. 47.

tract should be treated as rescinded, and that certain moneys which had been paid by the plaintiff to the defendants as portion of the considera tion for the sale, should be ordered to be refunded to the plaintiff It appears that there was a foreclosure decree outstanding against the defendants which was to become absolute on the 15th of Sep tember 1896 In order to raise money to save the property [619] from foreclosure, the defendants induced the plaintiff, who was a party defendant as a puisne mortgagee to the foreclosure suit, to purchase the property, the subject matter of the suit The agreement, however, between the parties was not committed to writing, apparently because the parties were not clear in their minds as to the details of the arrangement finally come to The plaintiff in part satisfaction of the purchase money paid into Court in the foreclosure suit on the 15th of September 1896, the sum of Rs 13,865 6 0, but no portion of this sum was ever repaid, nor did the plaintiff obtain a conveyance of the property agreed to be sold Not long after the payment of this money the pre sent plaintiff instituted a suit against the defendants for a refund of the purchase money so paid by him, alleging that the defendants had failed to fulfil their part of the contract, which was to execute a conveyance of the property within one month The defendants resisted the claim, and the Court which heard the suit was of opinion that time was not of the essence of the contract, and accordingly dismissed the suit That decree was affirmed by the High Court on the 18th of January 1900 In the present suit the Court of first instance (the Subordinate Judge of Gorakh pur) decreed the plaintiff s claim for specific performance of the agree ment set up by him The defendants thereupon appealed to the High Court

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Pandit *Moti Lal Nehru* and Munshi *Gobind Prasad*, for the appel lants

Messrs *Karamat Husain* and *Abdul Raoof*, and Pandit *Sundar Lal*, for the respondent

STANLEY, C J, and BURKITT, J —This appeal has arisen out of a suit which was instituted by the plaintiff respondent for the specific per formance of a contract for the sale of certain villages, which is alleged to have been entered into on the 15th of September 1896, with an alterna tive claim that if for any reason the Court should decline to pass a decree for specific performance, the contract should be treated as rescin ded, and certain moneys which were paid by the plaintiff respondent to the defendants appellants as portion of the consideration for the sale should be ordered to be refunded to the plaintiff The facts of the case are not complicated The defendants appear [620] to have been pressed for money There was a foreclosure decree outstanding against them, which was to become absolute on the 15th of September 1896 In order to raise money and save the property from foreclosure the defendants induced the plaintiff, who was a party defendant as a puisne mortgagee to the foreclosure suit, to purchase the property, the subject matter of the suit It was necessary that the agreement for purchase should be entered into forthwith in order that money might be provided for the satisfac tion of the debt in respect of which the foreclosure decree had been obtained Unfortunately the agreement was not committed to writing, as it is perfectly clear from the evidence that the parties were not clear in their minds as to the details of the arrangement finally come to The plaintiff in part satisfaction of the purchase money paid into Court in

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we are unable to discover what the true agreement was, and so cannot give a decree for specific performance. According to the documents before us the plaintiff's version of the agreement is correct, but the defendants have throughout insisted upon adding an additional term to those contained in these documents to which there is no evidence that the plaintiff assented. Undoubtedly there was an agreement for the purchase and sale of the property, and undoubtedly the plaintiff believed that the price was to be calculated upon the basis of the existing Government *jamabandis* and in that belief paid a portion of the purchase money. The defendants, however, have set up an additional term, and maintained that according to the true agreement between the parties a much higher price was agreed to be paid, namely, a price to be calculated on the basis of the actual collections made at the time.

The case does not appear to us to be unlike that which came finally for determination before their Lordships of the Privy Council, namely, the case of *Bassu Kuar* v. *Dhum Singh* (1). [624] In that case it was held that money due on an account stated, which would as such have been barred in three years from the date of the statement under art. 64 of the Limitation Act, becomes, for purposes of limitation, a debt of another character when, it having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable and so declared by decree. In that case, in contemplation of a sale of land by the debtor to the creditor, it was agreed that a book debt should be retained by the debtor in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit brought by the intending vendor for specific performance was, although decreed by the Court of first instance on the 24th of February 1881, dismissed by the High Court on the 14th of March 1884, on the ground that no binding contract enforceable by law had been made by the parties. It was held by their Lordships of the Privy Council that this decree brought about a new state of things and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditor's being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree being the date of the failure of an existing consideration within the meaning of art. 97. It was held by their Lordships that the matter might be regarded as falling under section 65 of the Contract Act under which, when the agreement was decreed to be ineffectual, the debtor having previously received an advantage under it, was liable to restore that advantage, or to make compensation for it. Their Lordships in their judgment reversing the decree of the High Court, which held that the claim for return of the money paid under these circumstances was barred by limitation, observed :—"It must be remembered that it has throughout been common ground to both disputants that there was a contract made between them, and that among its terms were the sale of the villages for Rs. 55,000, the retention by Dhum Singh of his debt of Rs. 33,359-3-6 as part payment, and the payment by Baru Mal of the balance. Their quarrel was about other matters. Dhum [625] Singh alleged that the terms just mentioned were all the terms of the contract, and he claimed its completion on that footing. Baru Mal alleged that there were other terms, accused Dhum Singh

(1) (1888) I. L. R. 11 All. 47.

of dishonesty, and after a time claimed the right of receding from the bargain altogether But the Subordinate Judge took the view of Dhum Singh and decreed completion of the contract according to that view Up to the date of the Subordinate Judge's decree in 1881 Dhum Singh retained the amount of his debt as of right and in accordance with the contract alleged by him After the decree of 1881 he still retained it as of right and with a title which could not be disputed in any Court of justice except by the one mode of appeal from the decree of 1881 Baru Mal might have sued for his debt, but the utmost benefit which could have come to him from such a suit would have been to have it suspended or retained in Court till after the decision of the appeal in the suit for specific performance" Later on in the judgment they say —" In their Lordships view the decree of the High Court in 1884 brought about a new state of things and imposed a new obligation on Dhum Singh He was now no longer in the position of being able to allege that his debt to Baru Mal had been wiped out by the contract, and that instead thereof Baru Mal was entitled to the villages He became bound to pay that which he had retained in payment for his land, and the matter may be viewed in either of two ways according to the terms of the Contract Act IX of 1872, or according to the terms of the Limitation Act XV of 1877," Their Lordships then refer to section 65 of the Contract Act which provides that " when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it, ' and observe —" In this case there most certainly was an agreement which, as written, was in the terms alleged by Dhum Singh But it was held not to be enforceable by him because there were other unwritten terms which he would not admit, and the other party did not seek to enforce the agreement according to his version of it but threw it up altogether The agreement became [626] wholly ineffectual, and was discovered to be so when the High Court decreed it to be so The advantage received by Dhum Singh under it was the retention of his debt Therefore by the terms of the Statute he became bound to pay his debt on the 14th of March 1884 (i e, the date of the High Court's decree declaring that the contract was not enforceable) Their Lordships then referred to the terms of the Limitation Act and held that the case fell within art 97 They say —" An action for money paid for an existing consideration, which afterwards fails, is not barred till three years after date of the failure The debt retained in part payment of the purchase money is in effect, and as between the vendor and purchaser a payment of that part, and if that were doubtful on the first retention, while there was yet an undecided dispute, it could no longer be doubtful when a decree of a Court of justice authorized the retention, and in effect substituted the land for the debt Dhum Singh retained the money, and Baru Mal lost the use of it in consideration of the villages which formed the subject of the sale deed That consideration failed when the decree of 1884 was made, and it failed none the less because the failure was owing to Baru Mal s own reluctance to take it under the conditions insisted on by Dhum Singh " This is a clear authority in support of the appellant's contention, that if the contract in this case is not specifically enforceable, he is entitled to a refund of the money which was paid as part of the consideration for the purchase There was undoubtedly an a

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for sale. The money in question was admittedly paid as part of the consideration for the sale. Owing to the conflict in the evidence and to the fact that the defendants insisted that there was a term in the contract that does not appear in the document to which we have referred, and to their insistence on the enforcement of the agreement according to their version of it, the contract has not been carried out. The plaintiff has throughout expressed his willingness to abandon the contract altogether, or to perform it according to the terms appearing in the documents which we have mentioned. He has gone further, and at the outset of the hearing of this appeal expressed his willingness to accept the defendants' version of the agreement, provided that a definite [627] sum was named by the defendants as the price payable according to their contention ; but this offer has been rejected. We are wholly unable upon the evidence to say with any degree of certainty what the terms of the contract were, and we therefore cannot make a decree for specific performance. The agreement is not one which, in the view which we take, this Court ought to or can enforce, and we so declare. This being our view, it necessarily follows that the defendants must repay to the plaintiff the money which he paid in part satisfaction of the purchase money. The Statute of limitation does not bar the claim for the recovery of the money, inasmuch as there was an existing consideration for the payment which has only now failed by reason of our judgment that the contract is not enforceable. We are bound to apply to the case article 97 of the Limitation Act in view of the decision of their Lordships of the Privy Council in the case to which we have referred. According to it the limitation begins to run from the date of the failure of the consideration. In this case the consideration fails from the present time by reason of the pronouncement of the Court. But the contract is not legally enforceable. The suit, therefore, so far as regards the alternative relief prayed for, is not barred by limitation, and we are glad to be able consistently with what justice and fair dealing dictate to give the plaintiff respondent that relief, that is, the alternative relief claimed in his plaint. He is not entitled to a decree for specific performance, and in that respect the decree of the lower Court will be set aside, and instead we dismiss the plaintiff's claim for specific performance. But we give him a decree for the recovery of the sum of Rs. 13,865-6-0 with simple interest at the rate of 6 per cent. per annum from the 15th of September 1896 up to the date of payment.

The defendants appellants must pay the plaintiff's costs of this appeal and also costs in the Court below.

Decree modified

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25 A. 628.

[628] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

RAMJI DAS (*Plaintiff*) *v.* AJUDHIA PRASAD AND OTHERS (*Defendants*).*
[1st May, 1903.]

Civil Procedure Code, section 561—Appeal—Procedure by way of objections not open to a party who has in fact appealed from the decree of the Court below.

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* Second Appeal No. 384 of 1901, from a decree of Rai Shankar Lal, Additional Judge of Saharanpur, dated the 24th of December 1900, modifying a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 12th of September 1899.

Held that objections under section 561 of the Code of Civil Procedure can only be filed by a party who might have appealed from the decree of the Court below, but has not done so It is not open to a party who has appealed, and whose appeal has been dismissed, subsequently to such dismissal, to prefer objections under section 561 to the decree of the Court below

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THE plaintiff in this case sued the defendants for compensation for damage caused by the defendants to the plaintiff s house. The Court of first instance (Subordinate Judge of Saharanpur) decreed the claim in part The defendants appealed against part of the decision of the Court of first instance, and the plaintiff also appealed against that part of the decree which refused him a portion of the relief claimed The plaintiff s appeal came on first for hearing, and was dismissed by a decree in the following terms —" It is decreed and ordered that the decree of the lower Court, dated the 12th of September 1899, be upheld and the appeal dismissed Immediately upon the dismissal of that appeal, the plaintiff filed objections in the defendants appeal setting up the very grounds upon which in his own appeal he had asked for relief and been refused The Court below declined to entertain these objections, and the plaintiff thereupon appealed to the High Court on the ground that the Court below was wrong in refusing to consider the objections raised by him under section 561 of the Code of Civil Procedure

Mr *W Wallach*, Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji*, for the appellant

Messrs *W. K Porter* and *R Malcomson*, for the respondents

BLAIR and BANERJI, JJ —In this appeal, which is also a plaintiff's appeal in the suit out of which the appeal last dealt with arose, the plaintiff objects under section 561 of the Code of Civil Procedure The Court of first instance had decreed the plaintiff's claim in part The defendants appealed against [629] that part of the decision of the Court of first instance The plaintiff also entered an appeal against that part of the decision which refused him the relief he had asked for The plaintiff's appeal came on first for hearing That appeal was dismissed and the decree was couched in the following language —" It is decreed and ordered that the decree of the lower Court, dated the 12th of September, 1899, be upheld and the appeal dismissed Immediately upon the dismissal of that appeal the plaintiff filed objections in the defendants appeal, setting up the very grounds upon which in his own appeal he had asked for relief and been refused The Court below declined to entertain these objections under section 561 of the Code of Civil Procedure Mr *Wallach* disputes the rightfulness of that decision He asks us to interpret section 561 as a section conferring the right upon a respondent to set up objections to the decree whether he has appealed or not Unquestionably the wording of that section is unfortunate, but considering its whole

[illegible]

appealed, and did not Upon thus reading the section it was not open to the plaintiff to maintain objections under section 561 of the Code of Civil Procedure Further, the decree of the lower appellate Court dismissing the plaintiff's appeal, and upholding the decree of the Court of first instance, in our opinion, precluded the plaintiff from agitating again the questions which had been raised in the appeal This appeal therefore fails, and is dismissed with costs

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

HABIB-UN-NISSA AND OTHERS (*Plaintiffs*) *v.* MUNAWAR-UN-NISSA AND OTHERS (*Defendants*).* [5th May, 1903.]

IN THE MATTER OF THE PETITION OF ASHIQ HUSAIN KHAN (*Respondent*).

Civil Procedure Code, section 595—Appeal to His Majesty in Council—Appeal from an order under section 562 of the Code of Civil Procedure.

Held that an order under section 562 is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly [630] be so if the order in question has the effect of deciding finally the cardinal point in the suit. *Saiyid Muzhar Husain* v. *Musammat Bodha Bibi* (1) *Mahant Ishvargar Budhgar* v. *Caudasama Amarsang* (2) and *Forbes* v. *Ameeroonissa Begum* (3) referred to.

[Fol. 1907 A. W. N. 291=5 A. L. J. 57 ; 45 I. C. 290=1918 Pat. 1=4 Pat. L. W. 342; **Ref.** 52 P. R. 1907=34 P. L. R. 1908 ; **Dist.** 10 C. L. J. 336.

THE facts of this case are briefly as follows. The plaintiffs' suit in the Court of first instance had been dismissed as barred by limitation. The plaintiffs appealed to the High Court, and the High Court overruled the decree of the Court below upon the question of limitation, and remanded the case for retrial under section 562 of the Code of Civil Procedure. Against this order one of the respondents applied for leave to appeal to His Majesty in Council.

Mr. *R. K. Sorabji*, for the applicant.

BLAIR and BANERJI, JJ.—This is an application for leave to appeal to His Majesty in Council. The Court of first instance had dismissed the plaintiffs' suit on the ground of limitation. This Court in first appeal overruled the decree of the Court below upon the preliminary point, and remanded the case for re-trial under section 562 of the Code of Civil Procedure. We have had cited to us a case decided by the Privy Council, reported in I. L. R., 17 All., 112, in which the Privy Council held that an appeal properly lay to His Majesty in Council from an order which finally decided the cardinal point in the suit. Their Lordships upon their attention being called to the fact that the practice of the High Court had been to treat orders under section 562 as not being final orders remarked that that practice was probably quite correct, and then proceeded to distinguish the case before them, and held that an appeal would lie because the question so decided was the cardinal point in the suit, and after the decision of the High Court could never be disputed again, so that the order was final. Their Lordships further remarked that the High Court miscarried in purporting to remand under section 562, and added that the case would rather fall under section 565, which requires the appellate Court to decide issues on which evidence has been taken. In the case of *Mahant Ishvargar Budhgar* v. *Caudasama Amarsang* (2), it was held that no appeal lay [631] as a matter of right from an order of remand, even though the subject-matter exceeded Rs. 10,000 and the Judges deciding the case stated their reason for the decision to be that the order in question could not

* Privy Council Appeal No. 20 of 1902.

(1) (1894) I. L. R. 17 All. 112.
(2) (1884) I. L. R. 8 Bom. 548.
(3) (1865) 10 Moo. I. A. 340.

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be regarded otherwise than as an interlocutory order In the case of *Forbes* v *Ameeroonissa Begum* (1) their Lordships treated an order of remand as an interlocutory order, and held that no appeal lay on the ground that it did not purport to dispose of the case Now in the present case, the decree of the Court of first instance did dispose of the case, wholly dismissing the plaintiffs' suit The appellate order of this Court, however, in reversing the decree of the Court of first instance, on the question of limitation, left the parties open to contest their rights and claims on every other point We are of opinion that this is purely an interlocutory order from which an appeal does not lie to His Majesty in Council

We accordingly dismiss the application with costs

Application dismissed.

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25 A 631 (=23 A W N 120.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt

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JAMAL UDDIN (*Plaintiff*) v MUJTABA HUSAIN AND OTHERS (*Defendants*) * [6th May, 1903]

Civil Procedure Code, section 539—Suit for a declaration that certain property is endowed property

Section 539 of the Code of Civil Procedure presupposes the existence of a trust for the administration of which it is necessary to make provision That section cannot apply to a suit in which the object of the plaintiff is to obtain a declaration that certain property is endowed property, the fact of endowment being denied on the other side

[Fol 33 Cal 789=10 C W N 581 33 All 660=8 A L J 710 , (Suit to set aside alienation of waqf property) Expl 2 C L J 431 13 Bom L R 49=9 I C 358 , Ref 19 I C 973 , 2 Lah. L J 457 Dist 2 O L J 460]

THE suit out of which this appeal arose was brought by the plaintiff to have it declared that certain property specified in the list appended to the plaint, was endowed for the purpose of a mosque and *imambara* and other charitable purposes It was alleged in the plaint that the property in question was so dedicated by Musammat Bandi Begam and Syed Ghulam Ali under an agreement, dated the 6th of April 1887, and an arbitration award, dated the 4th of May 1887 It was also alleged that [632] the agreement under which the property was decided provided an annuity of Rs 300, for the maintenance of the plaintiff and his family It was further alleged that the defendants, some of whom claim to be the heirs of Syed Ghulam Ali, whilst two of them, Syed Hasmat Husain and Syed Ashiq Husain, are said to be *Mutawallis* of the endowed property, colluded together and set up a case that the property belonged to Syed Ghulam Ali and never became endowed It was also stated that the defendants had formerly instituted two suits in respect of the property, in which they denied that it was ever endowed property. The plaintiff asked for a declaration that the property was endowed property and could not be inherited as the property of Syed Ghulam Ali The

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*First Appeal No 160 of 1901, from a decree of Babu Mata Prasad, Subordinate Judge of Moradabad, dated the 18th of April 1901

(1) (1865) 10 Moo I A 340

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defendant Musammat Begam filed a written statement in which she pleaded that section 539 of the Code of Civil Procedure operated as a bar to the suit, and also alleged that the endowment set up by the plaintiff was not made by Syed Ghulam Ali, or Musammat Bandi Begam. The same defence was set up in their written statements by the defendants Mujtaba Husain, Zamin Husain, and Musammat Husaini Begam.

The Court of first instance (Subordinate Judge of Moradabad) without hearing the evidence which the plaintiff was prepared to adduce, decided in favour of defendants' contention that section 539 was a bar to the suit. Notwithstanding this fact the Subordinate Judge nevertheless proceeded to deal with the case upon such evidence as he had before him, and ultimately dismissed the suit. From this decree the plaintiff appealed to the High Court.

Messrs. *Karamat Husain* and *Abdul Raoof*, for the appellant.

Pandit *Moti Lal Nehru* and Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The decision of the learned Subordinate Judge cannot be supported. The suit which has given rise to this appeal was brought by the plaintiff to have it declared that certain property, which is specified in the list appended to the plaint, was endowed for the purpose of a mosque and *imambara*, and other charitable purposes, and [633] for no other purpose. It is alleged in the plaint that under an agreement of the 6th of April 1887, and an arbitration award, dated the 4th of May 1887, the property in question was dedicated by Musammat Bandi Begam and Syed Ghulam Ali for the purposes which we have mentioned. It is also alleged that the agreement under which the property was dedicated provided an annuity of Rs. 300 for the maintenance of the plaintiff and his family. In the claim it is stated that the defendants, some of whom claim to be the heirs of Syed Ghulam Ali, whilst two of them, Syed Hashmat Husain and Syed Ashiq Husain, are alleged to be *mutawallis* of the endowed property, colluded together and have set up the case that the property belonged to Syed Ghulam Ali and never became endowed. It is also stated that the defendants instituted two suits in respect of the property, in which they denied that it was ever endowed property. The present suit is brought for the purposes of having it declared that the property was endowed, and that the case set up by the defendants that they are the true owners of it is a false case. In her written statement the defendant Musammat Begam set up the defence that section 539 of the Code of Civil Procedure operated as a bar to the suit. She also alleged that the endowment which was alleged by the plaintiff was not made by Syed Ghulam Ali or Musammat Bandi Begam. The only other defendants who filed written statements are Syed Mujtaba Husain, Zamin Husain and Musammat Husaini Begam, and they in their written statement also set up the bar of section 539, and alleged that the property was not endowed property. The learned Subordinate Judge, without hearing the evidence which the plaintiff was prepared to adduce, decided in favour of the defendants' contention that section 539 was a bar to the suit, no consent of the proper officer to its institution having been obtained. Notwithstanding the fact that he held that the suit was barred he yet proceeded to dispose of the case as if it was open to him to adjudicate upon it. This he clearly ought not to

have done Having found that he had no jurisdiction, it was his duty to return the plaint to the plaintiff to be presented to a Court having jurisdiction to try the suit He, however, upon the imperfect evidence which was before him, [634] took upon him to decide certain questions of fact and law, and upon his determination of these issues, as also upon the legal point to which we have referred, dismissed the claim

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We are wholly unable to agree with the view of the learned Judge upon the preliminary question which was raised Section 539 appears to us to have no application to the facts of this case That section presupposes the existence of a trust The language of the section shows this beyond any doubt It has provided for a case in which there is an alleged breach of any express or constructive trust created for any public charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust It enables the Advocate General, or two or more persons having an interest in the trust, and having obtained the consent in writing of the Advocate General, to institute a suit in the High Court, or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject matter of the trust is situate, to obtain a decree appointing new trustees, vesting any property in the trustees under the trust, declaring the proportion in which its objects are entitled, and so forth, a suit, in fact, for the administration, either partially or completely of the trust If the plaintiff in this case, or the plaintiff associated with one or more persons interested in the trust, had applied to the Legal Remembrancer, who in these Provinces would represent the Advocate General, for liberty to institute a suit, it would have been the duty of the person so applying to have satisfied the Legal Remembrancer that there was an express or constructive trust existing, and if he failed to satisfy the Legal Remembrancer of this fact, then we take it that it would have been his duty to refuse to entertain the application Here the suit is not brought for any of the purposes enunciated in section 539, nor is it instituted for the granting of any such further or other relief as is mentioned towards the end of that section It is a suit instituted simply and solely for the purpose of having a declaration of the Court that certain property is waqf It is in no way a suit for the administration of the waqf property, or for the removal of the trustees of that property, or for any of the other purposes to which we have referred The words [635] after paragraph (e), namely, "granting such further or other relief as the nature of the case may require," must be read with what has preceded as referring to further relief to which the party may be entitled, which arises out of the existence of the trust in respect of which the suit has been brought The words cannot be interpreted as including the relief which is sought in this case, which is a declaration merely that property has been dedicated as waqf Inasmuch as we take this view of the section, it is unnecessary for us to discuss the several decisions to which we have been referred, some of which appear t[illegible] the facts o[illegible] the decree o[illegible] the Subordinate Judge under the provisions of section 562, with a direction that it be replaced on the file of pending suits, and decided upon the merits The costs of this appeal and heretofore incurred will abide the event

Appeal decreed and cause remanded

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was duly presented by a Mukhtar of the Court. It was verified by one Abdul Rahman Amongst the various pleas raised by the defendants, they put forward the contention that the verification and signature on the plaint were "wrong and contrary to law." The [637] Court of first instance returned the plaint for amendment, and subsequently, after it had been amended, the Court made a decree in favour of the plaintiff The lower appellate Court has set aside that decree Hence this appeal The learned Judge of the lower appellate Court is of opinion that section 432 of the Code of Civil Procedure is not applicable to a suit brought by a Ruling Chief in a Court in British India in respect of his private property We cannot agree with this opinion The present suit, it is true, was brought under the Rent Act of 1881, but that Act contains no provisions about suits by Ruling Chiefs instituted in Courts in British India Consequently the provisions of section 432 of the Code of Civil Procedure would be applicable to a suit brought in a Court of Revenue, so that if the suit was prosecuted by a pe[illegible] nized agent under that section, it woul[illegible] brought and prosecuted on behalf of [illegible] appears that on the date on which the plaint was filed, Abdul Rahman had not been appointed by the Government as the recognized agent of the Maharaja plaintiff His appointment was made on the 16th of April 1900 The cause of action having arisen on the 14th of June 1897, the claim was not time barred on the date of the appointment of Abdul Rahman The learned Judge has held the claim to be barred, on the ground that Abdul Rahman signed the plaint and the verification under it upon the 28th of July 1900, that consequently the plaint became a valid plaint on that date, and that the period of limitation prescribed for the suit had expired on that date With this view we are unable to agree We cannot accede to the contention of the learned advocate for the respondent that there was no valid plaint before the Court before the 28th July 1900 The mere fact that a plaint contained a defect in the matter of signature or verification does not make it a void and inadmissible plaint On this point we may refer to the ruling in *Basdeo v John Smidt* (1) We have in this case the fact that after the plaint had been returned for amendment, it was filed again on the 22nd of December 1899, duly verified and signed by Abdul Rahman From that date up to the date of the [638] decision of the suit the plaint was before the Court Whatever defect might have existed in it in consequence of Abdul Rahman not having been appointed the recognized agent of the Maharaja by the Government until the 16th of April 1900, that defect was cured as soon as he was so appointed on the 16th of April 1900 On that date the prescribed period of limitation for the suit had not expired On behalf of the respondent reference was made to the ruling of a Division Bench of this Court in *Marghub Ahmad v Nihal Ahmad* (2) It is not necessary for the purposes of this appeal for us to say whether or not we agree with the view adopted in that case, but we are of opinion that that case is perfectly distinguishable from the present In that case there was no plaint before the Court which had been filed by the only person competent to file it Such is not the case here As soon as Abdul Rahman was appointed the recognized agent of the plaintiff Maharaja, he became competent to institute the suit and verify the plaint on behalf of the Maharaja The plaint

(1) (1899) I L R 22 All 55 (2) Weekly Notes, 1899, p 55

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was already before the Court, and Abdul Rahman had signed and verified it. It became a valid and effective plaint for all purposes as soon as the formal order for his appointment was obtained. For these reasons we are of opinion that the lower appellate Court was in error in dismissing the suit. We accordingly allow the appeal, set aside the decree of the lower appellate Court, and remand the case to that Court under section 562 of the Code of Civil Procedure for trial on the merits. The appellant will have the costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

25 A. 639 (=23 A. W. N. 161.)

[639] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

BHOLA NATH (*Plaintiff*) *v.* MUL CHAND AND ANOTHER (*Defendants*).*
[15th May, 1903.]

Act No. IX of 1872 (*Indian Contract Act*), *section* 30—*Wagering contract—Principal and agent—Suit by principal to recover from agent money received on account of a wagering contract.*

Held that an agent who has received money to the use of his principal on an illegal contract between him as such agent and a third party cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent the money so received. *De Mattos* v. *Benjamin* (1), *Bridger* v. *Savage* (2), and *Tenant* v. *Elliott* (3) referred to.

[Ref. 14 M. L. J. 326 ; 17 C. P. L. R. 67 ; 44 Mad. 334=29 M. L. T. 59=39 M. L. J. 632=1920 M. W. N. 776=60 I. C. 127.]

IN this case the defendants as brokers for the plaintiff entered into various contracts with third parties for the sale and purchase of large quantities of grain. These transactions were merely speculations on the rise and fall of prices, and were not accompanied, or intended to be accompanied, by actual delivery of grain. They were therefore contracts of a wagering nature, such as would, in respect of the parties between whom they were made, fall within the purview of section 30 of the Indian Contract Act. The suit out of which the present appeal arose was brought by the plaintiff on the allegation that the transactions above mentioned had resulted in a profit, and that after taking an account and deducting certain sums for brokerage and so forth, the defendant held some Rs. 1,300 and odd to the use of the plaintiff. The Court of first instance (Munsif of Hathras) dismissed the suit on the ground that the contracts out of which the plaintiff's claim arose were wagering contracts to which section 30 of the Indian Contract Act applied. On appeal by the plaintiff, the lower appellate Court (Additional Subordinate Judge of Aligarh) after referring certain issues for determination by the Munsif, came to much the same conclusion, and dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Mr. *S. S. Singh* and The Hon'ble Pandit *Madan Mohan Malaviya* for the appellant.

[640] Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the respondents.

STANLEY, C. J., and BURKITT, J.—In view of the findings of fact in this case, behind which we cannot go in second appeal, the decision

* Second Appeal No. 398 of 1901, from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 9th of January 1901, confirming a decree of Babu Gokul Prasad, Munsif of Hathras, dated the 16th of June 1900.

(1) (1894) 63 L. J. Q. B. 248.
(2) (1885) L. R. 15 Q. B. D. 363.
(3) (1797) 1 B. and P. 3.

of the learned Subordinate Judge cannot be supported so far as it is appealed against Issues were referred by the Subordinate Judge to the Munsif, and his findings upon those issues show that all the contracts to which this suit relates were entered into by the plaintiff with third parties through the defendants as his agents It is alleged by the plaintiff that moneys had been paid on foot of those contracts by the third parties to the defendants as agents for the plaintiff The contracts have been found to be, and undoubtedly are, contracts which come within the purview of section 30 of the Contract Act, and are therefore contracts in respect of which no suit for recovery of profits could have been maintained by the plaintiff against the parties with whom they were entered into Those third parties, however, waived their right to rely upon this section of the Statute, and are said to have paid over money to the defendants in respect of the losses which they sustained on foot of the contract If an agent receive money on his principal's behalf under an illegal or void contract the agent must account to the principal for the money so received and cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party had waived by paying the money If authority be needed for this proposition, it is to be found in two recent authorities to which we have been referred, namely, the case of *De Mattos* v *Benjamin* (1) and in the case of *Bridger* v *Savage* (2) The principle governing the question is laid down in the much older case of *Tenant* v *Elliott* (3) in which it was held that an agent having received money to the use of his principal on an illegal contract between the principal and a third party shall not be allowed to set up the illegality of the contract as a defence in an action brought by the principal for the money so received To such a suit as the present, section 30 of the Contract Act has **[641]** no application, inasmuch as it is not a suit by a party to a wagering contract to recover the profits of the wager from the other party to the contract For these reasons we are of opinion that the judgment of the lower appellate Court upon the legal question raised before it is wrong We find, however, that it has not been ascertained whether any money has been actually paid to the defendants in respect of the contracts in question The learned Subordinate Judge says, that having regard to the nature of the contracts, it was not necessary to enquire if the defendants made any profit out of such contracts In the account books profits are recorded, but the entry does not mean that they were actually recovered by the defendants It will therefore be necessary to remand an issue as to this to the lower appellate Court for determination Accordingly we remand the following issue under section 566 of the Code of Civil Procedure —' What amount, if any, was actually received by the defendants as profits resulting from the contracts which formed the subject matter of the suit, and of the amount of the profits, if any, so found to have been received, what sum remains due to the plaintiff after allowing credit to the defendants for brokerage, commission, and other charges to which the defendants may be entitled under their contract with the plaintiff?' On return of the finding ten days will be allowed for objections The Court will be at liberty to admit such further evidence as may be necessary for the purpose of determining this issue

Cause remanded

(1) (1891) 63 L J Q B 248
(2) (1885) L R 15 Q B D 363
(3) (1797) 1 B. and P 3

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minors) in which those representing the latter claimed title on their behalf to succeed to an estate, an issue was referred to arbitrators, "whether the appellant could be the sole heir to the estate under the custom of the country, or whether respondents could also be successors to it, if they can, what is the portion to which they would be entitled?" The arbitration resulted in the right of succession to the whole estate being awarded to the appellant The award, however, gave the respondents maintenance of Rs 30 and Rs 20 a month, respectively, and then, going beyond the terms of the reference, awarded that "the monthly stipend should continue for six years, after which time, when the children became capable of receiving education in a Government school, the Government would then propose what they should get for their support, that when both children are grown up and attain the age of discretion, they shall have villages separated for them according to thier stipend after the deduction therefrom of Government revenue The Deputy Commissioner, in December 1865, adopted the award as to the succession to the estate, and as to the maintenance, but not the portion of the award which related to matters not referred to arbitration His decision was affirmed by the Commissioner of Fyzabad in 1866 and by the Judicial Commissioner of Oudh in 1867 In 1883 the respondents, who had then attained their majority, claimed arrears of maintenance from the then Deputy Commissioner representing the Court of Wards (in whose charge the estate had been since 1866), and the Deputy Commissioner, whilst allowing the claim, proposed that in future, in lieu of the cash allowance, a village should be assigned to each of the respondents for their maintenance This proposal was sanctioned by the Chief Commissioner and by the Lieutenant Governor who ordered that villages yielding a profit of Rs 600 and Rs 400 per annum, respectively, after payment of the Government jama, should be given to the respondents, who were accordingly put into possession of the villages, though no deeds of conveyance were executed as directed by the Deputy Commissioner. In suits instituted by the appellant on attaining his majority in 1886 to recover the villages with mesne profits, the defence was that the suits were not maintainable with reference to s. 172 of the Oudh Land Revenue Act (XVII of 1876), which enacts that "the Court of Wards shall have power to lease or farm any part of the immoveable property under its charge and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors." *Held* by the Judicial Committee (reversing the decision of the Court below) that the allotment of the villages to the respondents could not be supported It was not authorised by any of the orders of the Court in 1865, 1866 or 1867, and the finding of the award on the subject was not within the reference to arbitration and was not adopted by the Court Nor was the allotment justified under s 172 of Act XVII of 1876 It was not for the benefit of the estate, and there was nothing to show

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